

# The Supreme Court of Canada and the Development of a Canadian Common Law of Contract

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## ABSTRACT

This paper provides a survey of developments in the Canadian common law of contracts in the jurisprudence of the Supreme Court of Canada during the last decades of the twentieth century and the first decades of the twenty-first. At the beginning of the modern era, the Supreme Court jurisprudence continued its traditional mandate of simply applying English contract doctrine to the resolution of Canadian contract disputes. In the later decades of the twentieth century, however, the Supreme Court jurisprudence manifested a growing sense of the Court's responsibility and capacity for the development of uniquely Canadian private law jurisprudence. Although initially confined to what might be considered to be incremental change, developments in recent years have embraced more dramatic innovations. Such changes might be explained on the basis that they realign doctrine in accord with its underlying values and principles in light of evolving modern sensibilities as to fair and just results. The paper identifies factors that may have contributed to this evolution of the Court's vision of its role. A persistent theme throughout the developments in contract law doctrine has been the encouragement of good faith performance of contractual obligations.

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## I. INTRODUCTION

In the common law system, it is well-understood that our courts perform two central roles. The first might be described as dispute adjudication. As generally conceived, it involves application of established doctrine to fact situations which, though disputed, will be the subject of findings by a trial judge. The second might be described as a law-making function. It is accepted that the courts will not only attempt to apply the existing doctrine but may engage in a process of examining such doctrine and considering making adjustments to it. Indeed, this latter role is said by admirers of the common law system to be its towering strength. It is this capacity to make new law that enables the common law to change from time to time and adjust to changing social and economic conditions and to changing perceptions of the just result. If it were not for this capacity of the common law to reform itself, as Lord Goff observed, “the common law would be the same now as it was in the reign of King Henry II”.<sup>1</sup> Further, while it is accepted that trial courts will place greater emphasis on the adjudication function rather than the law-making function and that appeal courts may be more willing to engage in the latter, it is also accepted that no sharp line can be drawn between the two functions. Common law doctrine is a work in progress.

At the same time, continuity is a cherished value in the common law. Many of the central tenets of the common law of obligations were settled in the nineteenth century – often (we rarely acknowledge) with borrowings from the civil law<sup>2</sup> – and, indeed, in earlier times. Continuity produces stability and predictability in the law. The connection between continuity and stability is not, of course, absolute. Where traditional doctrines have become dysfunctional – as where the rule becomes disconnected from its underlying rationale<sup>3</sup> or where exceptions threaten to overwhelm the

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<sup>1</sup> *Kleinwort Benson Ltd. v Lincoln City Council*, 513 at 5344 (HL).

<sup>2</sup> See J Gordley, *The Philosophical Foundations of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991); AWB Simpson, “Innovations in 19<sup>th</sup> Century Contract Law” (1975), 91 *Law Q Rev* 247. For an account of civilian influence present in a classic English contracts authority, see R. Danzig, “*Hadley v Baxendale*: A Study in the Industrialization of the Law” (1975), 4 *J Legal Stud* 249.

<sup>3</sup> Arguably, the modern reform of the pre-existing duty rules provides an illustration. See JD McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2020) Chapter 7B (3). And

existing doctrine<sup>4</sup> – reform of the rule can produce greater certainty and predictability in the law. This persistent tension between pressures to reform the law and pressures favouring stability and certainty of the law is an essential feature of the common law system. Well-informed counsel will understand that particular doctrines are vulnerable to change and will form their opinions and submissions in court, taking such vulnerabilities into account.<sup>5</sup>

The objective of this paper is to examine what appears to be a shift in the balance struck between these two functions by the Supreme Court of Canada in the latter part of the twentieth century and the early decades of the twenty-first. More particularly, this change in emphasis will be examined in the particular context of the development of the common law of contract. At the dawn of what is referred to here as the modern era, the common law contract jurisprudence of the Supreme Court displayed a distinct emphasis on the adjudication model. The existing law applied by the Court was the English law of contracts. By the time the twentieth century closed, however, the Court's jurisprudence manifested a much greater willingness to reconsider received English doctrine and create new and unique domestic jurisprudence.

The paper begins with a brief portrayal of Canadian Supreme Court contract jurisprudence at the opening of the modern era. It then continues with brief sketches of the leading opinions on contract matters in the last decades of the twentieth century and the early twenty-first century, in support of the proposition that such a shift has occurred. During that period a number of important innovations in Canadian contract law have emerged. The paper then engages in some speculation as to the factors that

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see, *Greater Fredericton Airport Authority v NAV Canada*, 2008 NBCA 28; *Rosas v Toca*, 2018 BCCA 79.

- <sup>4</sup> The doctrine of privity of contract appears to be headed in this direction. Perhaps the best illustration of such a problem is the overruling of the mistake of law doctrine. See *Air Canada v British Columbia*, [1989] 1 SCR 1161 (SCC) adopting the dissenting reasons of Dickson J in *Hydro Electric Com'n of Township of Nepean v Ontario Hydro*, [1982] 1 SCR 347 (SCC). For discussion, see PD Maddaugh and JD McCamus, *The Law of Restitution*, Loose-leaf Ed. (Toronto: Thomson Reuters, current) Chapter 11.
- <sup>5</sup> For a thoughtful discussion of the signals of vulnerability to doctrinal change, see MA Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard U. Press, 1988) Chapter 7. Eisenberg's thesis is that overruling doctrine is comparable to other forms of legal reasoning in the sense that it is possible to predict when an argument for overruling might enjoy success.

may have contributed to or facilitated such an evolution in the Court's sense of its role. The paper concludes with an account of striking recent doctrinal developments which suggest further evolution of the Court's approach to this important question.

## II. CANADIAN CONTRACT LAW ON THE EVE OF THE MODERN ERA

Assessment or, indeed description of the state of Canadian contract law in the middle of the twentieth century is made difficult by the absence of either a contemporary treatise on the subject or a body of law review literature. There is, however, an authoritative source in the form of a casebook on contracts prepared by Professor James Milner, a much-admired professor of urban planning and contract law at the University of Toronto. Milner's *Cases and Materials on Contracts*<sup>6</sup>, was published in 1963. My dog-eared copy is a cherished possession. Milner's book was a fine scholarly achievement. It may have been the first published case book on Canadian contract law. Among its many admirable features is a lengthy introduction<sup>7</sup> to the case method of studying contract law which could be read with profit by contemporary law students. Milner was determined to create a case book with substantial Canadian content in order, as he explained, "to present as full a picture of Canadian contracts, in and out of courts, as it is possible to do, simply because Canadian law students are more likely to understand the Canadian background of Canadian cases better than they will understand either English or American backgrounds."<sup>8</sup> In aid of this objective, Milner evidently surveyed the then available Canadian materials and included many excerpts from Canadian cases, a few dozen references to Canadian statutory material and excerpts from Canadian transactional materials.

The dominant presence, however, consisted of English cases. Of the 500 or so cases excerpted in the material, something in the order of 370 cases were drawn from English law reports. Of the remaining approximately

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<sup>6</sup> JB Milner, *Cases and Materials on Contracts* (Toronto, University of Toronto Press), 1963 [Milner]. The current edition of this casebook is S Waddams, J Girgis, B McDougall, J McCamus and JW Neyers, eds., *Cases and Materials on Contracts* 6<sup>th</sup> ed. (Toronto: Emond Montgomery, 2018).

<sup>7</sup> *Ibid* at vii - xx.

<sup>8</sup> *Ibid* at x.

130 cases, the overwhelming majority were decisions of Canadian provincial trial and appellate courts. A mere 22 excerpts or references were drawn from decisions of the Supreme Court of Canada. In addition to the British materials, Milner included many references to American jurisprudence. Excerpts were drawn from approximately 25 American cases, a slightly larger number than the references to the Supreme Court of Canada. As well, there were ten or so excerpts drawn from the first edition of the American Law Institute's *Restatement of Contracts*.<sup>9</sup> References to legal scholarship were especially light.<sup>10</sup> Indeed, Milner discouraged students from becoming engrossed in such materials<sup>11</sup>. Milner was evidently quite influenced by the views of Professor Lon Fuller and included a number of excerpts from Fuller's work. References to civilian material from Quebec and elsewhere were rare but, nonetheless, present. Obviously inspired by American predecessors, including Professor Fuller's well-known case book,<sup>12</sup> Milner's work constituted a genuine attempt to create a truly Canadian account of our domestic common law of contracts.

The mere number of the Canadian cases, however, may mislead. Very few of the Canadian cases excerpted can be said to be leading authorities in the sense that they either developed new doctrine or provided an articulate and convincing rationale for existing doctrine. The leading cases were English, many drawn from the formative period of English contract law in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Modern English cases were included as well, including a half-dozen opinions of Lord Denning.<sup>13</sup> Although Denning's casebook presence would increase in the decades ahead,<sup>14</sup> Denning's

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<sup>9</sup> American Law Institute, *Restatement of the Law of Contracts* (St. Paul MN: A.L.I. Publishers, 1932). See now American Law Institute, *Restatement Second of the Law of Contracts* (St. Paul MN: A.L.I. Publishers, 1981).

<sup>10</sup> Milner, *supra* note 6 at 437. The only Canadian reference was to an article on joint accounts by his Toronto colleague, John Willis.

<sup>11</sup> *Ibid* at xi-xii.

<sup>12</sup> The current edition is LL Fuller, MA Eisenberg and MP Gergen, *Basic Contract Law*, 10<sup>th</sup> ed. (St. Paul: West Pub., 2018). The first edition was published by Fuller in 1947. See LL Fuller, *Basic Contract Law* (St. Paul, West Publishing Co., 1947.)

<sup>13</sup> See Milner, *op. cit.*, *supra* note 6 at 169, 193, 371, 392, 599 and 762, including excerpts, for example, from *Central London Property Trust v High Trees House Ltd.*, [1947] KB 130 (promissory estoppel) and *Solle v Butcher*, [1950] 1 KB 671 (CA), (equitable mistake).

<sup>14</sup> Thus, contemporary Canadian contract casebooks typically include, in addition to the cases included in Milner, a series of approximately ten authored by Denning during the subsequent two decades, including, for example, *Beswick v Beswick*, [1966] Ch. 538

opinions were typically admired by students on the basis of their willingness to challenge existing authority and develop new solutions to problems presented by traditional doctrine.

The typical chapter in Milner begins with several excerpts drawn from leading English decisions followed by Canadian illustrations of the application of the doctrine under discussion. Almost without exception the Canadian authorities represented attempts by Canadian judges to apply English contract doctrine to the facts at hand. No Canadian equivalent to Lord Denning emerged from the materials. This was also true of the Supreme Court jurisprudence cited by Milner. The only exceptions appear to be *Degelman v Guaranty Trust*<sup>15</sup> and *Turney and Turney v Zhilka*.<sup>16</sup> As is well known, the former is a leading decision of the Supreme Court adopting American unjust enrichment theory as a basis for a restitution claim for services rendered under an agreement held to be invalid because of its failure to comply with the Statute of Frauds. The leading opinion was authored by Rand J., who had studied at Harvard under one of the subject's early architects, Professor Roscoe Pound.<sup>17</sup> Although obviously an important authority, its principal contribution was to the law of restitution, not contract law. *Turney and Turney v Zhilka*, on the other hand, did develop a unique Canadian doctrine of contract law, the doctrine of "true condition precedent". This doctrine held that where the fulfillment of a condition precedent depends on the will of a third party (such as an annexation or

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(C.A.) affd. [1968] AC 8 (HL) (Denning dissenting in the Court of Appeal on privity doctrine); *Lloyds Bank v Bundy*, [1975] QB 326 (CA) (inequality of bargaining power) and *Jarvis v Swan Tours Ltd.*, [1973] QB 233 (CA) (damages for mental distress). All or most of the Denning canon continues to be included in the standard Canadian casebooks. See Waddams, et al, *supra* note 6; S. Ben-Ishai and D. Percy, eds., *Contracts: Cases and Commentaries*, 10<sup>th</sup> ed., (Toronto: Thomson Reuters, 2018); A Swan, N Bala and J Adamski, eds., *Contracts: Cases, Notes and Materials*, 10<sup>th</sup> ed., (Toronto: LexisNexis, 2020). For a comparative analysis of the three Canadian casebooks, see D Sandomierski, "Tension and Reconciliation in Canadian Contract Law Casebooks" (2017) 54 Osgoode Hall LJ 1181.

<sup>15</sup> *Degelman v Guaranty Trust Co. and Constantineau*, [1954] SCR 785, excerpted by Milner, *supra* note 6 at 50 and 273.

<sup>16</sup> *Turney and Turney v Zhilka*, [1959] SCR 578, excerpted by Milner, *supra* note 6 at 557.

<sup>17</sup> W Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press, 2009) p. 15. Pound's article, "The Progress of the Law 1918-1919, Equity" (1920) 33 Harv L Rev 420 contained the suggestion that certain equity doctrines could be better explained on the basis of an unjust enrichment principle.

rezoning decision by a municipality), the condition cannot be waived by the party benefiting from the condition (in this example, the purchaser of the land). This unfortunate decision must have frustrated the expectations of many beneficiaries of such conditions precedent and was the subject of somewhat heated consideration by the Supreme Court in the decades ahead.<sup>18</sup>

In sum, the Canadian presence in Milner's case book, though the result of an admirable attempt by Milner to create a uniquely Canadian resource did not in any sense reflect the creation of a Canadian common law of contracts.<sup>19</sup> Canadian courts, including the Supreme Court of Canada, appeared to consider their role as being one of applying English contract doctrine to Canadian fact situations. This was, no doubt, true of Canadian jurisprudence at the time more generally. In his Hamlyn Lectures,<sup>20</sup> Justice Bora Laskin quoted from a 1959 article by Professor Horace Read, then Dean of the Dalhousie law faculty, to the following effect:

“A perusal of Canadian law reports not only verifies an absence of creative approach but conveys the impression that most of the opinions reported there are those of English judges applying English law in Canada, rather than those of Canadian judges developing Canadian law to meet Canadian needs with guidance of English precedent.”<sup>21</sup>

Laskin further observed that, at the time of writing in 1969, there had been no “marked change” in recent years.<sup>22</sup> Laskin also noted, however, that this should not be surprising. Prior to the abolition of appeals to the Privy Council, English doctrine typically governed the matters at hand. Quite apart from the question of authority, however, Laskin suggested that the

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<sup>18</sup> For discussion, see McCamus *op. cit., supra* note 4 at 777-784.

<sup>19</sup> A similarly early and heroic attempt to create an account of Canadian contract law was attempted by an Albertan scholar, practitioner and later, judge, the Honourable JE Coté. See JE Coté, *An Introduction to the Law of Contract* (Edmonton: Juriliber Ltd., 1974) (the first modern Canadian contracts text). At the time of Milner's casebook, there were no current Canadian textbooks on the subject. Students needing such assistance consulted the standard English texts.

<sup>20</sup> B Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969).

<sup>21</sup> HE Read, “The Judicial Process in Common Law Canada” (1959), 37 *Can Bar Rev* 265 at 268, quoted by Laskin, *op. cit., supra* note 20.

<sup>22</sup> Laskin, *op. cit., supra* note 20 at 49.

robustness of the English legal tradition had “induced admiration and suggested emulation beyond the compulsion of *stare decisis*”.<sup>23</sup>

### III. THE DEVELOPMENT OF UNIQUE CANADIAN CONTRACT LAW DOCTRINE: A BRIEF SKETCH

In the decades following Justice Laskin’s appointment to the Supreme Court of Canada in 1970, the Court appeared to develop a stronger sense of its independence from English authority. More particularly, the court developed a number of doctrines of contract law which have no equivalent in contemporary English law. In support of this proposition, the following account provides a brief summary of leading decisions exhibiting this pattern.

#### *A. Offer and Acceptance in the Conduct of Tendering*

A uniquely Canadian perspective on the application of the rules of offer and acceptance in the conduct of the tendering process was adopted by the Supreme Court in *Ontario v Ron Engineering & Construction (Eastern) Ltd.* in 1981.<sup>24</sup> Under traditional English doctrine, an invitation to submit bids or tenders would be considered to be an invitation to treat. Submission of the bids would constitute an offer which might or might not then be accepted by the issuer of the invitation. In *Ron Engineering*, the Supreme Court adopted a new model of analysis for tendering processes. The invitation itself was considered to be an offer which, when accepted by the submission of a bid, constituted what was referred to by the Court as “Contract A”. Submission of the bid also constituted an offer of a second contract, “Contract B”, which might or might not be accepted by the issuer of the invitation. The principal effect of this analysis is to create a binding contract, Contract A, governing conduct of the tendering process. The rules set out in the invitation to tender become a binding contractual commitment. As these rules are quite detailed, possibilities for litigation flourish, arising out of a failure of the issuer to follow the rules set out in the invitation.

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<sup>23</sup> *Ibid* at 50.

<sup>24</sup> [1981] 1 SCR 141 (SCC).



This obligation of strict compliance has been reinforced by the Court's holding that Contract A includes an implied obligation not to accept a "non-compliant" bid.<sup>25</sup> Where issuers do so, they become targets for lawsuits by disappointed bidders who believe they would have been awarded Contract B but for such a breach of Contract A by the issuer. Importantly, the Supreme Court subsequently confirmed that a term was to be implied in invitations to the effect that all bidders would be treated "fairly and equally".<sup>26</sup> This, in turn, has spawned a rich body of jurisprudence. Unsurprisingly, disappointed bidders are often of the view that they have not been so treated and claims for damages for loss of an opportunity to make a profit on Contract B have become a frequent feature of Canadian litigation on this subject. Although it would be possible to stipulate in the invitation to bid that no such contractual relationship had been established,<sup>27</sup> some issuers of invitations, especially public agencies, appear to be reluctant to do so and this stream of litigation shows no sign of drying up at the present time.

### ***B. The Canadian Version of the Doctrine Formerly Known as Fundamental Breach***

The English doctrine of fundamental breach was essentially an invention of Lord Denning. It was his view, first articulated in a case dealing with an unusually defective second-hand car, that no matter how broadly the exemption clause was drafted, it would not apply to what would become known as a "fundamental" breach of contract.<sup>28</sup> Such clauses could only avail the party in breach if the contract was otherwise being carried out in

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<sup>25</sup> *MJB Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 (SCC).

<sup>26</sup> *Martel Building Ltd. v Canada*, [2000] 2 SCR 860 (SCC).

<sup>27</sup> Such stipulations, however, are likely to be strictly construed against the interests of the issuer of the invitation. See *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69 (SCC). Moreover, although the Court, in *MJB*, supra, note 25, emphasized that the parties must be found to have intended to create Contract A, the evidence of intent accepted in that case appeared to be the fact that the bid was of value to the issuer and that bids were prepared at significant cost and were accompanied by a substantial and forfeitable deposit. These facts are likely to be present in all bidding processes involving projects of substantial value.

<sup>28</sup> *Karsales (Harrow) Ltd. v Wallis*, [1956] 1 All ER 806 (C.A.), a decision, interestingly, not included in Milner, *op. cit.*, supra note 6.

its essentials. The doctrine has had a checkered history in England and Canada which need not be recounted here.<sup>29</sup> The very name of the doctrine was a source of confusion as the concept of fundamental breach would often be confused with the doctrine of repudiatory breach of contract.

In its 1989 decision in *Hunter Engineering Co. Inc. v Syncrude Canada Ltd.*<sup>30</sup>, however, the Supreme Court began to develop an idiosyncratic Canadian version of the doctrine. Dickson CJC. and Wilson J., in concurring opinions, suggested different approaches to the doctrine. The potential swing vote expressed no preference between the two views. For Dickson CJC. the critical question was whether a particular exemption clause was agreed to in circumstances of unconscionability. If the doctrine of unconscionability applied to the formation of the agreement, the particular exemption clause would not be enforced. It is not entirely clear that the startling nature of the innovation in treating unconscionability as a doctrine that may have the effect of striking down an individual term and leaving the rest of the agreement to be enforceable was fully appreciated. Nonetheless, Dickson CJC. was clearly of the view that this was the correct approach to follow. Wilson J., on the other hand, building on the then English view of fundamental breach, would have held that exemption clauses should be enforceable if, when properly construed, they apply to the circumstances at hand. Even in such a case, however, such a clause could be held to be inapplicable where, in the circumstances of the particular breach, it was neither fair nor reasonable to enforce a clause in favour of the party in breach. These conflicting opinions, albeit concurring in result – the clause did not apply to the facts at hand – left Canadian law on the point unstable. A practice developed of holding that exemption clauses would be inapplicable *either* where they result from unconscionable dealings *or* where, in the particular circumstances of the breach, it would be unfair or unreasonable to apply the clause.<sup>31</sup>

This conundrum was ultimately resolved by the Supreme Court in the 2010 decision in *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*.<sup>32</sup> The opinion authored by Binnie J., although dissenting as to result, was accepted as an accurate statement of the fundamental breach

<sup>29</sup> See, generally, McCamus, *op. cit.*, *supra* note 3, Chapter 20.

<sup>30</sup> [1989] 1 SCR 426 (SCC).

<sup>31</sup> See, e.g., *Fraser Jeweller (1982) Ltd. v Dominion Electric Protection Co.*, (1997), 148 DLR (4<sup>th</sup>) 496 (Ont CA).

<sup>32</sup> *Supra* note 27.

doctrine by all members of the Court. Binnie J. articulated a three-step test for determining the enforceability of exculpatory clauses which, in effect, married the two branches of the *Hunter* test. The first step was to determine whether, on a narrow construction, the clause actually applied to the circumstances of the particular breach. If so, step two required the Court to determine whether the clause was unconscionable in the sense that it resulted from unequal bargaining power between the parties. If not, the third step required the Court to determine whether, in light of the particular circumstances of the breach, a court should refuse to enforce the clause on the basis of overriding public policy considerations. In *Tercon*, then, a clear statement of an idiosyncratic Canadian version of the fundamental breach doctrine emerged. Although the Court did divide on the application of the first step to the interpretation of the exculpatory clause at issue, the Court was unanimous as to the content of the three-part test. The doctrine has been applied many times by Canadian courts. Binnie J. noted the misleading nature of the “fundamental breach” label and suggested that it be abandoned. Although no alternative label was proposed, many have taken to referring to the doctrine as the “*Tercon*” rule. We should note in passing that the *Tercon* rule appears to plainly establish that an individual term of an agreement can be struck down on the basis of unconscionability doctrine. This too is a very significant departure from English doctrine.

### ***C. The New Duty of Good Faith in the Context of Wrongful Dismissal***

In its 2008 decision in *Honda Canada Inc. v Keays*,<sup>33</sup> the Supreme Court developed a novel approach to the awarding of damages for wrongful dismissal. As is well-understood, an employer has a right to terminate a contract of employment of indefinite duration subject only to the requirement that the employee be provided with reasonable notice of the dismissal. Thus, the typical “wrongful dismissal” claim asserts a claim for damages in the form of lost wages that would have been earned during the period of reasonable notice. In *Honda*, the Court held that in addition to the obligation to give reasonable notice, the employer was subject to an implied duty to dismiss the employee only in a good faith manner and that where the employer breached that duty, the employee may be entitled to

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<sup>33</sup> [2008] 2 SCR 362 (SCC).

recover damages for mental distress caused by the manner of dismissal or, indeed, punitive damages. The road to the decision in *Honda* was, however, a rather bumpy one.<sup>34</sup> The traditional English view, stated in *Addis v Gramophone Co. Ltd.*<sup>35</sup> was that damages cannot be recovered for the injured feelings suffered by the employee in the context of a wrongful dismissal. This doctrine was subsequently applied by many courts in both England and Canada in the years that followed. With the recognition of the availability of damages for mental distress in contract cases, first in England<sup>36</sup> and then in Canada,<sup>37</sup> Canadian courts and ultimately the Supreme Court of Canada struggled to determine whether mental distress damages could be awarded in a wrongful dismissal case where the employer engaged in insulting or oppressive conduct that caused mental distress to the terminated employee.

These matters first surfaced before the Supreme Court in *Vorvis v Insurance Corporation of British Columbia* in 1989.<sup>38</sup> The dismissal of the plaintiff occurred after a prolonged period of mistreatment by the employer and the plaintiff sought damages to compensate for the intangible injury. Understandably, McIntyre J. held that such damages could be made available only where the employer's misconduct constituted, in itself, a breach of contract. In his view, the mental distress did not flow from the lack of reasonable notice but rather, from the misconduct in question. Accordingly, it was necessary to find that the misconduct itself amounted to a breach of contract or a tort. As it did not, neither damages for mental distress nor punitive damages could be awarded. Although this reasoning was perfectly coherent, subsequent courts interpreted *Vorvis* as requiring two separate breaches of contract in order to award either mental distress or punitive damages. As we shall see, this problem has not completely disappeared.

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<sup>34</sup> For a more detailed account, see McCamus, *op. cit.*, note 3 at 955-962.

<sup>35</sup> [1909] AC 488 (HL).

<sup>36</sup> *Jarvis*, *supra* note 14.

<sup>37</sup> A long line of Canadian lower court decisions culminated in recognition by the Supreme Court of Canada in *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30 (SCC).

<sup>38</sup> [1989] 1 SCR 1085.

This issue surfaced again for the Court's consideration in *Wallace v United Grain Growers* in 1997.<sup>39</sup> In *Wallace*, the Court adopted the surprising view that, although the employer's misconduct in the course of failing to behave appropriately in the context of a wrongful dismissal did not constitute a separate and independent breach of contract from the failure to give reasonable notice, it could, nonetheless, be the subject of compensation by means of an extension of the reasonable notice period. McLachlin J. (as she then was) objected to this approach on the basis that the proper vehicle for imposing a duty of this kind was to recognize a requirement to imply a contractual term to act in good faith in dismissing the employee. It was this view that ultimately prevailed in the *Honda* decision. In *Honda*, then, the Court recognized an innovative Canadian doctrine requiring good faith in the manner of dismissal and awarding damages for the mental distress resulting from the breach of that implied undertaking.

#### D. *Privity of Contract*

The English doctrine of privity of contract holds that where A enters into a contract with B under which, for good consideration, B promises to confer value upon C, C has no standing to enforce B's obligation to confer value upon C. A, of course, is entitled to enforce B's obligation though the nature of A's remedy in such circumstances is subject to contention. Some would argue that as A has suffered no loss, A should be entitled only to nominal damages. The doctrine of privity is, of course, subject to large controversy.<sup>40</sup> It is not followed in civilian jurisprudence or in the United States. It has been subject to the criticism of law reform bodies<sup>41</sup> and academics.<sup>42</sup> Almost sixty years after its abolition was recommended by an

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<sup>39</sup> [1997] 3 SCR 701 (SCC).

<sup>40</sup> For a more detailed account, see McCamus, *op. cit.*, *supra* note 3, Chapter 9.

<sup>41</sup> See, for example, Manitoba Law Reform Commission, *Privity of Contract* (Winnipeg Law Reform Commission, 1993); Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987), Chapter 4.

<sup>42</sup> See, e.g., AL Corbin, "Contracts for the Benefit of Third Persons" (1930) 46 Law Q Rev 12; MA Eisenberg, "Third Party Beneficiaries" (1992) 92 Colum L Rev 1358.

English law reform body,<sup>43</sup> the English Parliament enacted legislation to this effect<sup>44</sup> which has been adopted, in turn, by one Canadian province.<sup>45</sup>

Sensitive to these concerns, the Supreme Court of Canada developed a new exception to the doctrine in 1992 in *London Drugs Ltd. v. Keuhne & Nagel International Ltd.*<sup>46</sup> The dispute in this case concerned the ability of the employees of the defendant warehousing corporation to defend themselves from a tort claim brought by the plaintiff customer. The plaintiff had entrusted storage of a transformer to the defendant and had opted not to obtain additional insurance offered by the defendant for injury sustained by the transformer during storage. The agreement exempted the defendant from liability in the event that such injuries were sustained. When loss was occasioned by the alleged negligence of the defendant's employees, the customer sued the employees directly, relying on the doctrine of privity for the proposition that the employees were unable to rely on the exemption clause. For the Court, Iacobucci J. crafted a novel exception to the privity doctrine that would apply in such circumstances and enable the employees to shelter behind the clause. Although Iacobucci J. acknowledged the much criticized nature of the doctrine, it was his view that major reform of the doctrine was a matter that must be left to the legislature. Nonetheless, it was his view that it was intolerable that employees be exposed to liability in these circumstances. As all customers would understand, it would be expected that the services to be provided by the defendant would, in fact, be provided by natural persons who are the employees of the defendant. Thus, it was surely implicit that the employees would also be protected by the limitation of liability clauses. The employees were actually providing the services in question at the time of the alleged negligence. The new exemption would apply in any case where the clause was intended, either explicitly or implicitly, to apply to employees, and secondly, where the employees were acting in the course of their employment and performing the very services provided for in the contract.

Although the careful reader of *London Drugs* might have assumed that the new exception applied essentially to service contracts exempting both the service provider and its employees from liability, the 1999 decision of

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<sup>43</sup> Law Revision Committee, *Sixth Interim Report* (Cmd. 5449).

<sup>44</sup> *Contracts (Rights of Third Parties) Act* (UK) 1991, c 31.

<sup>45</sup> *Law Reform Act* SNB 1993 c L-1.2. s 4.

<sup>46</sup> [1992] 3 SCR 299 (SCC).

the Court in *Fraser River Pile and & Dredge Ltd. v Can-Dive Services Ltd.*<sup>47</sup> established that a much broader exception to the privity doctrine was intended. In this case, a marine insurer, in its contract of insurance with a ship-owner had waived subrogation rights against “charterers”. When the vessel sank as a result of the charterer’s alleged negligence, the ship-owner agreed that the insurer should, nonetheless, be entitled to bring a subrogated claim against the charterer. The charterer successfully resisted the claim on the basis of a broadened version of the *London Drugs* exception. The Supreme Court held that the exception extended well beyond the services context and would apply in any case where a third party was either explicitly or implicitly intended to be covered by the provision and was doing the very thing envisaged by the provision. In this case, charterers were explicitly mentioned in the provision and, secondly, were doing the very thing envisaged, that is, chartering the vessel. Moreover, the fact that the ship owner had agreed to allow the insurer to bring a claim against the charterer was of no consequence. The charterer’s protection as a third-party beneficiary of the insurance contract had “crystallized” by the time of the accident.

Some questions relating to the scope of the new Canadian exception to the privity doctrine remain. The doctrine appears to be tailored to situations where a third party is relying on a provision entered into by two other parties as a defence to a claim by one of them against the third party. Nonetheless, some courts have taken the view that the new exception can be extended to situations in which the third party is attempting to actively enforce an undertaking given for their benefit.<sup>48</sup> Be that as it may, the new exception is certainly novel and is not replicated precisely in the English statutory modification of privity doctrine.<sup>49</sup>

### ***E. Concurrent Liability in Contract and Tort***

A vexing problem in English contract law has been to determine the role of tortious liability in circumstances where a breach of contract may

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<sup>47</sup> [1999] 3 SCR 108 (SCC).

<sup>48</sup> See, e.g., *Brown v Belleville (City)* 2013, ONCA 148 (Ont CA); *King v Shuniah Financial Services Ltd.*, 2006 FC 632 (FCTD). Cf. *District of Kitimat v Alcan Inc.* (2006), 205 D.L.R. (4<sup>th</sup>) 462 (BCCA).

<sup>49</sup> The English statute, *supra*, note 44, applies only where the agreement specifically confers benefits on a third party. The *London Drugs* exception may apply to third parties who are implicitly benefitted by the agreement.

also constitute tortious misconduct. For a variety of reasons, a victim of the tortious breach of contract may wish to advance a tort claim concurrently with, or as an alternative to, a claim for damages for breach of contract. It is unnecessary, for present purposes, to explore the complexities of English doctrine on this point and its evolution.<sup>50</sup> In the 1993 decision in *BG Checo International Limited v British Columbia Hydro and Power Authority*,<sup>51</sup> however, the Supreme Court of Canada adopted a much-simplified Canadian rule on the point. For the majority of the Court, La Forest and McLachlin JJ. held that such claims should be available concurrently in contract and tort unless the agreement itself provided to the contrary. Accordingly, on the facts of that case, the plaintiff was entitled to claim damages resulting from careless advice given by the defendant either in a claim for damages for breach of contract or in tort on the basis of negligent misrepresentation. Although a tort claim could be limited or precluded by terms of the contract, the claims were otherwise to be considered concurrent.

### ***F. Punitive Damages***

The Supreme Court adopted an innovative view with respect to the awarding of punitive damages in the context of breach of contract claims in *Whiten v Pilot Insurance Co.* in 2002.<sup>52</sup> Canada is the only commonwealth jurisdiction that has accepted that punitive damages can be awarded in a contract claim. Such awards are not available in England. Punitive damages may be awarded, however, in some tort claims. In American law, the general principle is that punitive damages can be awarded only where the contractual breach is tortious in nature.<sup>53</sup> In *Whiten*, however, the Supreme Court held that an award of punitive damages in a contracts case should not be subject to a limitation of this kind.

The claim in *Whiten* concerned the defendant insurer's breach of their obligation to handle or process claims in compliance with the standard of good faith and fair dealing. The insured's home was destroyed by fire. Notwithstanding a series of investigative reports to the contrary, the insurer

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<sup>50</sup> See, generally, W. Boulton, "Contract or Tort" (1966), 82 LQR 346; G. Fridman, "The Interaction of Tort and Contract" (1977), 93 LQR 422. And see, *Spring v Guardian Assurance Plc.*, [1995] 2 A.C. 296 (HL) *per* Lord Goff.

<sup>51</sup> [1993] 1 SCR 12 (SCC).

<sup>52</sup> [2002] 1 SCR 595 (SCC).

<sup>53</sup> Restatement Second of the Law of Contracts, *supra* note 9 at s 355.



persisted in the view that the fire had been caused by the plaintiff's arson and refused coverage. The Supreme Court, restoring the decision at trial, awarded \$1 million in punitive damages. At the same time, the Court indicated a concern to avoid what it considered to be the excesses of American experiences and accordingly, indicated a number of guidelines designed to restrict such awards to what might be considered to be extreme cases. Punitive damages are to be awarded only where they meet a test of rationality and proportionality to the wrongdoing and where compensatory damages are insufficient to accommodate the objectives of "retribution, deterrence and denunciation of particularly high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."<sup>54</sup> The Court rejected the American test of requiring an independent tort as it would "unnecessarily complicate the pleadings without, in most cases, doing anything of substance".<sup>55</sup> The clarity of the new Canadian rule, however, is slightly marred by its inheritance of the confusion flowing from *Vorvis*, inasmuch as the Court appeared to be of the view that punitive damages could be awarded only where a second breach of contract could be found in addition in some sense to the primary breach of contract..

### ***G. Compensation for Mental Distress***

The recognition of the availability of compensation for injuries in the form of mental distress caused by a breach of contract in England and Canada, referred to above,<sup>56</sup> was followed by a complicated exercise in finding a basis for awarding such compensation in the context of a wrongful dismissal of employment contracts. There have also been attempts to restrict the availability of such compensation to particular types of contractual relations. More particularly, English courts have restricted mental distress damages to contractual relationships where a "major or important objective of the contract is to provide pleasure, relaxation or

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<sup>54</sup> Pilot Insurance, *supra*, note 51 at para 94

<sup>55</sup> *Ibid* at para 31. For discussion, see JD McCamus "Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract" (2004), 41 San Diego L. Rev. 1491.

<sup>56</sup> *Supra* notes 36 and 37.

peace of mind”.<sup>57</sup> In 2006, in *Fidler v Sun Life Assurance Co. of Canada*,<sup>58</sup> the Supreme Court upended such a requirement and held that such injuries were compensable, subject merely to the restriction that such losses should be compensable only in circumstances where they were “such as may fairly and reasonably be considered either arising naturally ... from such breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of both parties”.<sup>59</sup> In short, such awards are potentially available where they have met the traditional limitation of recovery set out in *Hadley v Baxendale*.<sup>60</sup> McLachlin C.J.C. and Abella J. observed as follows:

“Until now, damages for mental distress have not been welcome in the family of remedies spawned by this principle. The issue in this appeal is whether that remedial ostracization continues to be warranted”.<sup>61</sup>

The question posed was answered with a resounding negative. In support of the conclusion that, subject to the usual principles for calculating damages, such injuries are compensable, the Court also seized the opportunity to clarify the confusion arising in the wake of the *Vorvis* decision. The Court held that it should no longer be considered sound doctrine that damages for mental distress could only be awarded in the context of an independent actionable wrong in addition to the breach of contract.<sup>62</sup>

### ***H. Monetary Awards in Lieu of Equitable Rescission***

A significant body of contract doctrine is devoted to the question of whether there are reasons to deny enforceability of what is otherwise considered to be a properly created contractual relationship because of various mitigating considerations relating to its formation. Some of these doctrines developed at common law. Others developed in the Court of Chancery. Where such doctrines apply, one party may wish to deny the enforceability of the agreement and seek recovery of the benefits already transferred pursuant to its terms to the other party. As a result of the historical divide between common law and equity, mechanisms for

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<sup>57</sup> *Farley v Skinner*, [2001] 4 All ER 801 (HL) at 812.

<sup>58</sup> [2006] 2 SCR 3 (SCC).

<sup>59</sup> *Ibid* at para 27.

<sup>60</sup> (1854) 9 Ex. 341, 156 ER 145.

<sup>61</sup> *Supra* note 58 at para 28.

<sup>62</sup> *Ibid* at paras 55-58.

achieving such results differ in the two systems. Vitiating factors at common law typically, though not invariably, produce the conclusion that the agreement in question was void, thus opening up the possibility of what was traditionally referred to as quasi-contractual relief to recover the value of benefits transferred under the agreement. In the context of equitable doctrine, however, the party wishing to set aside the agreement was required to seek a decree of equitable rescission from the Court of Chancery. In order to obtain such relief, the claimant would be required to establish that counter-restitution or, “a giving back and taking back” on both sides was possible and where this could be achieved, a decree of rescission would include an appropriate order achieving that objective.<sup>63</sup> There were, however, a number of additional “bars” to the availability of such relief where, for example, the passage of time prejudiced the party against whom relief was sought or where third-party rights had intervened as in a case where an innocent third party had purchased the subject matter of the initial agreement. Where the application of such bars precluded recovery, no relief was available. In such circumstances, then, the party against whom relief was sought would simply retain the ill-gotten gains flowing from the agreement. Although some adjustment was made in cases of fraudulent inducement of an agreement by permitting monetary compensation where specific restitution was impossible,<sup>64</sup> the general principle applied in the context of other equitable doctrines permitting rescission, such as cases of innocent misrepresentation, undue influence and unconscionability.

In 2009, in *Rick v Brandsema*,<sup>65</sup> the Supreme Court departed from this traditional requirement and awarded equitable compensation in a restitutionary measure for ill-gotten gains of the defendant husband who had negotiated a separation agreement by behaving unconscionably. His conduct had the effect of reducing the amount that would otherwise have been payable to his wife in the amount of \$649,000.00. By the time the claim to set aside the agreement had been brought, however, the traditional limitations on the availability of rescission had come into effect. In such circumstances, however, the Court held that monetary relief could be made available in a case where rescission became impossible. Abella J. explained,

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<sup>63</sup> A phrase employed in *Newbigging v Adam* (1886), 34 Ch D 502 (CA)

<sup>64</sup> See, e.g., *Kupchak v Dayson Holdings Ltd.* (1965) 53 DLR 92d 482 (BCCA).

<sup>65</sup> [2009] 1 SCR 295 (SCC).

“Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of an unconscionable bargain”.<sup>66</sup>

Abella J. drew support for this proposition from a number of lower court decisions holding that such a novel principle could apply to claims for other forms of equitable rescissionary relief,<sup>67</sup> it is reasonable to assume that the new doctrine applies across the broad range of equitable grounds for rescission.

### I. *On Interpretation*

Inevitably, the Court’s contractual jurisprudence touched upon matters of contractual interpretation from time to time. This typically involved an application of English interpretation doctrine. A striking departure from English jurisprudence, however, occurred in *Sattva Capital Corp. v Creston Moly Corp.*,<sup>68</sup> in 2014. The Court’s opinion, authored by Rothstein J., began by usefully affirming two important principles of English interpretation doctrine. First, the Court confirmed the basic principle that one is always entitled, in interpreting a contract provision, to examine the surrounding circumstances of the agreement – often referred to as the “factual matrix” – as an aid in interpreting its terms. As the Court observed, “the meaning of words is often derived from a number of contextual factors including the purpose of the agreement and the nature of the relationship created by the agreement”.<sup>69</sup> The Court quoted the classic statement of the doctrine by Lord Wilberforce to the effect that, “[n]o contracts are made in a vacuum: there is always a setting in which they have to be placed”.<sup>70</sup> Secondly, the Court confirmed, quite correctly, that the parol evidence rule has nothing to do with questions of contractual interpretation and accordingly, the factual matrix rule should not be characterized as an exception to that rule. The parol evidence rule assists in determining the contents of the agreement to be interpreted and has nothing whatsoever to do with the question of

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<sup>66</sup> *Ibid* at para 66, quoting from *Dusik v Newton* (1985), 62 BCLR 1, at 47.

<sup>67</sup> *Ibid* at para 67, citing *Treadwell v Martin* (1976), 67 DLR (3d) 493 (NBSCAD) (undue influence) and *Junkin v Junkin* (1978), 86 DLR (3d) 751 (Ont HC) (unconscionability). See also, *Dusik v Newton*, *supra*, note 66 (misrepresentation).

<sup>68</sup> [2014] 2 SCR 633 (SCC).

<sup>69</sup> *Ibid* at para 48.

<sup>70</sup> *Ibid* at para 47, quoting from *Reardon Smith Line Ltd. v Hansen-Tangen*, [1976] 3 All ER 570 (HL) at 574.

admissibility of materials related to the interpretation of that agreement. Where the agreement has been expressed completely in written form, the parol evidence rule, “precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary or contradict a contract that has been wholly reduced to writing”.<sup>71</sup> The rule does not preclude the admission of such evidence for the purpose of interpreting an agreement to the extent that the rules of interpretation so provide.

The striking departure from English doctrine in *Sattva* pertained to the characterization of questions of interpretation for purposes of determining the scope of appellate review. In traditional English doctrine, questions of contractual interpretation are considered to be questions of law and, accordingly, are subject to appellate review on that basis.<sup>72</sup> The historical justification for that rule was to reserve matters of contract interpretation for the judge alone in the context of jury trials. This rationale obviously lost much of its force with the decline of the use of juries in civil cases. The modern justification for the rule, however, was one of providing certainty and predictability in the interpretation of commercial documents.<sup>73</sup> In *Sattva*, the Court held that matters of interpretation should no longer be considered to be questions of law. Rather, they should be characterized as questions of mixed fact and law. Rothstein J. opined that, “the historical approach should be abandoned” on the basis that, “[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.”<sup>74</sup> By way of exception to the new approach, the Court acknowledged that in unusual circumstances, it may be that an identifiable and extricable question of law may be drawn out of what was initially characterized as a question of mixed fact and law. The result in *Sattva*, then, was to substantially restrict the possibility of appellate review in matters of contract interpretation.

In *Sattva*, the Court placed little or no emphasis on the precedential value of appellate interpretation jurisprudence, but this concern resurfaced a few years later in *Ledcor Construction Ltd. v Northbridge Indemnity Insurance*

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<sup>71</sup> *Ibid* at para 59.

<sup>72</sup> See, e.g., K. Lewison, *The Interpretation of Contracts*, 5<sup>th</sup> ed., (London: Sweet & Maxwell, 2011), at 173-177.

<sup>73</sup> *Ibid* at 174.

<sup>74</sup> *Sattva*, *supra* note 68 at para 50.

Co.<sup>75</sup> This decision involved the interpretation of the provisions of a “builders all-risk” insurance policy, a standard form insurance agreement issued by the insurer in question and typically not negotiated by the parties but offered by the insurer on a take-it-or-leave-it basis. In the Court’s view, the *Sattva* principle had less purchase in this context. The fact-specific circumstances of the transaction were less likely to be relevant. Moreover, the Court emphasized the precedential value of judicial interpretation of standard form agreements. For these reasons, interpretation issues involving standard form agreements should be characterized as questions of law subject to appellate review. As Wagner J. observed: “There is no bright line distinction between questions of law and those of mixed fact and law. Rather, ‘the degree of generality (or ‘precedential value’)’ is the key difference between the two types of questions”.<sup>76</sup> With standard form agreements, the precedential value weighs in favour of characterization as a question of law. What appears to remain at large, then, is the proper characterization of boiler-plate provisions in otherwise intensely negotiated agreements. While such agreements are not standard form, some particular provisions might be widely used and could benefit from appellate treatment. Be that as it may, there is no question but that on issues of appellate review of contractual interpretation, Canadian law has substantially departed from the English approach.<sup>77</sup>

#### IV. POSSIBLE EXPLANATIONS FOR THE EVOLUTION IN THE COURT’S LAW-MAKING ROLE

From a distance, it is difficult to determine precisely the explanation or explanations for the gradual shift in the Supreme Court’s sense of its role from what appears to have been an essentially adjudicative model at the beginning of the modern era to a much greater emphasis on its law-making

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<sup>75</sup> [2016] 2 SCR 23 (SCC).

<sup>76</sup> *Ibid* at para 41, quoting from *Sattva*, *supra* note 68 at para 51.

<sup>77</sup> Further evidence of the Court’s willingness to depart from English authority in matters of interpretation is provided by the recent decision in *Corner Brook (City) v Bailey* 2021, SCC 29, 460 DLR (4<sup>th</sup>) 169 (SCC), holding that the rule in *London and South Western Railway Co. v Blackmore* (1870), LR 4 HL 619, which held that the general words in releases are limited to circumstances contemplated by the parties at the time of signing, should be considered to have been subsumed by the rule in *Sattva* and ought no longer be followed.

function in the latter part of the twentieth century and the early part of the twenty-first century. Nonetheless, some speculation is possible. Certainly, an important structural change occurred with the abolition of appeals from the Supreme Court of Canada to the Privy Council in 1949.<sup>78</sup> While this development set the stage for what followed, indeed, made it possible, it did not do more than that. In fact, there was very little palpable change in the Court's adherence to the adjudication of disputes model for several decades thereafter. A further and important structural change occurred in 1975 when the Supreme Court was given almost complete control over its docket.<sup>79</sup> Although rights to appeal to the Supreme Court persisted in some criminal matters, appeals in civil cases were granted after 1975 only by leave of the Court. Prior to that time, leave was permitted as a right in matters exceeding a reasonably modest monetary value with the result that its docket was, to some extent, swamped by civil matters of little jurisprudential significance. From 1975, leave in civil cases was granted only in circumstances where the Court considered the matter to be one of national importance. In a law review article in 1975, Laskin J. offered the view that the court's "main function is to oversee the development of the law ... on issues of national concern".<sup>80</sup> While matters of national importance were often interpreted as situations in which there was a conflict between the jurisprudence of different provinces, it seems inescapable that the Court would be required to consider cases where the existing law was considered to be subject to question or improvement.

The adoption of the *Canadian Charter of Rights and Freedoms*<sup>81</sup> imposed a very substantial law-making role on Canadian courts, and more particularly, the Supreme Court itself, in 1982. Indeed, in an article by Professor Paul Weiler, written in the context of an announcement by Prime Minister Pierre Trudeau that such an initiative was planned, Weiler accurately predicted that such a development would impose upon the Court a very substantial law-making function.<sup>82</sup> Canadian jurisprudence in the

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<sup>78</sup> *Statute of Westminster*, 1931, c 4, enabled such a change, implemented by domestic legislation abolishing such appeals in 1935 for criminal cases and in 1949 for all other matters.

<sup>79</sup> *An Act to Amend the Supreme Court Act*, SC 1974075-76, c 18.

<sup>80</sup> B Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada (1975), 53 *Can Bar Rev* 469 at 475.

<sup>81</sup> Part I of the Constitution Act, 1982; Canada Act 1982 (U.K.) 1982, c 11, Schedule B.

<sup>82</sup> PC Weiler, "Two Models of Judicial Decision-Making" (1968), 46 *Can Bar Rev* 406.

post-1982 period strongly suggests that the Court responded vigorously to this new challenge. An interesting question for present purposes is whether an inescapable requirement of a new capacity for development of the law with respect to public law jurisprudence had any impact on the view taken by the Court in developing a more modern approach to the development of private law doctrine. The fact that the Court's more activist role in private law appears more or less contemporaneously with the need to develop its Charter jurisprudence tempts one to think there may be a connection between the two phenomena. One possible hypothesis, then, is that the cultural shift imposed by the *Charter* on the Court's public law jurisprudence migrated to its treatment of private law.<sup>83</sup>

It is much more difficult to assess the importance of the changing composition of the Court or, indeed, the contribution of individual jurists to the Court's evolving conception of its role. Nonetheless, few would disagree with the proposition that the appointment of the Honourable Bora Laskin to the Court in 1970 and his appointment as Chief Justice in 1973, was a matter of considerable significance from this perspective. Laskin J. had a clear view that the Court should adopt a more muscular approach to its law-development function, a view not shared in the early years of his tenure by the majority of his colleagues. In the early years of his appointment, his opinions were often registered in dissent.<sup>84</sup>

Some indication of Laskin's interest in the reform of contract law doctrine is manifest in his opinions for the Court in *Highway Properties Ltd. v Kelly Douglas & Co. Ltd.*<sup>85</sup> in 1971 (overruling the traditional exception to the expectancy rule applied in leasehold cases) and in *AVG Management Science v Barwell Developments Ltd.*<sup>86</sup> in 1979 (overruling the doctrine in *Bain*

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<sup>83</sup> For a similar observation by McLachlin CJC, see B McLachlin, "The Evolution of the Law of Private Obligation: The influence of Justice La Forest" in R Johnson, JP McEvoy, T Kuttner and W MacLauchlan, eds., *Gerard V. La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Supreme Court of Canada Historical Society, 2000) 21 at 45.

<sup>84</sup> See P Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) C.20. And see, JD McCamus, "The Laskin Legacy in Private Law: The Judge as Custodian of the Common Law" in N Finkelstein and C Backhouse, eds., *The Laskin Legacy: Essays in Commemoration of Chief Justice Bora Laskin* (Toronto: Irwin Law, 2007) C.14.

<sup>85</sup> [1971] SCR 562 (SCC).

<sup>86</sup> [1979] 2 SCR 43 (SCC).



*v Fothergill*)<sup>87</sup>. This interest was also evident in his dissenting opinion in *Barnett v Harrison*<sup>88</sup> in 1976, in which Laskin J. sought to persuade the Court to overrule the aforementioned unsatisfactory doctrine in *Turney v Zhilka*.<sup>89</sup> That decision had invented the idiosyncratic Canadian doctrine preventing waiver of what is called a “true condition precedent” where fulfillment of the condition rested on the conduct of a third party. Laskin J. would have restricted *Turney* to cases where the interests of both parties to the agreement were engaged by the condition, thus making it inappropriate to allow one party to waive fulfilment of the condition. This view would have overruled the decision of *Turney* itself and set the law on a more appropriate course. Ironically, the majority opinion in *Barnett* affirming the *Turney* doctrine was written by Justice Brian Dickson, who conceded that the doctrine had not been applied in other common law jurisdictions, but, inasmuch as it had been in force in Canada since 1959 and applied many times, it should be preserved in the “interests of certainty and predictability in the law”.<sup>90</sup> The irony is that, in due course, the views of Laskin J. and Dickson J. appeared to coalesce on many matters, including the importance of the law-making function of the Court. Indeed, on this particular point, in *McCauley v McVey*,<sup>91</sup> Dickson J., concurred with Laskin J. in the majority opinion that significantly confined the operation of *Turney v Zhilka* doctrine. Eventually, and in his role as Chief Justice, Dickson C.J.C. asserted a strong leadership role in developing the Court’s public law and private law jurisprudence. Dickson J.’s admiration of Laskin J. is documented by Dickson J.’s biographers.<sup>92</sup>

The growth of the legal academy and the resulting growth in the body of Canadian legal scholarship may have also provided a supportive environment for the adoption of a more activist role. As noted above, Milner’s 1963 case book essentially eschewed extensive reference to academic literature. Milner did not say so, but one reason for such restraint might well have been that there was very little Canadian contract law

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<sup>87</sup> (1874) LR 7 HL 158 (damages for failure to make title).

<sup>88</sup> [1976] 2 SCR 531 (SCC).

<sup>89</sup> *Supra* note 16.

<sup>90</sup> *Barnett*, *supra* note 88 at 559.

<sup>91</sup> (1979), 98 DLR (3d) 577 (SCC).

<sup>92</sup> RJ Sharpe and K Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003).

literature in existence at the time. There were no Canadian textbooks and very few law review articles focusing on contracts doctrine. Starting at about that time, however, a number of law faculties sprouted up across the country, and this, together with the expansion of existing faculties, has continued to the present time.<sup>93</sup> This development, in turn, created a much larger legal academic profession, the proliferation of university-based and other law journals and an extensive Canadian legal literature. Canadian treatises on contract law began to appear in 1977<sup>94</sup> with three others appearing in the ensuing decades.<sup>95</sup> The extent to which the growth of academic literature might have provided a supportive environment for the Court's increasing emphasis on law development is a matter of conjecture. Dickson CJC. often stressed the value of academic literature to the Court's deliberations and suggested that judges and academics were "allies in a common cause".<sup>96</sup> Again, contemporaneity does not establish cause and effect but the existence of a substantial body of Canadian private law scholarship may have provided a supportive environment for the Court's work. Citation practices may offer some evidence of utility. At the beginning of the modern era virtually no references to academic literature were made in the Supreme Court opinions. The Court followed the then English view that it ought not refer to the works of living authors (unless

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<sup>93</sup> Most recently, two new law faculties were established in Ontario – Lakehead University in Thunder Bay and Ryerson University in Toronto – and one in British Columbia – Thompson Rivers University in Kamloops. The early history of Canadian legal education is summarized in Laskin, *op. cit.*, *supra* note 20 at 74-88. The first university law faculty in a Canadian common law province was established at Dalhousie in 1883. The University of Manitoba established a law program in collaboration with the Manitoba Law Society in 1914 and established its current independent Faculty of Law in 1964.

<sup>94</sup> SM Waddams, *The Law of Contracts* (Toronto: Canada Law Book, 1977). The current seventh edition was published by Thomson Reuters in 2017. A shorter work appeared a few years earlier. See JE Côté, *An Introduction to the Law of Contract* (Edmonton, Juriliber, 1974).

<sup>95</sup> GHL Fridman, *The Law of Contract in Canada*, 5<sup>th</sup> 3d. (Toronto: Thomson Reuters, 2011); A Swan, J Adamski and AY Na, *Canadian Contract Law*, 4<sup>th</sup> ed. (Toronto: LexisNexis, 2018); JD McCamus, *op. cit.*, *supra*, note 3.

<sup>96</sup> The title of a speech given at the Dalhousie Law School in 1981 was "The Relationship of Judges and Law Schools – 'Allies in a Common Cause'" referred to by Sharpe and Roach, *op. cit.*, *supra* note 92 at 216. See also, M Bastarache, "The Role of Academic and Legal Theory" (1999), 37 *Alta L Rev* 739. Justice Bastarache is another member of the Court with a distinguished academic career prior to his appointment.

they were later appointed to the bench). Much has changed in both England and Canada on this point. Contemporary Supreme Court opinions typically contain many references to both Canadian and non-Canadian literature. It is tempting to assume that these materials are of assistance.

The presence of former academics on the Court who were likely to support the growth and development of the law, may have encouraged such development. Although Laskin J. was the first appointment of this kind, others were to follow. Gerard V. La Forest, prior to his appointment, had a very distinguished career as a legal academic and scholar. Not long after his appointment to the Court, La Forest J. observed that he enjoyed writing judgments, “where one can move the law forward ... where the law can be refashioned for the public good and private justice”.<sup>97</sup> Chief Justice McLachlin, whose leadership in public and private law mirrored that of Dickson C.J.C., had also spent time in academic life. Although the presence on the Court of judges with full-time academic experience may have been of some influence, we should note, however, that the work of crafting opinions that moved the law forward was widely shared by members of the Court without such experience. Thus, with a few exceptions, the opinions referred to in Part III of this article were written by members of the Court who had not spent time in academic life.

## V. RECENT DEVELOPMENTS: BEYOND “INCREMENTALISM”?

### A. The “Incremental Change” Test

As Part III of this article attempts to demonstrate, the Supreme Court’s actual decisions in contract law provide abundant evidence of the Court’s assumption of the law-making role of a final court of appeal in the modern era. The Court has also spoken quite openly about its law-making function.

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<sup>97</sup> GV La Forest, “Some Impressions on Judging” (1986), 35 UNBLJ 145 at 156, quoted by Sharpe and Roach, *op. cit. supra*, note 92 at p. 297. See also, B McLachlin, *op. cit. supra*, note 83 and GV La Forest, “Judicial Lawmaking Creativity and Constraints” in R. Johnson, JP McEvoy, T Kuttner and HW MacLauchlan, eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-97* (Winnipeg: Canadian Legal History Project, 2000). In the same volume, see RJ Sharpe, “The La Forest Years: The Vocation of Judging – a Judge’s Perspective” at 499 (suggesting, at p. 515, that La Forest J’s “private law jurisprudence provides a model for radical but disciplined law-making”).

In *Watkins v Olafson*,<sup>98</sup> McLachlin J. observed the following with respect to the Court's capacity to change the law:

“Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.”<sup>99</sup>

McLachlin J. further suggested that there are sound reasons for this approach. Courts are focussed on an individual case and are not well-positioned to assess the impact of major changes to the law. She concluded that, “most importantly, there is a long-established principle that in democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.”<sup>100</sup> This statement was offered in the context of a dispute concerning the reform of a tort doctrine, and it may well be the case that major reform of the tort system – the adoption of no-fault liability, for example – should be left to the legislatures. Given the breadth of the statement, however, it seems likely that it was intended to apply to private law reform more generally. Although the suggestion that the courts should exercise their law-making function cautiously is understandable and unexceptional, one may have a number of reservations with this rather general statement of the limits of the Court's law-making capacity.

First, even though the statement begins with the phrase, “generally speaking”, and continues to suggest that major reforms have been “generally declined”, it is likely to be interpreted as an indication of a rigid limit on that capacity. Indeed, in subsequent decisions of importance, the Court creates the appearance of being at pains to assure the reader that the change being adopted is merely “incremental” in nature.<sup>101</sup> And yet, it is apparent that quite significant changes to the law are made by final courts of appeal. In a similar statement of law-making capacity, Lord Goff observed that development of the law is both inevitable and, as a general matter, only exercised interstitially or, one might say, incrementally. He went on to

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<sup>98</sup> [1989] 2 SCR 750 (SCC).

<sup>99</sup> *Ibid* at 760-761.

<sup>100</sup> *Ibid* at 761.

<sup>101</sup> See, e.g., the many statements to this effect in *Bhasin v Hrynew*, [2014] 3 SCR 494 (SCC).

suggest, however, that major reform may also be appropriate in the following terms:

“Occasionally, a judicial development of the law will be of a more radical nature constituting a departure, even a major departure, from what has previously been considered to be established principle and leading to a realignment of subsidiary principles within that branch of the law.”<sup>102</sup>

Interestingly, Lord Goff’s comments were made in the context of a consideration of whether to abolish the traditional mistake of law rule, a result actually achieved in this case. As Lord Goff noted,<sup>103</sup> this reform – which he obviously considered to amount to a radical break from the past – had earlier been accomplished by the Supreme Court of Canada.<sup>104</sup> Major reform of private law doctrine by the courts may be unusual, but it does occur. Indeed, McLachlin J., writing extra-judicially, suggests as much by indicating that the Court may make “sweeping changes” to the law, albeit cautiously, where, on the basis of “broad principle” and “policy considerations”, the Court finds it necessary to do so.<sup>105</sup>

A further reservation is that the incremental test is inherently vague.<sup>106</sup> The distinction between incremental and major change is not easily applied. Considering the matters discussed in Part III of this article, are any of the changes made arguably major? The imposition of good faith duties in wrongful dismissal cases and in tendering processes might well be considered to be major by those subject to the new duties. The latter reform has had a very dramatic impact on the risks involved in conducting tendering processes. Is the embrace of punitive damages in contract cases incremental or major? And so on. The answers to these questions are not invariably obvious.

A third set of reservations pertains to the suggestion in *Watkins* that major reform of private law doctrine should be handled exclusively by “the

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<sup>102</sup> *Kleinwort Benson Ltd. v Lincoln City Council*, [1998] 2 AC 349 (HL) at 378.

<sup>103</sup> *Ibid* at 373.

<sup>104</sup> *Township of Nepean v Ontario Hydro*, [1982] 1 SCR 347 *per* Dickson J. in dissent, later adopted for the Court by La Forest J in *Air Canada v British Columbia*, [1989] 1 SCR 1161 (SCC).

<sup>105</sup> McLachlin, *op. cit.*, *supra* note 83 at 23-24.

<sup>106</sup> For criticism of the incrementalism test on this and other grounds, see PM Perell, “Changing the Common Law and Why the Supreme Court of Canada’s Incremental Change Test Does Not Work” (2003) 26 *Adv Q* 345.

legislature".<sup>107</sup> The first concern is that the legislature is not at all likely to attend to such reforms. The history of the common law of contracts is consistent with the view that legislators are very likely to leave such matters to the courts. There are very few examples of legislative amendments of the law of contracts. One of the very few of such initiatives – the enactment of the English privity legislation<sup>108</sup> – occurred only some sixty years after reform of the doctrine was recommended by a "strong Law Revision Committee".<sup>109</sup> Canadian law reform commission reports recommending reform of contract law are usually ignored by legislators.<sup>110</sup> Understandably, it appears that legislators are content to leave such matters to the courts.

A further concern rests on the federal nature of Canadian constitutional arrangements. Matters of private law, including contract law, are constitutionally assigned to the provinces. Thus, a call by the Court for legislative reform of contract law is likely to be met, if at all, by varying responses from provincial legislatures with a resulting patchwork of reform. A desirable measure of unity of common law contract doctrine across the common law provinces and territories is much more likely to be preserved by the exercise of judicial law-making capacity.

Finally, the success of legislative reform of contract law doctrine is, at best, rather limited. Although the traditional rule in *Foakes v Beer*<sup>111</sup> was successfully overruled by statute in some provinces,<sup>112</sup> the legislation is narrowly focused on the precise fact situation of that case and leaves the unsatisfactory pre-existing duty rule otherwise intact. The only other significant reform – frustrated contracts legislation<sup>113</sup> – is notoriously

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<sup>107</sup> *Watkins*, *supra* note 98 at 761.

<sup>108</sup> *Supra* note 44.

<sup>109</sup> The Committee's 1937 report was referred to in these terms by Lord Reid in *Beswick v Beswick*, [1968] AC 70 (HL) at p 72. Lord Reid further noted that if there was to be a further period of "Parliamentary procrastination" the House of Lords might find it necessary to deal with the matter. He further comforted himself with the thought that legislation was "probable at an early date". It was enacted 31 years later.

<sup>110</sup> This was the fate, for example, of the *Ontario Law Reform Commission Report* referred to at *supra*, note 41. The success rate of Canadian law reform commissions in other areas of law has been much higher.

<sup>111</sup> (1884), LR 9 App. Cas. 605 (HL).

<sup>112</sup> See, e.g., *Mercantile Law Amendment Act* RSO 1990, c M-10; *Mercantile Law Amendment Act* CCSM, c M-120. For discussion, see McCamus, *supra* note 3, Chapter 7B (4).

<sup>113</sup> For a critical assessment of the original English legislation, adopted in some provinces,

unsuccessful. The difficulties inherent in crafting surgical statutory intervention in common law doctrine have been an article of faith in the common law system for a very long time. As long ago as 1744, Lord Mansfield observed:

“All occasions do not arise at once ... a statute very seldom can take on all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”<sup>114</sup>

Though this insight may rest to some extent on a bias favouring the common law system, there is little evidence that this view is belied by experience in common law jurisdictions. The list of successes in parliamentary reform of contract law is rather short. In sum, then, the suggestion in *Watkins* that major reform of private law should be left to the legislatures lacks persuasive force.

We turn then to recent Supreme Court jurisprudence that may be considered to constitute significant reform of contract doctrine and, after doing so, will return to the question of identifying appropriate opportunities for judicial reform of contract doctrine.

### ***B. The Doctrine of Good Faith in Contractual Performance***

Perhaps the most interesting and important contract decision of the Court in recent decades is the now well-known 2014 decision in *Bhasin v Hrynew*<sup>115</sup>, in which the Court recognized for the first time in the British Commonwealth, a common law doctrine requiring good faith performance of agreements. There are a number of interesting aspects of the opinion of Cromwell J. The opinion displays a mastery of comparative material including the jurisprudence of both the United States and Quebec, both of which have long recognized such a doctrine and, as well, extensive familiarity with the history and academic literature concerning issues now to be considered aspects of the new doctrine of good faith contract performance.

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see G Williams, the *Law Reform (Frustrated Contracts) Act*, 1943 (London; Stevens & Sons, 1944). See also, British Columbia Law Reform Commission, *Report on the Need for Frustrated Contract Legislation* (Vancouver, 1971) recommending an improved version of the statute, adopted in British Columbia and a few other jurisdictions. One province, Nova Scotia, has not enacted either version of the legislation.

<sup>114</sup> *Omychund v Barker* (1744), Atk 21, 26 ER 15 at 22-23.

<sup>115</sup> [2014] 3 SCR 494 (SCC).

The facts of the case are well-known and may be briefly summarized. The defendant, Can Am, was a supplier of educational savings plans (“ESPs”) through retail dealers known as “enrollment directors”. The plaintiff, Bhasin, had been able to build a successful business as an enrollment director selling Can Am’s ESAs in Calgary since 1989. The defendant, Hrynew, was another successful Can Am director who competed with Bhasin in the Calgary area. Bhasin’s agreement with Can Am had a three-year term and could be terminated by either party on six months’ notice. Bhasin was obliged to sell Can Am products exclusively. Can Am owned the Directors’ client lists. The agreement contained an “entire agreement” clause. Mr. Hrynew held a position of influence with Can Am. He was Can Am’s largest dealer in Alberta and importantly, was on good terms with Can Am’s regulator, the Alberta Securities Commission (“ASC”). When Hrynew left a previous supplier to join Can Am, he indicated a desire to merge or take over existing Can Am enrollment directors’ business. Can Am facilitated such mergers in the following years. More particularly, Hrynew developed the ambition of taking over Bhasin’s business and hiring Bhasin as his employee. Can Am supported Hrynew in this ambition, perhaps because Hrynew threatened to leave Can Am if the Bhasin merger was not achieved. Bhasin became aware of Hrynew’s ambitions and asked Can Am whether a merger of his business with that of Hrynew was a “done deal”. Can Am “equivocated” and did not provide a straightforward answer.<sup>116</sup>

Matters came to a head when Can Am became aware of ASC’s concerns with Can Am’s activities. In the course of Can Am’s discussions with the ASC, Can Am disclosed that it planned to restructure its business in a manner that would involve Bhasin, a fact not disclosed to Bhasin himself. When ASC required Can Am to appoint a Provincial Trading Officer (“PTO”) to audit the activities of its directors, Can Am appointed Hrynew to the position. Alarmed by this development, Bhasin refused to allow Hrynew to review its financial business records. Can Am lied to Bhasin about Hrynew’s role, falsely asserting that the ASC would not allow the appointment of an outsider to the PTO position and further, that Hrynew was bound by an obligation of confidentiality. Can Am threatened to terminate its relationship with Bhasin if he did not cooperate with Hrynew. Bhasin persisted in refusing to allow Hrynew to conduct an audit and Can

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<sup>116</sup> *Ibid* at para. 100.



Am terminated its relationship with Bhasin. In the result, Bhasin essentially lost his business and, in the view of the trial judge, was deprived of an opportunity that he might otherwise have had to develop his business independently from Can Am. Bhasin commenced an action against both Can Am and Hrynew on various grounds including an allegation that Can Am, by its appointment of Hrynew as PTO and by exercising its contractual discretion to terminate for the improper purpose of a forced expropriation of Bhasin's business had breached an implied duty of good faith performance.

The results in the courts below were divided. The trial judge held that such an implied duty existed and was breached by Can Am's conduct.<sup>117</sup> Its decision was reversed in the Alberta Court of Appeal<sup>118</sup> on the basis that such a duty did not form part of the existing common law and was, in any event, precluded by the entire agreement clause. In the Supreme Court, however, in a unanimous decision, the Court gave clear support for the recognition of a general organizing principle of good faith performance which both grounded a number of existing rules and provided a basis for the recognition of a new rule that would provide a basis for granting relief to Mr. Bhasin. Cromwell J. summarized these two steps in the following fashion:

“In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.”<sup>119</sup>

The first step rests on a distinction drawn by Cromwell J. between overarching and underlying general principles of private law doctrine and the detailed and more specific “rules” of law that are applied to a particular situation. The organizing principle “states in general terms the requirement of justice from which more specific doctrines may be derived.”<sup>120</sup> It is not a

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<sup>117</sup> *Bhasin v Hrynew*, (2012) 9 WWR. 728 (Alta QB).

<sup>118</sup> *Bhasin v Hrynew*, (2013) 362 DLR (4<sup>th</sup>) 18 (Alta CA).

<sup>119</sup> *Supra* note 115 at para 33.

<sup>120</sup> *Ibid* at para. 64, citing R Dworkin, “Is Law a System or Rules?” in RM Dworkin, ed.,

free-standing rule, but rather, a standard that underpins and is manifest in more specific legal doctrine. In his articulation of the underlying principle, Cromwell J. stated that the principle is simply that parties generally must perform their duties honestly and reasonably and not capriciously or arbitrarily. As well, he stated that the principle exemplifies the notion that, in carrying out his or her own performance of the contract, the contracting parties “should have appropriate regard to the legitimate contractual interests of the contracting partner”.<sup>121</sup> The underlying principle, he stated, is manifest in a number of existing doctrines, such as unconscionability and implied terms and other principles of contract interpretation. The principle also underlies more specific rules requiring good faith in such contexts as the dismissal of employees, the conduct of tendering competitions and the formation and enforcement of insurance contracts. In addition, however, Cromwell J. identified the following three existing rules of general application that impose good faith performance obligations on parties to all agreements:

- the duty of cooperation – one must cooperate with the other party in order to achieve the objectives of the contract,
- the duty not to abuse discretionary power – contractual discretionary powers must be exercised reasonably and for the intended purpose,
- the anti-evasion rule – parties must not evade their contractual obligations by devious means or subterfuge.<sup>122</sup>

For Cromwell J., none of these three rules were engaged by the *Bhasin* facts.<sup>123</sup> But a new fourth rule – the duty of honesty – should be recognized

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*The Philosophy of Law* (Oxford: Oxford University Press, 1977) 38. See also, R Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977), c.2.

<sup>121</sup> *Ibid* at para. 65.

<sup>122</sup> *Ibid* at para. 47-51. Cromwell observed that “[w]hile these cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith.” *Ibid* at para 47.

<sup>123</sup> In particular, Cromwell J. rejected the possibility that the abuse of discretion rule could apply to the discretionary power to terminate the agreement in *Bhasin*. See *ibid.*, paras. 90-91. This point may be subject to reconsideration. American cases have held that where, for example, an employer terminates an employee in order to deprive the employee of benefits earned but not yet due until after the date of termination, the discretion has been exercised improperly. See, e.g., *Fortune v National Cash Register*, 364 NE 2d, 1251 (Mass. 1971). A similar issue came before the Supreme Court in *Matthews v Ocean Nutrition Canada Ltd.* 2020 SCC 26, a wrongful dismissal case in which the

and would apply to this fact situation. Can Am had provided misleading and false information to Bhasin relating to the performance of the agreement and this conduct amounted to a breach of the new fourth specific rule requiring honesty in contractual performance.

The new duty of honest performance was to be distinguished for Cromwell J., from the fiduciary duty of loyalty and from the tort doctrine of fraud. Unlike the fiduciary duty of loyalty, a party to a contract is under no general duty to subordinate his or her interests to that of the other party. Unlike civil fraud, the new duty does not require that the party engaging in dishonesty intends that the party rely in some fashion on the false statement. Moreover, the measure of damages for breach of the new duty is in the expectancy rather than tort measure.<sup>124</sup> Finally, Cromwell J. emphasized that the new duty does not impose an affirmative obligation to disclose information. The duty simply requires one to be truthful.

Applying the new duty of honesty to the *Bhasin* facts, Cromwell J. concluded that the misleading statements of Can Am to Bhasin breached the duty of honesty. Further, relying for this fact on the finding of the trial Judge, Cromwell J. held that if Can Am had been truthful, Bhasin would have undertaken action to preserve the value of the business at an earlier stage, the value to be assessed at \$87,000.00.

Predictably, the *Bhasin* decision has been much referred to in judicial decisions across the country and a rich body of jurisprudence on the duty

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plaintiff alleged that the dismissal was motivated by the defendant's desire to deprive the plaintiff of the benefits of a long-term incentive plan that would have become payable after the date of termination and, as a result, the decision to terminate was made in bad faith. The Supreme Court held that the value of the benefits was to be included in the calculation of the wrongful dismissal damages. Accordingly, it was unnecessary to consider the good faith point. For the majority, however, Kasirer J. indicated, at paras 78-79, his agreement with the court below that its finding that the dismissal was not so motivated precluded a finding of bad faith. This may be considered to constitute slender, albeit indirect, support for the proposition that dismissal for an improper motive of this kind could constitute bad faith.

<sup>124</sup> In the more recent decision in *CM Callow v Zollinger*, 2021 SCC 45, a majority of the Court confirmed the unanimous opinion in *Bhasin* that the expectancy rule applied. In a concurring opinion authored by Brown J, however, it was suggested that the "reliance" or tort measure was more appropriate, though it would lead to the same calculation on the *Callow* facts. For discussion, see JD McCamus, "The Canadian Doctrine of Good Faith Contractual Performance" (2022), 38 J of Contract Law 1.

of good faith performance has emerged within the past few years.<sup>125</sup> The Supreme Court has recently returned to this subject. In *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*<sup>126</sup> and *C.M. Callow v Zollinger*,<sup>127</sup> the Supreme Court reaffirmed the basic structure of the *Bhasin* doctrine and its distinction between the underlying general principle and the four specific rules imposing good faith duties in contracts generally. In order to successfully allege breach of the duty of good faith performance, one must fit within one of the existing four rules or persuade the court to recognize a new specific rule grounded on the underlying principle of good faith performance. This structural issue was of particular importance in the *Wastech* case.

The *Wastech* decision involved a long-term contract under which the plaintiff provided waste haulage services to the defendant municipal waste authority. The contract conferred what was stipulated to be an “absolute discretion” on the authority to allocate deliveries to various disposal sites, some nearer to Vancouver than others. In light of an unexpected decline in the volume of waste anticipated in a particular year, the authority exercised its discretion to allocate a larger portion of waste to a nearby site. This had the effect of reducing the volume of services to be provided by the plaintiff, thereby reducing the plaintiff’s revenue pursuant to the terms of the agreement. The plaintiff objected that this decision had the effect of making it impossible for the plaintiff to meet a target operating ratio (“TOR”) or “anticipated profit” set out in the agreement.

At first instance, the arbitrator held that by exercising its discretion in this fashion, the defendant had failed to have “appropriate regard” for the “legitimate interests” of the plaintiff. On the eventual appeal to the Supreme Court, the Court held that the references to “appropriate regard” and “legitimate interests” were inappropriate. These were phrases employed by Cromwell J. to explain the nature of the underlying principle and did not create a specific rule requiring such conduct.<sup>128</sup> It was an error, then, for the arbitrator to rely on the discussion of general principle in *Bhasin* as if each explanatory expression utilized by Cromwell J. created a new rule of law.

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<sup>125</sup> For a survey, see B. Kain, “A Matter of Faith: The Treatment of *Bhasin v Hrynew* by Appellate Courts (Part I)” (2020), 51 Adv Q 139.

<sup>126</sup> 2021 SCC 7.

<sup>127</sup> *Supra* note 124.

<sup>128</sup> *Supra* note 126 at para. 52.

The recent decisions considered two further points of interest. In *Wastech*, the Court clarified the test to be applied in determining whether a contractual discretionary power has been exercised in good faith. For the majority, Kasirer J. explained that “the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purpose for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably”.<sup>129</sup> That purpose might be made apparent by the wording of the term conferring the power. That was not the case in *Wastech* as the power was stipulated as an “absolute discretion”. In the absence of guidelines from the power-conferring term, one turns to a construction of the agreement as a whole. This was helpful in *Wastech* as a recital identified as a purpose of the agreement that it was intended to “maximize efficiency” and “minimize costs.”<sup>130</sup> Plainly, the defendant had exercised its discretion with this object in view. If the agreement, or a broad construction, failed to indicate the purpose of the power, the Court would have to “form a broad view of the purpose of the venture to which the contract gives effect and of what loyalty to that venture might involve for a party to it, and to take those particular purposes as providing the inherent elements for the exercise of the power”.<sup>131</sup>

The *Callow* decision applies the new duty of honesty in a situation where the defendant had not engaged in an “outright lie”. The issue related to a discretion to terminate – or fail to renew – an agreement to provide maintenance services to the defendant condominium. The plaintiff had been encouraged by representatives of the defendant to assume that his services were considered satisfactory. Further, the plaintiff provided “extra” services in the hope of securing a renewal, unaware of the fact that the defendant had already decided to exercise its contractual right to terminate the agreement in due course. The defendant accepted the services and was aware of the plaintiff’s motivation in providing them. In such circumstances, the majority held that these interactions constituted “active communication” by the defendant suggesting that a renewal of the agreement was likely and, further, that the defendant knew that the plaintiff

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<sup>129</sup> *Ibid* at para 63.

<sup>130</sup> *Ibid* at para. 98.

<sup>131</sup> *Ibid* at para 72, quoting P Sales, “Use of Power for Proper Purposes in Private Law” (2020), 136 Law Q Rev 384 at 363.

was under such an impression.<sup>132</sup> In this situation, the defendant was under a duty to correct the plaintiff's misapprehension. Although the Court reaffirmed the principle stated in *Bhasin* that the duty of honesty does not impose a duty of disclosure, it is evident that a fine line is to be drawn between permissible non-disclosure and misleading conduct creating false impressions that must be corrected.

Finally, it is of interest that in *Bhasin* and *Wastech*, the Court adopted the view that one cannot contract out of the duties of honesty and the duty to exercise discretionary powers in accord with their intended purpose. In *Bhasin*, the Court held that one cannot contract out of the duty of honesty. It is an external standard imposed by law.<sup>133</sup> Thus, the "entire agreement clause" set out in the agreement did not preclude imposition of the duty.<sup>134</sup> Similarly, in *Wastech*, the Court held that the duty to exercise discretionary powers in good faith is imposed by law.<sup>135</sup> It was thus immaterial that the agreement stipulated the discretion as being "absolute". One is nonetheless obliged to exercise the power only for the intended purpose.

### C. *The New Doctrine of Unconscionability*

The equity doctrine setting aside transactions on the basis of unconscionability has a long history in Canadian and English law. In the late nineteenth century, Chancellor Boyd set out the rules in terms that are familiar to us today:

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<sup>132</sup> *Supra* note 124 at para 101. In dissent, Côté J expressed the view that the fact that a party was aware that the other party was operating under a mistaken belief created no duty to correct the misapprehension in the absence of "positive action that materially contributed to that belief." *Ibid.*, para. 206. In her view, the defendant's conduct did not "materially contribute" to the plaintiff's mistaken belief. *Ibid.*, para. 236.

<sup>133</sup> *Supra*, note 115 at para. 74. Following the lead of the *Uniform Commercial Code*, Cromwell J. suggested that parties could "influence the scope of honest performance in a particular context" and that parties "should be free in some contexts to relax the requirement of the doctrine so long as they respect its core minimum requirements." See, *ibid.*, para. 77. The UCC provides in section 1-302(b) that "the parties, by agreement, may determine the standards by which the performance of the obligations is to be measured if those standards are not manifestly unreasonable", quoted by Cromwell J, *ibid.*, para. 73. Thus, presumably, where accurate information is difficult to obtain, a "best efforts" clause might assist. A simple statement that "this contract is not subject to the duty of honesty" would be ineffective.

<sup>134</sup> *Ibid* at para 75.

<sup>135</sup> *Supra* note 126 at para 91

“if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts show that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand.”<sup>136</sup>

In brief, a transaction may be set aside where, first, there exists an inequality of bargaining power between the parties and second, the bargain itself is improvident. Under traditional doctrine, the inequality branch of the test requires that the weaker party suffer from some unusual personal difficulty in resisting the overreaching of the other party. Such difficulties would include a lack of intellectual prowess as a result, for example, of physical or mental disability, the infirmities of old age, inexperience in contract dealing, drunkenness at the time of the transaction, illiteracy, etc., and more recently, emotional distress. In sum, there must be an unusual imbalance in bargaining power. Under the second branch of the test, the agreement must be manifestly unfair. Further, it appears to have been assumed that the stronger party must knowingly take advantage of the weaker party’s vulnerability. Finally, the traditional doctrine provides a basis for rescission of the entire agreement rather than deletion of individual terms.<sup>137</sup>

The recent decision in *Uber Technologies Inc. v Heller*<sup>138</sup> has effected major reforms of various elements of the traditional doctrine and has facilitated a more expansive application of the doctrine in the future. The claim in *Uber* was a class action brought on behalf of Uber drivers. As is well known, Uber is a large multi-national corporation which operates a large business online in which it matches Uber drivers providing either taxi or delivery services to potential customers. Uber earns its revenue by taking a portion of the stipulated fee charged by the drivers. Uber’s agreements with drivers are entered into online. The plaintiff claimed that various aspects of the agreement failed to comply with provincial employee standards legislation and sought various remedies. Each agreement stipulated that any disputes between the driver and Uber were to be resolved by mediation and arbitration in Amsterdam in accordance with the laws of

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<sup>136</sup> *Waters v Donnelly* (1884), 9 OR 391 (HCJ).

<sup>137</sup> See, generally, JD McCamus, *op. cit.*, *supra* note 3, Chapter 11-D.

<sup>138</sup> 2020 SCC 16. And see, JD McCamus, “Contracts of Adhesion and Unconscionability” (2022), 38 BFLR 55.

the Netherlands under International Chamber of Commerce (“ICC”) rules. The ICC rules were not reproduced in the contract but could be accessed online. A careful review of ICC rules would reveal that commencement of such proceedings requires the payment of a commencement fee of \$14,500.00 US. The evidence indicated that Heller earned approximately \$20,800.00 to \$31,000.00 Canadian annually. Uber responded to the class action by asserting that its agreement with Heller and other drivers required that such disputes be resolved in the fashion stipulated in the agreement. The plaintiff class responded by claiming that these arrangements were unconscionable.

Application of the traditional unconscionability doctrine to these facts faced a number of hurdles. First, there was no evidence to suggest that Mr. Heller or any other member of the class suffered from an unusual inability to bargain in the manner required by the traditional test. Second, on the present facts, there would be no basis upon which to find that Uber was aware of any such difficulty. Third, Mr. Heller did not wish to strike down or rescind the entire agreement. Rather, he wished to strike down the dispute resolution term, as itself being unenforceable, with the remainder of the agreement being valid. On the latter point, the Supreme Court concluded that the dispute resolution arrangement constituted a collateral agreement entered into by Heller and Uber.<sup>139</sup> Accordingly, only that agreement proved to be unconscionable. The main agreement between Heller and Uber could remain standing. Attention was thus focused on the two elements of the traditional test.

In general terms, the Court identified the purpose of unconscionability doctrine as one of providing a solution to the problems created when agreements do not correspond with the “classic paradigm” of a “freely negotiated exchange between autonomous and self-interested parties.”<sup>140</sup> Where this assumption does not align with reality, the arguments for enforcing contracts carry less weight.<sup>141</sup>

With respect to the first branch of the test, the Court made a number of observations concerning its content which have the effect of substantially expanding its coverage. The Court noted that, “[d]ifferences in wealth, knowledge, or experience may be relevant but inequality encompasses more

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<sup>139</sup> *Ibid* at para. 96.

<sup>140</sup> *Ibid* at para. 56.

<sup>141</sup> *Ibid* at para. 57.



than just those attributes”.<sup>142</sup> Further, inequality may arise on personal characteristics or, alternatively, on “circumstances” in which the parties might find themselves.<sup>143</sup> Such circumstances might include financial desperation or what the Court referred to as the “rescue at sea” scenario.<sup>144</sup> A further example of inequality may arise where only one party can understand or appreciate the full import of the contractual terms creating a type of “cognitive asymmetry”.<sup>145</sup> Such an asymmetry could result from the present characteristics of the vulnerable party or because of a disadvantage peculiar to the broad bargaining process such as duress or difficulty to understand terms of the parties’ agreement. The collective effect of this observation is to expand the test in such a way as to include typical consumers or small business owners who suffer from no unusual difficulties in bargaining but who, for any of a variety of reasons may have difficulty understanding the terms of the arrangement or may feel themselves to be under some pressure to agree. The suggestion made in some earlier cases that there must be an “overwhelming” imbalance in bargaining power was rejected as rigid and an undue narrowing of the doctrine.<sup>146</sup> Mr. Heller was apparently an individual of ordinary bargaining capacity who had entered into an agreement with a large multi-national enterprise on the basis of terms he had not likely understood. The new inequality of bargaining test was therefore applicable.

Further, the Court simply rejected any suggestion that the test required that the stronger party be aware of the particular difficulties of the weaker party and that it intended to knowingly take advantage of the inequality of bargaining power. The Court explained: “a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation”.<sup>147</sup> The fact that it is now unnecessary to demonstrate intentional exploitation obviously opens up a greater possibility of class actions based on unconscionability doctrine. If individual members of the class were required to establish particular vulnerabilities and the intention of the other party to exploit them, this would prove to be a substantial barrier to

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<sup>142</sup> *Ibid* at para. 67.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* at para 70.

<sup>145</sup> *Ibid* at para 71.

<sup>146</sup> *Ibid* at para 82.

<sup>147</sup> *Ibid* at para 85.

certification of the class action in question. This did not prove to be the case in *Uber*, nor will it prove to be so in the future.

These revisions to the first branch of the test have obvious implications for the interpretation and drafting of standard form agreements offered to typical consumers and small business owners on a “take-it-or-leave-it” basis. The Court openly discussed this aspect of the doctrine, relying on Karl Llewellyn<sup>148</sup> for the proposition that in such contexts the offeree has not really assented to the “boiler-plate” provisions. Rather, the offeree typically understands and agrees to the “dickered terms” and merely assents to the standard terms on the assumption that they are both consistent with the “dickered terms” and not manifestly unreasonable and unfair in their content.<sup>149</sup> The drafting of standard form contracts containing terms that may be considered to be unreasonable or unfair has been subjected to a much greater risk of unenforceability than under traditional doctrines.

Under the *Uber* decision, the second branch of the test may be met where the terms of the agreement “flout the ‘reasonable expectation’”<sup>150</sup> of the weaker party or cause unfair surprise. Determining fairness is inherently a contextual enterprise.<sup>151</sup> The fact that the agreement confers an undue advantage on the stronger party or an undue disadvantage on the weaker party is a useful clue.<sup>152</sup> The term in the present case effectively denied Heller any effective access to dispute resolution. This handily meets the test. We may note that in a previous decision, Abella J.<sup>153</sup> suggested that a similar analysis could apply to a forum selection clause. As a general matter, then, barriers to access to dispute resolution appear to be vulnerable to an unconscionability analysis.

In summary, although the *Uber* decision thus confirms the continuing application of the traditional two-part test – inequality of bargaining power and an improvident transaction – the Court has expanded the scope of the test in important respects. First, the inequality test may apply to a person with normal intellectual and bargaining capacity dealing with a large

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<sup>148</sup> KN Llewellyn, *The Common Law Tradition: Deciding Appeals*, (Boston: Little, Brown & Co., 1960) pp. 370-71, quoted in *Uber*, *supra*, note 135, para. 87.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* at para 77.

<sup>151</sup> *Ibid* at para 75.

<sup>152</sup> *Ibid* at para 74.

<sup>153</sup> *Douez v Facebook*, [2017] 1 SCR 494 (SCC)

commercial entity on the basis of, for example, a standard-form or non-negotiable contract. Second, inequality of bargaining power is of two kinds: “personal” resting on the personal “characteristics of the complainant or “circumstantial” resting on the “circumstances of the particular situation”. Third, the stronger party need not have intentionally taken advantage of the weaker party’s vulnerability.

The suggestion that difficult circumstances including “financial desperation” may meet the first branch of the test raises a number of interesting possibilities. We may consider whether the new doctrine creates new hazards for those dealing with individuals who are on the brink of insolvency. The recent decision of the British Columbia Court of Appeal in *Pearce v 4 Pillars Consulting Inc.*<sup>154</sup> provides an illustration. This case involved a class action by clients of the defendant debt restructuring consultants to recover fees paid on the basis that the fees contravened provincial consumer protection legislation. The defendant raised a “waiver of class action” clause contained in all customer agreements as a defence. Applying *Uber*, the Court of Appeal held that inequality of bargaining power was established. All members of the class were obviously in financial distress. With respect to the second branch of the test, the clause deprived members of the only practical means to achieve redress as the individual claims were of relatively low monetary value. The clause was found to be unconscionable and unenforceable.

### A. A “Realignment with Basic Values or Principles” Test?

The recent decisions in *Uber* and *Bhasin* provide an interesting context in which to consider the “incrementalism” test for the appropriate scope of judicial law-making. Many observers would consider each decision to constitute a major reform of contract doctrine. The *Uber* decision, in particular, appears to import into the common law something rather like the civilian doctrine of abusive terms.<sup>155</sup> When added to the innovation of the unconscionable term introduced by the *Tercon* decision<sup>156</sup> the effect is

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<sup>154</sup> 2021 BCCA 198.

<sup>155</sup> *Civil Code of Quebec*, S.O. 1991 c. 64, art. 1437. The *Uber* Court did not make the comparison. See JD McCamus, *op. cit. supra*, note 2 at pp. 489-490; JD McCamus, *op. cit. supra*, note 138.

<sup>156</sup> *Tercon*, *supra* note 27. In *Uber*, the Court held that the arbitration clause constituted a separate collateral agreement which was unconscionable. It was therefore unnecessary for the Court to determine whether the *Tercon* unconscionable term doctrine was

to reform – one might say “radically reform” – the doctrine of unconscionability.

It is easier to defend the reform achieved in *Bhasin* as incremental. To a large extent, the decision provides a principled explanation for existing Canadian doctrines relating to good faith dismissal, fair treatment in tendering and the three rules relating to abuse of contractual discretionary powers, the duty to cooperate and the anti-evasion rule.<sup>157</sup> Although it is true that *Bhasin* also recognized a new duty of honest performance, one might defend the “incrementalism” of that reform by suggesting that it amounts to a modest revision of the tort doctrine of deceit implanted into the contractual setting.<sup>158</sup> What is striking about the reasoning in *Bhasin* is its recognition and application of a newly articulated underlying general principle of contract law embracing the concept of good faith. Many will consider this to be a significant – perhaps major – shift in Canadian contract law.<sup>159</sup>

It is of interest to note that in both of these decisions, the Court quite frequently justifies the novel aspects of the opinions on the basis of basic underlying principles or values of contract law. Although reasonable persons, and especially legal scholars, might disagree on the precise identification of such values, a broad consensus would include on such a list, (i) giving effect to the reasonable expectations of the parties,<sup>160</sup> (ii)

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applicable. See *Uber, supra*, note 138, para. 96.

<sup>157</sup> *Bhasin, supra* note 115 at para 63.

<sup>158</sup> It is certainly arguable, however, that the reform is substantial in nature. See K Maharaj, “The Trouble with Tort: Why Deception in *Bhasin* Cannot Presently be Deceit” (2019), 1 *Journal of Commonwealth Law* 119.

<sup>159</sup> The United Kingdom Supreme Court appears to be of the view that this amounts to a significant departure from English law. In *Pakistan International Airlines Corporation v Times Travel (U.K.) Ltd.*, [2021] UKSC 40, the Court considered the question of defining the concept of “lawful act duress” as a basis for setting aside agreements. The majority rejected the view of Lord Burrows that the doctrine is engaged where a threatened breach of contract was not based on good faith. In their view, the doctrine of good faith formed no part of English law, and the proposal of Lord Burrows might be more acceptable in the United States and Canada where such a doctrine has been recognized. See *ibid.*, at paras. 27 and 39. Two of the three general good faith rules adopted in *Bhasin*, it may be noted, have long been recognized in English law. See, *Aleyn v Belchier* (1758), 1 *Eden* 132, 28 *ER* 634 (abuse of discretion), referred to in *Bhasin, supra*, note 115 at para. 35; *McKay v Dick* (1881), 6 *App. Cas.* 251 (HL) (duty to cooperate).

<sup>160</sup> For a suggestion that the central purpose of the law of contracts is to protect the

avoiding or preventing uncompensated, detrimental reliance on promises and (iii) enforcing truly consensual bargains. We might now add a principle requiring performance of contractual obligations in good faith.<sup>161</sup> In *Uber* and *Bhasin*, the Court frequently makes reference to such values in justifying the modification of the law being achieved. As *Bhasin* suggests, the Court's conception of those underlying values may also evolve over time in order to accommodate, presumably, evolving understandings of the fair and just result.<sup>162</sup>

Thus, the new doctrine of unconscionability is justified on the basis that it gives effect to the reasonable expectations of vulnerable parties with respect to the contents of the agreement and further, that it is designed to ameliorate conditions arising where such parties have not truly consented to the terms of the agreement.<sup>163</sup> In *Bhasin*,<sup>164</sup> both the recognition of the underlying principle and the new duty of honesty are justified on the basis that they give effect to the reasonable expectations of the parties. A similar justification is offered in *Wastech*<sup>165</sup> with respect to the imposition of the duty to exercise contractual discretionary powers for the intended purpose. Similar observations may be made with respect to other path-breaking decisions discussed in Part III of this article. The new rules on tendering protect bidders who detrimentally rely on promises that tendering will be conducted fairly.<sup>166</sup> Incentives for good faith conduct underly many of the

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reasonable expectations of the parties, see A. Swan, *op. cit., supra*, note 93 at pp 3-17. Cf. SA Smith, "The Reasonable Expectation of the Parties: An Unhelpful Concept", (2020), 48 Can Bus LJ 399.

<sup>161</sup> For an argument that, on theoretical grounds, good faith is the principal or "core" value underlying contract law, see D Markovits, "Good Faith as Contract's Core Value" in G Klass, G Letsas and P Saprai, eds., *Philosophical Foundations of Contract Law* (Oxford: Oxford U.P. 2014) C 14.

<sup>162</sup> I leave to others the interesting question as to whether the increasing influence of a concept of good faith in various contract law doctrines in Canadian law reflects broader social trends. It is tempting to think that the development, during the same era, of a series of initiatives, legislative, institutional and jurisprudential, designed to achieve greater transparency, reasonableness and good faith in the conduct of public affairs may be evidence of a broader trend of this nature.

<sup>163</sup> *Uber*, *supra* note 138 at paras 56, 57, 77 and 87.

<sup>164</sup> *Bhasin*, *supra* note 115 at paras 60, 76 and 80.

<sup>165</sup> *Wastech*, *supra* note 126 at para 92.

<sup>166</sup> *Tercon*, *supra* note 32.

innovations, perhaps including the ability to award punitive damages.<sup>167</sup> The treatment of exculpatory clauses in *Tercon* has much in common with the rationale underlying *Uber*, and so on.

One might tentatively suggest, then, that the process of judicial innovation at work in these cases essentially involves a realignment of contract doctrine with its underlying values and principles in an attempt to render the doctrine more attuned to modern social and economic conditions and sensibilities with respect to the fair result. Lord Mansfield might describe it as a matter of the common law “working itself pure” by drawing from “the fountain of justice.”<sup>168</sup> He would certainly agree that the courts are the agency best suited to engage in a law reform process of this kind. While we might not embrace the Mansfieldian metaphor, there is nonetheless some force in the argument that the courts, rather than the legislatures, are better equipped by training in and experience of the law to identify desirable opportunities for and to effect change of this kind. In the unlikely event that they should be considered to have erred in doing so, legislative correction always remains a possibility.

Rather than insisting that judicial law-making must always be incremental or interstitial, then, would it be helpful to recognize that it is within the purview of the courts to make significant changes to the law when doing so brings the doctrine into closer alignment with its underlying values, principles and purposes? Major reforms of the law in the past – such as abolition of the mistake of law rule<sup>169</sup> – could certainly be justified on this basis.

## VI. CONCLUSION

This survey of modern developments in contract law to be found in the jurisprudence of the Supreme Court of Canada in recent decades leads to a number of conclusions.

First, there has been a very substantial evolution of the Court’s sense of its responsibility for effecting change. At the beginning of the modern era,

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<sup>167</sup> *Whiten*, *supra* note 52.

<sup>168</sup> *Omychund*, *supra* note 114.

<sup>169</sup> See *Kleinwort*, *supra*, note 102 and *Air Canada*, *supra*, note 104, both of which justify the reform on the basis that it brings the law into closer alignment with the unjust enrichment principle.

the Court essentially applied the English law of contracts with little or no suggestion that it could be questioned in any respect. Several decades on, there is little doubt that the Court has embraced its appropriate role as a final court of appeal in modifying and modernizing Canadian contract doctrine. It has done so very impressively. It has amply fulfilled Laskin's prescription that it should become "the court to which other Canadian courts must look to create a precedent rather than the court which must itself seek one".<sup>170</sup>

In carrying out this function, the Court has considered a much broader range of materials than it would have reviewed in the earlier era. In decisions like *Bhasin* and *Uber*, extensive reference is made to decisions in other jurisdictions, including the United States, and academic literature by Canadian and non-Canadian authors. Rather like the English courts of the nineteenth century, reference is occasionally made to civilian sources,<sup>171</sup> an undoubted virtue of Canada's bi-jural nature and the bi-jural composition of our Supreme Court. This is not to suggest, however, that it would be wise to simply transplant doctrines from one system to the other. The interconnectedness of private law doctrine makes transplantation a rather risky enterprise. Nor is it to suggest that the two systems should always generate the same results, though there is surely no harm in them doing so. It is merely to suggest that in formulating solutions to as yet unsolved problems in one system, it may be illuminating to observe how they may have been resolved, if at all, in the other. The Supreme Court of Canada is well-positioned to profit from such comparative insights.

One may ask whether there is now a distinct Canadian common law of contracts. The question is not easily answered. English cases still provide a pervasive and persuasive source of our common law contracts jurisprudence. Nonetheless, there are now quite significant differences between Canadian and English law on this subject. Canadian lawyers can no longer simply rely on accounts of English doctrine on the assumption that Canadian law is essentially the same. Leading Canadian decisions have become a dominant presence in published Canadian casebooks.<sup>172</sup> If asked

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<sup>170</sup> Laskin, *op. cit.*, *supra* note 20 at p 67.

<sup>171</sup> In *Bhasin*, recognition of the good faith principle was justified, in part, on the basis that it brought Canadian common law into closer alignment with the Law of the United States and Quebec. See *Bhasin*, *supra* note 115 at para 41.

<sup>172</sup> See the works cited *supra* note 14.

to generalize about the nature of the new Canadian doctrine, a persistent theme is one of encouraging good faith conduct and fair and equitable results in contract disputes.

Finally, an examination of this jurisprudence leads one to question whether the Supreme Court's self-imposed limitation that it may only change the law in an "incremental" fashion provides an adequate description of its mandate. It has been suggested here that major changes in the law are made from time to time and that one possible justification for them is that they constitute attempts to realign the law of contracts with its underlying values and purposes in an attempt to bring the law into closer accord with modern social and economic conditions and modern sensibilities as to the fair result.