

2002 INSTITUTE

RECENT CASELAW ON CONTRACTING

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* The author gratefully acknowledges the contribution to this article of Michael Skiba, student-at-law

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PART I ALWAYS DO RIGHT - Duty of Good Faith and Duty of Care in Contract Formation and Performance

A. INTRODUCTION

"Always do right. This will gratify some people and astonish the rest."

- Mark Twain

The question of whether a party must "do right" in the context of commercial negotiations and contract performance is one laid increasingly before the courts.

The Supreme Court of Canada in the case *Martel Building Ltd. v. Canada*¹ issued a unanimous decision refusing to extend the tort of negligence into the realm of commercial negotiations and declining to consider the existence of a duty of good faith in negotiations. The *Martel* case will serve in this paper as the temporal point of embarkment in considering "recent" case-law.

A detailed analysis of the evolution of the concept of "good faith" in Canadian jurisprudence and the doctrinal debate surrounding its precepts and place in the continuum between "freedom of contract" at the one end and "fiduciary duty" at the other end are beyond the scope of this paper. I highly recommend to you the excellent articles listed at the end of this paper for reading in that regard.

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Briefly, however, it can be stated that notions of an independent obligation to act in good faith arising outside the four corners of the contract are dismissed by those who view the freedom of contract as a right not to be limited by moral or ethical obligations that are unbargained for between the parties to the contract. Professor S. M. Waddams has argued that restricting a person's behaviour under a contract with obligations imported from outside the contract serves only to negate the very right that was bargained for in the first place, a result which defeats the very essence of the freedom of contract.²

Traditionally, Canadian courts have reined in egregious behaviour by contracting parties with the application of traditional concepts such as fraud, misrepresentation, unconscionability, undue influence, economic duress and promissory estoppel. These concepts are applied situationally to restrict the offending behaviour without importing a general overarching duty of good faith applicable to the contracting process.

Arriving at a workable definition of "good faith", the standard by which it should be measured, the circumstances in which it should be applied (ie. as a rule of law or as a rule of interpretation of the very contract at issue) and the appropriate remedy for its breach are difficult issues with which judges must grapple.

B. PRE-MARTEL CASELAW

In any discussion on the obligation of good faith in Canadian jurisprudence, there are certain cases which are commented on and quoted from again and again. Bearing in mind the "difficult issues" mentioned above, it is instructive to briefly review these historically significant cases in terms of

the type of contract under review, the type of conduct being impugned and the route by which the court arrives at its final decision.

(i) Contract formation

The following cases deal with the issue of good faith in the contract formation stage, in the contexts of pre-contractual negotiations, negotiations within a contract (ie. negotiating renewal rent) and in the tendering process.

*Walford v. Miles*³: Extensively quoted in the Canadian jurisprudence, this 1992 decision of the House of Lords clearly states the prevailing position that “the concept of a duty to carry on in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.”⁴ According to this case, each party is entitled to pursue its own interest to the fullest extent possible in the course of negotiations.

*Lac Minerals Ltd. v. International Corona Resources Ltd.*⁵: The Supreme Court of Canada considered fiduciary duty and the duty to negotiate in good faith. During negotiations, the plaintiff (Corona) revealed confidential information to the defendant (LAC) about valuable deposits on adjoining properties Corona was attempting to purchase. LAC subsequently defeated Corona’s efforts to purchase the properties and purchased them itself. The Court found the defendant liable based on a breach of duty of confidentiality.

LaForest J. was the only judge who expressly discussed the issue of good faith saying, “the institution of bargaining and good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.”⁶

Canadian National Railway v. Inglis Ltd.⁷: In this case the Ontario Court General Division considered a lease which provided that renewal rent would be "an amount which in the opinion of the lessor is fair and reasonable", with no guidance as to how the discretion was to be exercised. The Court found an obligation on the landlord to be able to demonstrate that the renewal was determined on a fair and equitable basis.

Tarmac Canada Inc. v. Regional Municipality of Hamilton-Wentworth⁸: The Ontario Court of Appeal considered the obligation of good faith in the context of the construction industry. The defendant municipality put out an invitation for tenders that included a standard privilege clause reserving to the municipality the right to accept any tender, not necessarily the lowest bid. The plaintiff contracting company responded with the lowest bid, but the contract was awarded to the second lowest bidder. At trial, the defendant put forward no reason for its decision not to accept the lowest bidder and the trial judge found a breach of an implied duty of fairness and good faith, stating that such failure to give reasons warranted an adverse finding of fact by the court.

On appeal, Sharpe J.A. adopted the findings of the trial judge and held that there was an implied obligation to treat all bidders fairly and in good faith. Invoking a privilege clause as a basis for employing hidden criteria in assessing bids under a tender invitation breached the implied duty to treat all bidders fairly and in good faith.

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.⁹: This 1999 Supreme Court of Canada decision dealt with a situation where the defendant invited tenders for a contract and accepted the lowest bid despite the fact that the bid did not comply with the bid

specifications as outlined in the invitation for tenders. The invitation included a standard privilege clause. The plaintiff had submitted the second lowest bid. The trial judge found that the non-conformity of the winning bid was in fact a qualification that invalidated the tender. Awarding the contract to the "non-conforming" bidder resulted in a "technical breach" of the obligation to treat all bidders fairly but the privilege clause allowed the defendant to accept the winning bid. The defendant was not obliged to award the contract to the plaintiff as the next lowest bidder. On appeal, the Court of Appeal dismissed the appeal, stating that an express privilege clause could not be overridden by a term implied by custom or industry usage to the effect that the lowest bid must be accepted.

Iacobucci J. for the majority of the Supreme Court of Canada considered the question whether the privilege clause in the tender documents allowed the defendant to disregard the lowest bid in favour of a non-compliant one. While the Court observed that there was no explicit term in the invitation for tenders requiring the defendant to accept the lowest bid, the Court did find that it was appropriate in the circumstances to find an implied obligation on the defendant to accept only a compliant bid, as to allow otherwise would defeat the purpose of a requirement for compliant bids in the first place. A bidder would only submit a compliant bid if it held the expectation that only compliant bids would be considered, an expectation supported by the requirements in the tendering documents which did not allow for modifications of the specifications in the tender documents.¹⁰ The Court required that the privilege clause be read in harmony with the rest of the tender invitation documents, and when this was done, it was found that the privilege clause did not override the obligation to accept only compliant bids.¹¹ The Court found that although the defendant may have acted in good faith

thinking it had interpreted its contract correctly, this was not a valid defence to the action for breach of contract.¹²

(ii) Contract performance

There is more judicial willingness to impose an obligation of good faith in the performance of contracts, aided in many cases by the familiar discussion of "giving effect to the reasonable expectation of the parties". Special note should be made of the *Gateway* decision below.

Greenberg v. Meffert¹³: The *Ontario Court of Appeal* found that a discretion exercised under an employment contract must be exercised honestly and in good faith.¹⁴ In collusion with another agent and in return for a secret payment, the defendant real estate company denied commission for the plaintiff agent in respect of a sale which closed after the agent's employment was terminated, but for which he performed a significant amount of work. The employment contract stipulated that the company had sole discretion as to the disbursement of commissions where a deal closed after the termination of an agent's employment. The court called the company's conduct "patently improper" and stated that "[f]air dealing is implicit in the contract."¹⁵ On the topic of good faith, the court said that the improper conduct "vitiates not only the reasonableness required in the objective criteria but the good faith and honesty required whether the discretion is objective or subjective."¹⁶

LeMesurier v. Andrus¹⁷: The *Ontario Court of Appeal* held that a vendor and a purchaser in a real estate transaction "owe a duty to each other honestly to perform a contract honestly made".¹⁸ The Court denied the purchaser's right to repudiate an agreement of purchase and sale based on a very minor defect in title. Grange J.A. stated in his reasons that "the approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the

performance of contracts.”¹⁹

McKinlay Motors Ltd. v. Honda Canada Inc.²⁰: The Newfoundland Supreme Court recognized a free-standing duty of good faith in the performance of contracts and awarded damages for the breach of the obligation to act in good faith while the contract was still in force. This was the first Canadian case to award damages based on a breach of this duty alone. The franchisor unilaterally reduced the number of vehicles it allocated to the franchisee’s dealership and eventually terminated the franchise agreement. Wells J. stated that “it is obviously an implied term of any such agreement that the parties act toward each other in their business dealings in good faith.”²¹

Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)²²: This is the leading Canadian case on the doctrine of good faith in the context of commercial leases. It is also cited regularly for its attempt to define the scope of the duty of good faith generally. The Nova Scotia Supreme Court, Trial Division was faced with a claim that the plaintiff’s (Gateway’s) main competitor (Arton) did not use good faith in fulfilling its promise to use ‘best efforts’ to find a replacement tenant for the plaintiff’s shopping centre. Arton had convinced Gateway’s anchor tenant (Zellers) to assign its lease with Gateway to Arton, move out of Gateway’s mall space and sign a new lease for space in Arton’s nearby mall. The result was that Gateway’s main competitor held the lease for the anchor space in Gateway’s mall, together with the responsibility to find a new tenant for the space. Arton had agreed to use ‘best efforts’ to find a new tenant in exchange for Gateway’s promise to withdraw an objection lodged with the Municipal Board against Arton’s expansion of its shopping centre. The Court found that Arton’s conduct clearly showed it was in breach of its obligation to use its "best efforts" and

failed to discharge its duty to perform "in good faith".

At the trial level, Kelly J. found that the existence of a contractual doctrine of good faith was particularly suited to the context of a commercial lease, noting the special relationship that existed between a landlord and its tenants in a shopping centre. The Court noted that the interdependence of tenants in that atmosphere, combined with the particular importance of an anchor tenant (such as Zellers), and Arton's special knowledge of these relationships, raised the implication that Arton's conduct in failing to re-let the space raised a clear inference that it intended to act in bad faith.

Kelly J. commented as follows:

"The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in its performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" – a conduct that is contrary to community standards of honesty, reasonableness or fairness."²³

Kelly J. went on to describe 'bad faith' as conduct which results when:

"one party, without reasonable justification, acts in relation to the contracts in such a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, contrary to the original purpose and expectation of the parties."²⁴

On appeal, the Nova Scotia Court of Appeal²⁵ upheld the decision on the basis that Arton's failure to use best efforts, as it had agreed, to find a tenant for the space was contrary to the original expectations of the parties. The Court of Appeal declined to specifically adopt Kelly J.'s findings of a general duty of good faith in the performance of obligations under contracts of lease.

MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.²⁶: The plaintiff medical laboratory leased space in the defendant's office complex and carried out a specimen collection

service for the medical profession. The lease contained a restrictive covenant on the landlord not to allow another medical laboratory in the building, with the exception of doctors taking laboratory specimens from their own patients in their own premises. When the plaintiff refused to increase its rent payments to the extent requested by the landlord, the defendant leased an office to a group of doctors who staffed the office with nurses to take sample specimens. These specimens were then sent for analysis to another medical laboratory in direct competition with the plaintiff. As a result, the plaintiff's business suffered and it sued for an injunction and damages. The doctors involved were also shareholders and/or directors of the defendant landlord. Haley J. of the Ontario Court (General Division) cited the trial decision in Gateway in finding the defendants to be in breach of "the good faith required of the law of parties to a contract."²⁷ The Court noted that the defendants had destroyed "the whole premise upon which MDS's original participation in the building was based".²⁸

Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.²⁹: In this case, the Alberta Court of Appeal explicitly refused to adopt the trial judge's disposition of the case on the basis of a breach of an independent, implied covenant of good faith. Instead, the court reasoned that in the particular industry in question (mining), there were settled expectations about the method of pooling mining properties for the purposes of royalty payments, and that these expectations had not been complied with. Kerans J.A. stated that "this case turns on a rule founded in the agreement of the parties, not in the law."³⁰ The judge discussed the fact that some judges refer to an independent doctrine of good faith and some refer to a doctrine of good faith that rests on the expectations of the parties under the contract, and decided that this case could be decided based on the latter. Kerans J.A.

reiterated the words of the trial judge, saying “a party cannot exercise a power granted in a contract in a way that “substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties”.³¹

GATX Corp. v. Hawker Siddeley Canada Inc.³²: The *Ontario Court (General Division)* considered a transaction that was specifically designed to circumvent a right of first refusal previously granted by the defendant to the plaintiff with respect to shares of a corporation in which they each were shareholders. The transaction was not specifically prohibited by the shareholder agreement or by the by-laws or articles of the corporation, but was structured in a fashion not anticipated or expected by the shareholders so as to preclude the rights of the shareholders. The court found that “the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given.”³³ Blair J. went on to state that “[t]his is an illustration of the application of the good faith doctrine of contractual performance, which in my view is a part of the law of Ontario.”³⁴ [emphasis is added]

Wallace v. United Grain Growers Ltd.³⁵: The *Supreme Court of Canada* examined the duty of good faith in the context of employment contracts. The defendant company wrongfully dismissed the plaintiff employee. The Court recognized that in the employment context there is an implied obligation of good faith and fair dealing in the manner of dismissal. The court was split, however, on the issue of how to award damages for breach of such obligation. The majority decided that the proper remedy for a bad faith dismissal was an extension of the notice period. The minority was prepared to go further by holding that employment law is now developed to a point where an

implied obligation of good faith should be recognized in every contract of employment, the breach of which would be an independent cause of action.

David C. Rosenbaum, in his article “*They Can’t Do That: The Obligation of Good Faith*”³⁶ succinctly sums up the development of the foregoing case law when he states that:

“Based on case law in Canada to date, it is submitted that conduct is especially likely to be successfully attacked on the basis of a breach of an implied obligation of good faith where it is either outside of the four corners of the contract, and nullifies the other party’s rights under the contract, or deprives the other parties of what it reasonably expected to get from the contract in some significant way . . . , or where it is arguably permitted on a literal reading of the contract, but is so far beyond the spirit of the contract as to be contrary to the intentions of the parties”³⁷

C. *MARTEL BUILDING LTD. v. CANADA*

The *Martel* case is our highest authority on the issue of whether a duty of care is owed by one party to another in the context of commercial negotiations. The Supreme Court of Canada has refused to recognize such a duty. Furthermore, the Court declined to consider whether or not commercial negotiations are to be governed by a duty of good faith. The following summarizes the case at trial and on appeal:

Martel Building Ltd. v. Canada³⁸

***Martel* Trial Court Decision**

Facts: Martel Building Ltd. as landlord leased a building in Ottawa to the federal government as tenant.

The lease came up for renewal. The government's negotiator did not diligently pursue the negotiations and did not inform the landlord of certain key facts (including the fact that the government had a non-negotiable bottom-line rental rate, the negotiator did not have final authority to bind the government and the government had a ‘drop dead date’ to meet, after

which it would proceed to tender). It was found that due to the failure of the government negotiators to communicate effectively and in a timely manner with the landlord, the landlord lost the opportunity to negotiate the lease renewal. During the tendering process, the government conducted a financial analysis and added certain costs to the landlord's bid. The lease was awarded to another bidder. The landlord sued for negligence in the negotiation and tender processes and breach of good faith in the context of the negotiations.

Held: Reed J.

1. The trial judge considered the arguments both for and against the existence of a *duty of good faith in contractual negotiations* and concluded that *no such tort had yet emerged in Canada*. The trial judge went on to decide the case on general negligence principles.
2. The trial judge decided that there was a sufficiently close relationship between the landlord and the tenant to conclude that “in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff.”³⁹ As a result, the requisite duty of care existed between the parties.
3. In finding a breach of the duty of care, the trial judge considered whether the actions of the government were reasonable in the circumstances and concluded they were not based upon:
 - 1) delay in the negotiations;
 - 2) carelessness in providing information as to the authority of the negotiators,
 - 3) failure to make clear the government's position on various bargaining points and scheduling requirements,
 - 4) failure to provide timely and accurate information;
 - and 5) arbitrary assessment of certain costs added to the landlord's tender bid.

4. The Court dismissed the action finding there was no obligation to renegotiate and no binding agreement to renew. There was no actionable tort for failure to negotiate in good faith.

Although a duty of care existed between the parties that was breached, there was no causal connection between the breach and the plaintiff's loss of opportunity to renew the lease in the downward spiralling market.

Martel Court of Appeal Decision⁴⁰

Held: Desjardins J.A.

1. The Federal Court of Appeal declined to deal with the doctrine of good faith, where Desjardins J.A. for the court said "I do not plan to deal with whether the time has come for this court to recognize that a distinct tort of failure to negotiate in good faith has now emerged."⁴¹
2. The Court agreed with the trial judge's analysis in the finding of a duty of care in the negotiation of the lease renewal.
3. The Court added that a common law duty of care was owed to the plaintiff in the tendering process. Such duty of care operated to imply an "obligation to treat all bidders fairly and not to give any of them an unfair advantage over the others."⁴²
4. The Court said that in the tendering process, the implied contractual obligation to treat all bidders fairly according to the good faith principle, is an assumed obligation which gives rise to a common law duty of care.⁴³

5. The Court found a breach of both the duty of care in the commercial negotiation process and in the tendering process.⁴⁴
6. The Court found a causal connection between those breaches and the landlord's loss of: 1) the opportunity to negotiate the lease renewal; and 2) a reasonable expectation of receiving the contract following a fair bidding process.⁴⁵ The appeal was allowed and the case referred back to the trial judge on the issue of damages.

Martel Supreme Court of Canada Decision⁴⁶

Held: Iacobucci and Major JJ.

1. The government's appeal was allowed. The Court first reviewed the law that states there is no recovery for economic loss where the plaintiff does not suffer physical harm or property damage, subject to 5 specific exceptions. Negligence in the conduct of commercial negotiations did not fall into any of these exceptions. However, recognizing that the categories of actionable economic loss are not closed, the Court went on to analyze whether it was appropriate to extend the duty of care to an area not previously categorized.
2. In this case, the Court agreed with the lower courts in finding that the relationship between the landlord and the tenant was sufficiently proximate to raise the presumption of a duty of care. The factors the Court considered included the pre-existing lease arrangement, the communications between the parties and a genuine and mutual contracting intent.⁴⁷

3. However, the Court went on to enunciate five ‘compelling policy reasons’ that preclude extending the duty of care into the area of arm’s length commercial negotiations. They are as follows:

- i) The very nature of a commercial negotiation creates the goal of realizing the best possible financial bargain at the expense of the other party.
- ii) To extend a duty of care to pre-contractual commercial negotiations could deter socially and economically useful conduct. It would defeat the essence of negotiation and hobble the marketplace to label a party's failure to disclose its bottom line, its motives or its final position as negligent.
- iii) To impose a duty of care in contractual negotiations would interject into tort law after-the-fact insurance against failure to act with due diligence and failure to pursue alternative negotiation strategies to achieve a better bargain.
- iv) Introducing tort liability into contractual negotiations would force the courts into a regulatory function, scrutinizing the minutiae of pre-contractual conduct, a function that is already performed well by other causes of action providing alternative remedies (eg. undue influence, economic duress and unconscionability).
- v) Needless litigation should be discouraged.⁴⁸

4. In summary, the Court concluded that, **in the circumstances of this case**, the deleterious effects that would be occasioned through an extension of the duty of care into the conduct of commercial negotiations would outweigh the benefits.⁴⁹
5. The Court summarized by saying "We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may be a set of circumstances in which a duty of care may be found, it has not yet arisen".⁵⁰
6. The Court further found that an implied term to treat all bidders fairly and consistently in the assessment of the tender bids was justified based on custom, usage and the intentions of the parties. The costs and effort associated with tendering a bid would suggest that a party would not go to such trouble unless there was an understanding that all bidders would be treated equally and fairly. The implication of such a term is necessary to give business efficacy to the tendering process.⁵¹

The inclusion of a privilege clause does not relieve the invitor of tenders from its obligation to treat all bidders fairly and equally. However, the obligation must be read in light of such clauses that reserve privileges or discretion to the invitor.⁵²
7. The Court limited the findings of breach of such duty in the tendering process as found by the Court of Appeal and found no causation between the breaches that remained and the loss suffered by the plaintiff. The Court highlighted the wide discretion and the express privileges reserved to the defendant in the tender invitation in relieving the defendant from liability for many of its actions in evaluating the bids.⁵³

8. The Court also clarified that any claim in tort for breach of duty of care would fail for the same reason that any claim in contract would fail (as outlined above), and that conceptually the tort claim does not rest on any principles separate from the contractual claim.⁵⁴
9. The Court refused to pronounce on whether negotiations are to be governed by a duty of good faith, only reiterating the lower court's statements that a duty to bargain in good faith has not been recognized to date in Canadian law.⁵⁵

As a result of the *Martel* decision, practitioners have the clear message that so far the door is closed on a duty of care in conducting negotiations, although the Supreme Court has conceded that circumstances may arise which may justify opening that door. On the issue of "good faith" in commercial negotiations, we have the Court's observation that "a duty to bargain in good faith has not been recognized to date in Canadian law".⁵⁶

D. OTHER RECENT CASES – Post *Martel*

In the cases summarized below, one should be aware that only the judges in *Cam-Valley* and *Cornell Engineering* appeared to have the *Martel* decision before them.

(i) Contract Formation

EdperBrascan Corp v. 117373 Canada Ltd.⁵⁷ (*Ontario Superior Court of Justice*)

Facts: EdperBrascan and Labatt Brewing Company Limited entered into a letter agreement to effect a "corporate divorce" through the liquidation over time of Labatt's investment portfolios in the EdperBrascan group of companies. The letter agreement provided that if the liquidation was not complete by March 1, 1998, EdperBrascan would purchase the remaining investments for

cash or, at its option, for securities of "equivalent value" selected from a list of 4 companies. In determining "equivalent value", the letter agreement provided that the securities would be valued in accordance with a certain formula or at a price mutually agreed if Labatt did not agree that the formula represented "equivalent value". EdperBrascan alleged that Labatt never attempted in good faith to agree on a price for the offered securities. Those securities were not among the 4 listed companies as required by the letter agreement. Labatt rejected the securities as being not in compliance with the letter agreement and demanded a cash payment since the securities of "equivalent value" from among the 4 listed companies were not tendered.

Held: Lane J.

1. The Court noted that the requirement of mutual agreement on the price of the securities was "an agreement to agree", thus *prima facie*, void. EdperBrascan relied on cases that found an obligation to act in good faith in performing that part of an otherwise valid and consensual contract calling for mutual agreement. The Court distinguished those cases by pointing out that those cases involved terms which had some sort of objective means of measurement spelled out in the contract (i.e. "prevailing market rentals"). There was no such means written into this contract.⁵⁸
2. The Court rejected the notion that a duty to bargain in good faith exists whenever a negotiation takes place within an existing contract.⁵⁹
3. The Court recognized that the duty to act in good faith exists in certain circumstances, such as in the exercise of a discretion or in contracting to use best efforts. However, the

common law rule remains that contracts to negotiate are inherently uncertain and therefore incapable of creating binding and enforceable obligations.⁶⁰

4. The Court ultimately dismissed the action as containing no genuine issue for trial, finding that an obligation to negotiate in good faith is "unworkable in practice" and "inherently inconsistent with the position of a negotiating party", and that this does not change simply because there is an existing contract within which the negotiation is to be conducted.⁶¹

978011 Ontario Limited v. Cornell Engineering Company Limited⁶² (*Ontario Court of Appeal*)

Facts: Cornell unilaterally terminated its services agreement with 978011 (a personal service company) for the services of Macdonald (the principal of 978011). Cornell's senior officer signed the agreement without reading the termination clause providing for compensation in the event of unilateral termination. The trial judge held that Macdonald, who had a personal relationship with Cornell's officer, had a duty to bring the termination clause to his attention before it was signed, due to the fact that Macdonald had amended the termination clause in the final drafting stages without the knowledge of Cornell's officer.

Held: Weiler J.A.

1. The Court reviewed the trial judge's finding that there was a special relationship between Macdonald and the respondent that was akin to a partnership, and thus Macdonald was under a duty to bring the amendments in the contract to the attention of Cornell.⁶³

2. The Court then highlighted the Canadian jurisprudence which says that absent a special relationship, there is no duty in common law to negotiate in good faith or to have regard to the interests of the other party.⁶⁴
3. The Court observed that the circumstances where the law requires more than self-interested dealing share certain characteristics, namely that one party relies on the other for information necessary to make an informed choice and the party in possession of such information has an opportunity by withholding the information to bring about the choice made by the other party.⁶⁵
4. The Court then pointed out 5 factors where reliance by one party on the other party is justified:
 - i) a past course of dealing between the parties in which reliance for advice, etc., has been an accepted feature;
 - ii) the explicit assumption by one party of advisory responsibilities;
 - iii) the relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing;
 - iv) the manner in which the parties were brought together, and the expectation that could create in the relying party; and
 - v) whether 'trust and confidence' knowingly has been reposed by one party in the other.⁶⁶

5. On the facts, Weiler J. concluded that Cornell's senior officer was not justified in relying on Macdonald to point out the termination clause in the contract and that the information was readily accessible to Cornell had such individual simply read the contract. As a result, Cornell was not justified in expecting not to be bound by the terms of the contract.

Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.⁶⁷ (*Ontario Court of Appeal*)

Facts: Cam-Valley developed a multi-phase condominium project, the original design of which provided for an Outdoor Recreational Area (ORA). However, the developer's plans changed and instead of developing the ORA and conveying such recreational area to the condominium corporations, Cam-Valley razed the trees on the ORA land and slated the lands for another residential development. The condominium corporations sought an injunction and an order transferring the ORA to them. They succeeded at trial. The developer appealed.

Held: Finlayson J.

1. The developer's appeal was allowed. Finlayson J., writing for the majority, rejected the argument of the trial judge that a developer and a condominium purchaser stand in a fiduciary relationship, stating "a prospective purchaser cannot be the fiduciary of the developer in any accepted equitable sense; otherwise the developer could not negotiate with the buyer at all."⁶⁸
2. Finlayson J. rejected the trial judge's reliance on *LeMesurier, supra*, stating that that case was concerned with the performance of an executory contract, and that "the trial judge appears to have taken this authority a step further by applying the principles ... to the pre-

contractual phase of the parties' relationship. ...This notion that the developer has an obligation to incorporate all the purchasers' 'reasonable expectations' into the disclosure documents is unrealistic and unsupported by authority."⁶⁹

3. The judge cited *Martel* and *Mannpar*⁷⁰ as authority for the proposition that there is no obligation or duty to bargain or negotiate in good faith. The Court distinguished a "bright line" between the status of the developer and the prospective purchaser prior to executing the purchase agreement and the obligation of the contracting parties to complete the closing in good faith.⁷¹
4. Finlayson J. further spoke on the issue of fiduciary duties between vendors and purchasers, stating that an overarching fiduciary duty did not exist. "The suggestion by the trial judge that a prospective purchaser is entitled to repose some element of trust in the developer that it will deal with the purchaser's reasonable expectations in the disclosure documents introduces an element of paternalism that is totally unjustified in such a relationship...the prospective purchaser is protected by the statutory requirement of full disclosure, not the extension of fiduciary principles to the bargaining process."⁷²

Weiler J.A.

1. Weiler J. concurred in the result, but instead reasoned that the trial judge had not meant to impose a fiduciary obligation on the developer, but instead a duty of good faith requiring the developer not to act solely in its own interest in determining the fate of the ORA lands.

2. Weiler J. imposed such a duty on the developer on the basis of the disparity between the parties in both bargaining power and access to information. Weiler J. likened the relationship to that of insurer and insured, or employer and employee in the context of dismissal. Weiler J. held that “while the developer has the right to change the development, just as an employer has the right to terminate an employee, that right must be exercised with candour and reasonableness, taking into consideration the interests of the condominium owners.”⁷³
3. Lastly, Weiler took the position that this case concerned the performance of a contract and not its negotiation. As a result, the imposition of a duty of good faith was warranted because the developer intended the purchasers to believe that the ORA lands would remain undeveloped if the ORA was not constructed.⁷⁴
4. Despite these findings, Weiler J. found damages to be the appropriate remedy for breach of the duty of good faith, not an injunction or conveyance of the lands.

*Northland Fleet Services Ltd. v. Quintette Operating Corp.*⁷⁵ (British Columbia Supreme Court)

Facts: The plaintiff, Northland Fleet, contracted with the defendant, Quintette to perform vehicle maintenance and repair. The contract included a clause that the parties would negotiate in good faith with a view to renew for a 3 year renewal term. Quintette purportedly terminated the contract unilaterally on the mistaken belief that there was a clause which permitted termination

without cause. Quintette then declined to enter into renewal negotiations. Northern Fleet sued for breach of contract for breach of this provision, among others.

Held:

1. On this "lost chance claim", the Court held that the agreement to negotiate in this case was an enforceable obligation that had been breached.
2. The Court held that there is, "as yet, no absolute rule or principle of law that automatically precludes the enforceability of an agreement to negotiate with a view to reaching an agreement ... the Court should strive to interpret such agreements in a manner that gives them the legal effect intended by the parties".⁷⁶
3. Given the history of dealings between the parties, the Court found in this case that the agreement to negotiate was enforceable and "[a]dding the requirement to negotiate in good faith would add more value if that requirement is equated with "best efforts" diligence".⁷⁷
4. The Court rejected the defendant's argument that its stated desire to perform the contracted duties henceforth "in-house" was a defence to its failure to negotiate. Observing that the defendant had done nothing deceitful, the Court said "the honesty of the party in breach in setting out its reasons for the breach does not ameliorate the breach".⁷⁸
5. The Court provided guidance in what would have been required of the defendant stating "good faith negotiations in the circumstances here would have required an explanation of the defendant's reasons for not wishing to renew the contract and an opportunity for the plaintiff to address the defendant's concerns".⁷⁹

6. In the end, on the "lost chance" claim, the plaintiff won the battle but lost the war. The Court, after assessing the likelihood of success, determined that the prospect of the plaintiff obtaining a profitable contract was negligible and no positive value could be ascribed to the "lost chance".⁸⁰

(ii) Contract performance

***Working Ventures Canadian Fund Inc. v. Angoss Software Corporation*⁸¹ (Ont. SCJ)**

Facts: In this case, the plaintiff, Working Ventures, agreed to provide financing to Angoss, the defendant. The parties entered into a loan agreement whereby \$300,000 was advanced immediately as bridge financing to cover Angoss' pressing payroll and current obligations. Working Ventures agreed to loan a further \$2,000,000 on the security of a debenture upon satisfactory completion of its due diligence investigations. Pursuant to the loan agreement, Angoss paid a \$50,000 commitment fee and issued warrants to Working Ventures. Upon completion of its due diligence investigation, Working Ventures declined to advance the further \$2,000,000 but insisted on keeping and eventually exercising the warrants. Angoss refused to honour the warrants, claiming that the warrants were issued as part of a loan agreement which Working Ventures failed to perform in good faith. Working Ventures sued Angoss for specific performance of the issuance of the shares pursuant to the warrants.

Held: **Cameron J.** (*Ontario Superior Court of Justice*)

1. The Court ordered Angoss to honour the exercise of the warrants and pay the balance of principal and interest owing under the \$300,000 promissory note.
2. The Court stated that “[a]bsent a different written agreement [emphasis added] there is no common law obligation to bargain in good faith. Even if there was the obligation it would probably be so vague and imprecise as to be unenforceable.”⁸²

3. The Court further stated that there is no freestanding general duty overlaying all contracts in Ontario that they be performed in good faith. However, there is clearly a duty not to use bad faith in the performance of contracts. This obligation “must be measured against the obligations and rights of the parties and their intentions and reasonable expectations under their express contract. A duty of good faith should only be imposed in those relationships akin to partnership, insurance, **or where the terms of the contract clearly provide for it [emphasis added]**. Bad faith could probably be said to exist where the conduct is, by an objective standard, capricious or arbitrary.”⁸³
4. The Court found no obligation to impose an objective standard on Working Ventures in its determination of whether it was satisfied with its due diligence investigation.⁸⁴
5. The Court concluded its analysis by stating that the courts should avoid second-guessing business decisions by imposing obligations of good faith or readily finding the existence of bad faith.⁸⁵ “The Court should be reluctant to interfere in a business decision by finding bad faith except in the clearest of circumstances evidencing capricious or arbitrary conduct.”⁸⁶

*NewsWest Corp. v. Glendar Holdings Ltd.*⁸⁷ (Saskatchewan Court of Queen's Bench)

Facts: The Plaintiff NewsWest was a wholesale distributor of magazines and books. The defendant Glendar (the principal of which was an employee of NewsWest) purchased a retail outlet from a company related to NewsWest and the parties entered into a supply agreement. The relationship between the parties deteriorated after NewsWest terminated the employment of

Glendar's principal. Glendar ceased doing business and sold the store to a competitor of the plaintiff.

Held:

1. The Court found that the contracts in question were contracts of adhesion (prepared and used by NewsWest in its business with all its customers) and contained no clause which specifically disallowed Glendar's actions in selling its business and ceasing to be a customer.⁸⁸ What the plaintiff was asking the Court to do was imply a good faith covenant that the parties would only exercise the powers available under the contract for a good faith reason, not a bad faith reason (ie. for reasons other than solely to avoid the contract).⁸⁹
2. The Court declined to accept that Canadian courts have recognized as a general principle that contracts must be performed in good faith.⁹⁰
3. The Court was influenced by the fact that at the formation stage of the contract, the parties were not equals but employer and employee.
4. Interestingly, the Court also observed that NewsWest had not dealt with Glendar's principal in an entirely good faith manner in the circumstances surrounding the termination of his employment and concluded "... if the law has reached the point where the good faith obligation has independent application with respect to contract formation, contract performance and contract enforcement (and I do not know that it has) the absence of good faith of a party at one stage, should preclude that party from receiving the benefit of the

good faith obligation at another stage, at least at this point when it is not settled as a matter of law that an independent obligation of good faith exists at any of the stages".⁹¹

5. Finally, the Court held that the application of the good faith obligation as an aid of interpretation cannot overcome the application of the *contra proferentum* rule operating in favour of the defendants with respect to the contracts of adhesion in issue.⁹²

E. WHAT THE CASES TELL ME

1. There are a number of decided cases imposing on the parties to a contract an obligation to perform their obligations under the contract in good faith (*LeMesurier*, Kelly J. in *Gateway*, *CNR*, *Wallace*, *GATX*, *Mesa*, Weiler J. in *Cam-Valley*). It has been said, however, in 2 of the cases under review that there is no general principle that contracts must be performed in good faith (*Angoss*, *NewsWest*).
2. No duty of care arises in conducting commercial negotiations. The door is not closed, however, on finding such a duty if the appropriate set of circumstances arises (*Martel*).
3. Absent a "special relationship", there is no general duty to negotiate towards a contract in good faith or to have a regard for the interests of the other party (*Cam-Valley*, *EdperBrascan*, *Cornell Engineering*).
4. "Special relationships" that may be scrutinized closely by the courts in determining whether a duty of good faith in negotiations or performance exists would include:
 - those where one party is reliant on the other for information or expertise (*Cornell*)
 - a mentor-mentee relationship (*Cornell*)

- those where there is a disparity of bargaining power (Weiler J.A. in *Cam-Valley*)
 - those where the parties have a history of dealings between them (*Northland Fleet*)
 - a landlord and tenant relationship (*Gateway*)
 - an employer and employee relationship (*Wallace, NewsWest*)
5. In the context of a negotiation within an otherwise valid contract calling for mutual agreement:
- an "agreement to agree" continues to be prima facie unenforceable, absent a specific objective means of measurement spelled out in the contract (*EdperBrascan*)
 - there is no duty to bargain in good faith just because the negotiation takes place within an existing contract (*EdperBrascan*)
 - however, if the clause in question specifies that the parties will negotiate in good faith (equating such a clause with a "best efforts" diligence) and the history of the parties' dealings reveal compelling reasons for including the agreement to negotiate, a court may uphold such a clause and impose a duty to negotiate in good faith (*Northland Fleet*).
6. There is no precise definition of "good faith" but guidance may be found in the following recurring themes on what constitutes "bad faith":
- "... bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contract in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties"⁹³ (Kelly J. in *Gateway*)

- "... in the course of dismissal, employers ... should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive"⁹⁴ (*Wallace*)
- it is conduct which "... substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties"⁹⁵ (*Mesa*)
- a party must not act "in a fashion designed to eviscerate the very right which has been given"⁹⁶ (*GATX*)
- " 'Bad faith' could probably be said to exist where the conduct is, by an objective standard, capricious or arbitrary"⁹⁷ (*Angoss*)

The Court in *Northland Fleet* set out its expectations as to what the defendant should have done to demonstrate its "good faith" in the negotiations of the renewal, even if such negotiations had failed. The Court stated that the defendant should have communicated "an explanation of the defendant's reasons for not wishing to renew the contract and an opportunity for the plaintiff to address the defendant's concerns".⁹⁸

The Courts focus largely on the expectations of the parties at the time of formation of the contract when evaluating the duty to perform in good faith. Conduct consistent with such expectations is unlikely to be impugned.

7. The doctrine of "good faith" will not be deployed by the courts to "save" a party from the consequences flowing from his contract or his conduct, for example:

- the failure of the party to read the contract (*Cornell*)
- the failure of the parties to "mutually agree" on a price (*EdperBrascan*)
- to exclude the application of the *contra proferentum* rule in interpreting ambiguous clauses in contracts of adhesion (*NewsWest*).

8. The Courts may be reluctant to overlay an obligation of good faith on a party where the other party is protected by statutory disclosure (as with documents to be delivered to a purchaser under the *Condominium Act (Ontario)*) (*Cam-Valley*). It will be interesting to see whether the concepts of "good faith" which have been frequently applied by the courts in the franchisor-franchisee relationship will continue to apply in the context of contract formation now that we have the new disclosure regime contained in the *Arthur Wishart Act (Franchise Disclosure), 2000*.

9. In the context of a tender, a wide privilege clause in favour of the invitor may limit the implied obligation to treat all bidders fairly and equally, so long as the impugned conduct falls within a strict reading of the contractual language of the tender documents (*Martel, MJB*).

10. The mistaken belief that one is acting in accordance with the contract or that one is acting honestly is not a valid defence to an action for breach of contract (*MJB, Northland Fleet*).

11. The Golden Rule. If a party intends to rely on a duty of good faith owed to him, he must first ensure that he himself has displayed good faith (*Northland Fleet*).

12. Generally speaking, the lower courts appear more willing to consider and apply a doctrine of good faith while appeal courts rely on more traditional legal bases in analyzing the contracts and matters at issue.

PART II STAYING OUT AND GETTING OUT – Agreements in Principle and Letters of Intent

A. INTRODUCTION

"It is easier to stay out than get out. "

- Mark Twain (1901)

Parties are increasingly using letters of intent, memoranda of understanding and heads of agreement at the pre-contractual stage to set down key features of a transaction prior to investing significant time, effort and expense. As will be discussed by Paul Wickens in his lecture today, it is not enough for a party to consider himself "off the hook" just because such a pre-contractual document baldly states "subject to a definitive agreement".

At what point do letters of intent or verbal discussions or the proverbial handshake turn into a "definitive agreement" much to the surprise and chagrin of a party who considered himself still "unbound"?

B. CASELAW

The principles set out in the following decision of the Ontario Court of Appeal have since been frequently cited in subsequent cases.

Bawitko Investments Ltd. v. Kernels Popcorn Ltd.⁹⁹ *Ontario Court of Appeal*

Facts: The parties negotiated several points in a franchise agreement in variance from the standard form of the agreement, and upon reaching consensus, shook hands. The defendant said "You've got a deal." However, when the defendant submitted execution copies of the

agreement to the plaintiff, it did not conform to the agreement reached during negotiation. The plaintiff refused to sign. The defendant refused to redraft the agreement and the plaintiff brought an action for breach of contract. The trial judge found that there was an oral agreement between the parties as a result of the negotiation of several key terms and this oral agreement was sufficient, and intended, to bind the parties.

Held: Robins, J.A.

1. The Court allowed the appeal. The Court placed importance on a letter by the defendant to the plaintiff which clearly stated that “all franchise documents must be in their final form and properly signed and sealed "by a certain date" and “the store will not commence business as a franchise operation until all documents have been sufficiently executed.”¹⁰⁰
2. The oft-cited passage from Robins J.A. in this key case is as follows:

“As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may “contract to make a contract”, that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, *when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract.* In other words, in such circumstances the “contract to make a contract” is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an

already complete and binding contract but is essential to the formation of the contract itself.”¹⁰¹ [emphasis added]

3. On the facts, the Court held that the parties were not *ad idem* as to the essential terms necessary to form a completed and legally enforceable franchise contract.
4. It should be noted that the judge considered a franchise agreement to be a specialized form of contract which cannot be completed by “only the filling in of blank spaces or the completion of minor details which the parties can impliedly be taken to have agreed upon.”¹⁰² The franchisor-franchisee relationship required the parties' express agreement on the detailed provisions set up to regulate the business relationship of the parties.¹⁰³

Modderman v. Ondaatje Corp.¹⁰⁴ (*Ont C.J.*)

Facts: The parties entered into a "letter of intent" with respect to Modderman's employment with Ondaatje in connection with a specific strategic business plan. The letter provided at the beginning that "the key terms and conditions are as follows" but at the end invited Modderman to "move forward to a formal contractual agreement on substantially the terms outlined above". The letter contained "open terms" such as the details of his compensation and the terms of his profit sharing but also binding terms such as a confidentiality clause. The letter of intent provided that the confidentiality clause would "survive the expiration of this employment arrangement with you". The relationship between the parties deteriorated and Ondaatje ceased to deal with Modderman. Modderman sued for breach of contract.

Held: **E. MacDonald J.** (*Ontario Court of Justice (General Division)*)

1. The judge held that, in this case, the parties did not create a binding contract.

2. The judge found Modderman to be manipulative in respect of his evidence at trial and in his business dealings with Ondaatje.
3. The judge emphasized that "...[c]ontext is critically important in the determination of whether or not the letter of intent constitutes an enforceable contract."¹⁰⁵
4. In this case the "context" included the sophistication of the businessmen involved, the references in the letter to the desirability of a more formal contract, the open-endedness of many important terms and the fact that the future of the relationship was contingent on the success of the particular business strategy.

Gendis Inc. v. Richardson Oil & Gas Ltd.¹⁰⁶ (Manitoba Queen's Bench)

Facts: The plaintiff and defendant each owned 50% of the shares of Tundra Oil and Gas Ltd.. Cohen was chairman of the board for the plaintiff and Richardson was managing director of the defendant. The two men had a very cordial business and social relationship for many years. Richardson expressed interest in buying the shares in Tundra owned by the plaintiff and the parties, after extensive negotiations, settled on terms. When the written agreement was presented for signature, Richardson refused to close on the basis of a new term that was included in the agreement. This new term was of no detriment to the defendant. The plaintiff sued for breach of contract. The trial court concluded that the parties intended to enter into a binding contract and that the terms were sufficiently certain to constitute a binding agreement despite there being no formal written and signed document.

Held: **Monnin J.A.** (*Court of Appeal*)

1. The Court dismissed the appeal. The judge emphasized that “[t]here are contract cases that make their way before the courts in which great and sometimes innovative principles of law are established. This is not such a case. The determination of this case is to be found on the facts ...”¹⁰⁷
2. The court quoted a passage from *Scamell & Nephews Ltd. v. Ouston et al* ¹⁰⁸ in support of its conclusion that the intention to contract was clear, precise and fixed. The passage outlines two circumstances in which the court should interfere and find that no contract existed between the parties:

“The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention ... the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at the substance and not the mere form. ... The other reason ... is that the parties never in intention nor even in appearance reached an agreement.”¹⁰⁹

C. WHAT THESE CASES TELL ME

1. The Courts will look at the facts of each case in determining whether a binding contract has been formed, the touchstone being the intention of the parties.
2. Other factors would include:
 - the relationship between the parties and their prior social and business dealings
 - the importance placed by the parties on having a formal written agreement
 - the complexity and/or nature of the transaction (ie. will the contract to govern a continuing relationship between the parties?)
 - the conduct of the parties during negotiations and after the alleged "contract" is formed

- the essential or non-essential nature of the terms yet to be agreed upon

3. In drafting a letter of intent, it is important to clearly distinguish those provisions meant to be binding and those not binding so the court will not be forced to turn to "background", "context" and "conduct" in interpreting it.

RECOMMENDED READING

1. E. Belobaba, "Good Faith in Canadian Contract Law" in *Commercial Law: Recent Developments and Emerging Trends (Special Lectures of the Law Society of Upper Canada, 1985)*
2. Shannon Kathleen O'Byrne, "Good Faith in Contractual Performance: Recent Developments" in *(1995) 74 Canadian Bar Review*
3. David C. Rosenbaum, "They Can't Do *That*: The Obligation of Good Faith", in Harvey M. Haber, Q.C. *Tenant's Rights and Remedies in Commercial Leases- A Practical Guide*, ch. 3., Canada Law Books Inc.
4. David I. Bristow, Q.C. and Reva Seth, "Good Faith in Negotiations" in *CBA Annual Conference, Halifax, Nova Scotia, August 23, 2000*

ENDNOTES

- ¹ *Martel Building Limited v. Canada* [2000] 2 S.C.R. 860.
- ² (1992), Meredith Lect. 415 at p. 421.
- ³ [1992] 1 All E.R. 453 (H.L.).
- ⁴ *Ibid.*, at p. 460.
- ⁵ [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97. [cited to S.C.R.]
- ⁶ *Ibid.*, at p. 672.
- ⁷ (1992) 93 D.L.R. (4th) 461 (Ont. Gen. Div.), aff'd (1997), 153 D.L.R. (4th) 291 (C.A.).
- ⁸ (1999), 5 M.P.L.R. (3d) 1, 48 C.L.R. (2d) 236, 125 O.A.C. 72 (Ont. C.A.).
- ⁹ [1999] 1 S.C.R. 619; (1999), 170 D.L.R. (4th) 577. [cited to S.C.R.]
- ¹⁰ *Ibid.*, at para. 30.
- ¹¹ *Ibid.*, at paras. 44-5.
- ¹² *Ibid.*, at para. 54.
- ¹³ (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, 9 O.A.C. 69 (C.A.), leave to appeal refused 30 D.L.R. (4th) 768n, 56 O.R. (2d) 320n. [cited to O.R.]
- ¹⁴ *Ibid.*, at p. 764.
- ¹⁵ *Ibid.*
- ¹⁶ *Ibid.*
- ¹⁷ (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424, (C.A.) leave to appeal to S.C.C. refused 63 O.R. (2d) x, 21 O.A.C. 239n. [cited to O.R.]
- ¹⁸ *Ibid.*, at p. 7.
- ¹⁹ *Ibid.*
- ²⁰ (1989), 80 Nfld. & P.E.I.R. 200, 46 B.L.R. 62 (Nfld. T.D.). [cited to B.L.R.]
- ²¹ *Ibid.*, at p. 80.
- ²² (1991), 106 N.S.R. (2d) 180 (S.C.), aff'd (1992), 112 N.S.R. (2d) 180 (C.A.).
- ²³ *Ibid.*, at pp. 191-2.
- ²⁴ *Ibid.*, at p. 197.
- ²⁵ (1992), 112 N.S.R. (2d) 180 (C.A.).
- ²⁶ (1994), 12 B.L.R. (2d) 209, 55 C.P.R. (3d) 360 (Ont. Ct. (Gen. Div.)). [cited to B.L.R.]
- ²⁷ *Ibid.*, at para. 29.
- ²⁸ *Ibid.*, at para. 28.
- ²⁹ (1994), 149 A.R. 187, 13 B.L.R. (2d) 310 (C.A.), leave to appeal to S.C.C. refused, 162 A.R. 318n, 15 B.L.R. (2d) 284n. [cited to B.L.R.]
- ³⁰ *Ibid.*, at p. 320.
- ³¹ *Ibid.*, at p. 321.
- ³² (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)).
- ³³ *Ibid.*, at p. 276.
- ³⁴ *Ibid.*
- ³⁵ (1997), 3 S.C.R. 701, 152 D.L.R. (4th) 1, 123 Man. R. (2d) 1. [cited to S.C.R.]
- ³⁶ Rosenbaum, David C. "*They Can't Do That: The Obligation of Good Faith*", from Harvey M. Haber, Q.C. Tenant's Rights and Remedies in Commercial Leases: A Practical Guide, ch. 3, Canada Law Books Inc. (Toronto: 1998).
- ³⁷ *Ibid.*, at p. 114.
- ³⁸ (1997), 129 F.T.R. 249 (TD).
- ³⁹ *Ibid.*, at para. 75.
- ⁴⁰ *Martel Building Limited v. Canada* (1998), 229 N.R. 187, 163 D.L.R. (4th) 504. [cited at D.L.R.]
- ⁴¹ *Ibid.*, at pp. 512-13.
- ⁴² *Ibid.*, at p. 514, from the dissenting judgment of Pratte J.A. in *Best Cleaners and Contractors Ltd. v. The Queen*

- [1985] 2 F.C. 293.
- ⁴³ *Ibid.*, at p. 514.
- ⁴⁴ *Ibid.*, at p. 515.
- ⁴⁵ *Ibid.*, at p. 518.
- ⁴⁶ *Supra*, note 1.
- ⁴⁷ *Ibid.*, at para. 52.
- ⁴⁸ *Ibid.*, at paras. 62-71.
- ⁴⁹ *Ibid.*, at para. 72.
- ⁵⁰ *Ibid.*
- ⁵¹ *Ibid.*, at para. 88.
- ⁵² *Ibid.*, at para. 89.
- ⁵³ *Ibid.*, at paras. 93-105.
- ⁵⁴ *Ibid.*, at para. 107.
- ⁵⁵ *Ibid.*, at para. 73.
- ⁵⁶ *Ibid.*
- ⁵⁷ (2000), 50 O.R. (3d) 425, 37 R.P.R. (3d) 188 (Ont. S.C.J.). [cited to O.R.]
- ⁵⁸ *Ibid.*, at para. 47. Also see *Mannpar Enterprises Ltd. v. Canada* (1999), 173 D.L.R. (4th) 243 at p. 265, where the B.C. Court of Appeal stated that without "...a benchmark or a standard by which to measure such a duty, the negotiation concept is unworkable."
- ⁵⁹ *Ibid.*, at para. 49.
- ⁶⁰ *Ibid.*, at paras. 50-1.
- ⁶¹ *Ibid.*, at para. 56.
- ⁶² [2001] 53 O.R. (3d) 783, 198 D.L.R. (4th) 615. [cited to O.R.]
- ⁶³ *Ibid.*, at para. 30.
- ⁶⁴ *Ibid.*, at paras. 31-33.
- ⁶⁵ *Ibid.*, at para. 34.
- ⁶⁶ *Ibid.*, taken from Finn, "The Fiduciary Principle", in *Essays in Equity, Fiduciaries and Trusts*, T.G. Youdan ed., (Carswell, 1989), at pp. 16-24.
- ⁶⁷ [2001] 53 O.R. (3d) 1, 196 D.L.R. (4th) 621. [cited to O.R.]
- ⁶⁸ *Ibid.*, at para. 34.
- ⁶⁹ *Ibid.*, at para. 40.
- ⁷⁰ *Supra*, note 58.
- ⁷¹ *Ibid.*, at para. 38.
- ⁷² *Ibid.*, at para. 43.
- ⁷³ *Ibid.*, at para. 100.
- ⁷⁴ *Ibid.*
- ⁷⁵ (2001), 16 B.L.R. (3d) 58 (BCSC).
- ⁷⁶ *Ibid.*, at para. 42.
- ⁷⁷ *Ibid.*
- ⁷⁸ *Ibid.*, at para. 41.
- ⁷⁹ *Ibid.*, at para. 45.
- ⁸⁰ *Ibid.*, at para. 46.
- ⁸¹ [2000] O.J. No. 4537 (Ont. SCJ). [Quicklaw]
- ⁸² *Ibid.*, at para. 82.
- ⁸³ *Ibid.*, at para. 83.
- ⁸⁴ *Ibid.*, at para. 88.
- ⁸⁵ *Ibid.*, at para. 89.
- ⁸⁶ *Ibid.*, at para. 91.
- ⁸⁷ [2001] 9 W.W.R. 312 (Sask. Ct. of QB).
- ⁸⁸ *Ibid.*, at para. 29.

⁸⁹ *Ibid.*, at para. 30.

⁹⁰ *Ibid.*, at para. 31.

⁹¹ *Ibid.*, at para. 33.

⁹² *Ibid.*, at para. 34.

⁹³ *Supra*, note 22 at p. 197.

⁹⁴ *Supra*, note 35 at para. 98.

⁹⁵ *Supra*, note 29 at para. 14.

⁹⁶ *Supra*, note 32 at para. 72.

⁹⁷ *Supra*, note 81 at para. 83.

⁹⁸ *Supra*, note 75 at para. 45.

⁹⁹ (1991), 79 D.L.R. (4th) 97 (O.C.A.).

¹⁰⁰ *Ibid.*, at p. 101.

¹⁰¹ *Ibid.*, at pp. 103-4.

¹⁰² *Ibid.*, at p. 106.

¹⁰³ *Ibid.*

¹⁰⁴ [1998] O.J. No. 3018 (OCJ (General Division)). [Quicklaw]

¹⁰⁵ *Ibid.*, at para. 40.

¹⁰⁶ [1999] M.J. No. 504 (Man. Q.B.), aff'd [2000] 9 W.W.R. 1, 148 Man. R. (2d) 19 (Man. C.A.). [cited to [2000] W.W.R.]

¹⁰⁷ *Ibid.*, at p. 10.

¹⁰⁸ [1941] A.C. 251.

¹⁰⁹ *Ibid.*, at pp. 268-9.