Two Views of the Cathedral: Civilian Approaches, Reasonable Expectations, and the Puzzle of Good Faith's Past and Future

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The Supreme Court of Canada's decision in Bhasin v Hrynew *was hailed as a landmark development in the common law good faith doctrine. However,* Bhasin *leaves unanswered the question of how the doctrine will develop in the future. This article offers two views of how the law might develop.*

The first view posits that the stand-alone duty of honest performance in Bhasin *reflects a more civilian flavour of adjudication in introducing a mandatory standard that exists outside of the contract. This view suggests the potential for a migration of good faith doctrines away from implied terms, consolidating all common law good faith duties as mandatory rules that are largely independent of parties' intent.*

The second view sees these radical changes producing a theoretical quagmire for which there is no apparent solution, and good faith is instead plunged back into the same uncertainty that Cromwell J sought to avoid in Bhasin. *On this view, the use of the term "reasonable expectations" in defining duties of good faith is neither appropriate nor desirable. It introduces too much uncertainty and inconsistency into future doctrinal developments. Additionally, in establishing the new duty, Cromwell J's reliance on Quebec and United States law threatens to deprive Canadian common law courts of autonomy and self-determination.*

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Introduction

Canadian common law has long struggled with the concept of good faith in contracts, bereft of organization and overall coherence despite a fairly well-developed body of case law and ample critical analysis from academia and the bar. The Supreme Court of Canada's decision in *Bhasin v Hrynew*[1] was therefore rightly hailed as a landmark development in common law good faith jurisprudence, not only for the measure of conceptual coherence that its principled approach ostensibly brought, but also for the Court's progressive stance in seeking to advance the law in harmony with modern commercial realities. While the decision was not without criticism, commentary was largely of the view that the Court's move to recognize[2] a free-standing duty of honesty

1. 2014 SCC 71.

2. There is some inconsistency in Cromwell J's language in *Bhasin* as to whether the court is recognizing or creating the overarching principle of good faith and new duty of honesty in performance. For an overview of this confusion, see Leonid Sirota, "Did You Make It

in contractual performance was a welcome step in clarifying and developing Canadian contract law.[3]

Such consensus, however, belies an important question that *Bhasin* poses for the future of Canadian common law good faith law[4] as a result of the theoretical steps taken by Cromwell J to arrive at his conclusion. As many critics have noted, the clarity that *Bhasin* brought is matched by the uncertainty it offers for the future of good faith in Canadian law;[5] this paper attempts to offer an answer to that uncertainty, providing a common law perspective for civilian, as well as common law and civilian, lawyers. In providing a descriptive critique of the bases on which Cromwell J's analysis relied, I argue that the radical nature of *Bhasin*'s logic[6] provides a blueprint for sweeping, fundamental changes to good faith.

Yourself?" (17 July 2015), online (blog): *Double Aspect Blog*, <doubleaspect.blog/2015/07/17/did-you-make-it-yourself>.

3. See Daniele Bertolini, "Decomposing *Bhasin v Hrynew*: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance" (2017) 67:3 UTLJ 348 at 349–50; Geoff R Hall, "*Bhasin v. Hrynew*: Towards an Organizing Principle of Good Faith in Contract Law", Case Comment, (2015) 30:2 BFLR 335 at 336; Angela Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v Hrynew*", Case Comment, (2015) 56:3 Can Bus LJ 395 at 404; Neil Finkelstein et al, "Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015) 53:2 Alta L Rev 349 at 370. See also Edward J Waitzer & Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can Bus LJ 285 at 286, 292–93, 295 (where the authors survey the accelerating trend of adjudicative bodies relying on reasonable expectations to guide decision making and cite *Bhasin* as an example of that trend).

4. The reader will note that this article refers at times to "good faith law" and at other times to "good faith doctrine". The use of these two different terms is deliberate: good faith *law* encapsulates the academic and theoretical component of good faith (a distinction that is particularly relevant at 411–14, *below*), whereas good faith *doctrine* is intended to denote good faith law only as it is applied by courts. It additionally bears noting that the term "doctrine" may be something of a misnomer, as one must distinguish between doctrine in the broad sense—meant to encapsulate the whole of good faith case law, which is better understood as a *collection* of doctrines under one organizing principle—and specific good faith doctrines (e.g., the duty of honest performance, the duty to exercise discretion reasonably).

5. See Swan, *supra* note 3 at 403–04; John D McCamus, "The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015) 32:2 J Cont L 103 at 114–17.

6. Though this is discussed in greater detail below, it bears noting from the outset how the logic of *Bhasin* is radical. In brief, the decision in *Bhasin* to divorce good faith from an origin *within* the contract and instead impose it as a term independent of intent is an unprecedented step in Canadian common law good faith doctrine, and likely across all common law jurisdictions in the world.

In turn, I attempt to forecast the future of good faith law, offering two potential outcomes that are in stark contrast—indeed, sometimes contradictory. Much as Guido Calabresi and A. Douglas Melamed observed that a single analytical framework only gives one view of the law, or what they would call one view of the Rouen Cathedral,[7] so too does this paper not restrict itself to a single perspective. The first "view of the cathedral" proposes as a more desirable consequence that if radical changes do come, their effect will be much the same as *Bhasin*'s "incremental change",[8] giving good faith the benefit of further doctrinal consolidation and coherence. In other words, the creation of a standalone duty of good faith in *Bhasin* reflects a more civilian flavour of adjudication in introducing a mandatory standard that exists apart from the parties—one that is both desirable and appropriate, notwithstanding the departure this signals from the common law's historical tendency to focus on contextual elements of parties' actual contracts to determine good faith duties. A comparison of the common law "implied terms" mode of good faith with the civilian approach reveals the truly paradigmatic shift adopted by Cromwell J in recognizing a good faith duty that operates irrespective of parties' intentions. Far from being an incremental change, *Bhasin*'s method in fact runs contrary to fundamental considerations of the common law of contracts—possibly foreshadowing a migration of good faith doctrines away from implied terms to free-standing status. Analogizing to the history of frustration, this migration may in fact be much ado about nothing and instead achieve the coherence and clarity that Cromwell J prioritized.

The second view of the cathedral—and less desirable outcome, as this paper posits—sees these radical changes as having produced a theoretical quagmire for which there is no readily apparent solution, and good faith is instead plunged back into the same uncertainty that Cromwell J sought to avoid. Put briefly, the use of the term "reasonable expectations" in defining duties of good faith is neither appropriate nor desirable because it introduces too much uncertainty and inconsistency into future doctrinal developments, and because Cromwell J's reliance on Quebec and United States jurisdictions in establishing the new duty[9] threatens to deprive Canadian common law courts of future autonomy and self-determination. As a result, it may end up reinstating the incoherence and confusion that Cromwell J sought to avoid. Ultimately, I refrain from offering a definitive conclusion as to which of these two views of the cathedral will win out, although I suggest

7. See Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089 at 1089–90, n 2, citing George Heard Hamilton, *Claude Monet's Paintings of Rouen Cathedral* (Oxford: Oxford University Press, 1960) at 4–5, 19–20, 27.

8. *Supra* note 1 at para 89.

9. See *ibid* at paras 32, 34, 41, 82–85.

that the first view may be more the more likely of the two. It remains to be seen whether such radical changes will be realized in future jurisprudence, but the possibility will remain for *Bhasin* to live up to the profound potential many commentators have said it holds.

I. The First View of the Cathedral: Towards a Civilian Framework

A. A Brief History of Canadian Common Law Good Faith

Notwithstanding the early common law's broad approval of good faith as a general principle of contracts,[10] the historical trend of common law jurisprudence was to treat the subject very narrowly. Unsurprisingly, the historical approach was aptly characterized as "piecemeal",[11] offering no consistent or principled approach from which Canadian law could find a basis. Accordingly, the life of good faith in Canadian common law began to at least some extent *ex nihilo* by relying on work done in the United States by Robert Summers, particularly with respect to the *Restatement (Second) of Contracts*, and Professor Karl Llewellyn, the principal architect of the *Uniform Commercial Code* (*UCC*).[12] Starting with the Ontario Law Reform Commission's 1979 *Report on the Sale of Goods* and its 1987 *Report on Amendment of the Law of Contract*, Canadian law accordingly favoured a model of good faith in the common law that implied a duty of good faith into contractual performance,[13] similar to the implied covenant of good faith and fair dealing.[14] Subsequent to these reports, there was ample

10. See *Aleyn v Belchier* (1758), 28 ER 634 (Ch); *Mills v Mills* (1938), 60 CLR 150, 11 ALJR 527 (HCA); *Mellish v Motteux* (1792), 170 ER 113; *Carter v Boehm* (1766), 97 ER 1162.

11. *Bhasin v Hrynew*, *supra* note 1 at para 42, citing *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1987), [1989] 1 QB 433 at 439, [1988] 1 All ER 348 (CA), Bingham LJ (as he then was).

12. As McCamus observes, Llewellyn was familiar with and an admirer of the German *Civil Code*'s provision on good faith. See John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2004) 29:1/2 Adv Q 72 at 73 [McCamus, "Abuse of Discretion"]. Thus, in some indirect sense, it stands to reason that the development of good faith in Canadian common law was partly inspired by this civilian tradition.

13. See Ontario Law Reform Commission, *Report on Sale of Goods*, vol 1 (Toronto: Ministry of the Attorney General, 1979) at ch 7 [OLRC, *Report on Sale of Goods*]; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987) at ch 9 [OLRC, *Report on Amendment*].

14. As Robertson observes, these reports were based largely on the work done in the United

scholarly discussion on this point, with no clear resolution either in favour of or against the duty.[15] The judiciary was similarly slow and reticent to recognize such a duty, although the form was always one of implied terms: while jurisprudence bifurcated along the lines of implied in fact versus implied in law, the role of good faith was always understood to be originating from the contract itself.[16]

The conservative nature of this approach was made particularly stark in light of the significant developments in the civilian jurisprudence from Quebec that preceded the coming into force of the new *Code civil du Québec* in 1994.[17] The Supreme Court of Canada recognized in 1981 that good faith in Quebec civil law, far from being only an organizing principle of the civil law as a whole, was in fact a legal obligation attaching to every contract governed by Quebec law.[18] That obligation's precise content would defy a general definition, instead varying based on the circumstances. The Supreme Court of Canada recognized a similarly expansive view of the doctrine of abuse of rights in *Houle v Canadian National Bank*: specifically, and notwithstanding a contractual stipulation that the parties could exercise their rights "without notice", the Court found an obligation to provide "reasonable notice" that overrode the express language of the contract.[19] Such was the expansive treatment of extra-contractual obligations in Quebec case law that they were codified by the *Code civil du Québec* in articles 6, 7, and 1375.[20] In brief, good faith is and long has been a core feature of Quebec civil law. Rather than according with the common law's confusion and controversy over the extent to which good faith doctrines contained any

States by Robert S Summers, particularly with respect to the *Restatement (Second) of Contracts*. See Joseph T Robertson, "Good Faith as an Organizing Principle of Contract Law: *Bhasin v Hrynew*—Two Steps Forward and One Look Back" (2015) 93:3 Can Bar Rev 809 at 828.

15. See *ibid*.

16. The discussion later in this article—especially that in section II.A.(iv), *below*—addresses many of the landmark cases on good faith, although not in the context of identifying their reliance on implied terms. It is thus worth mentioning here that each of those Canadian cases discussed later in this article address good faith as a matter of implied terms. Additionally, there are a handful of other important Canadian cases that are not discussed in this article, which also confirm that implied terms are central to Canadian good faith doctrine. Justice Cromwell discusses many of these cases in the context of implied terms throughout *Bhasin*. See *supra* note 1 at paras 44, 49–54, 56, 74. See generally *Transamerica Life Canada Inc v ING Canada Inc* (2003), 68 OR (3d) 457 at 466–70, 234 DLR (4th) 367 (CA); *Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd* (1994), 19 Alta LR (3d) 38 at 41–46, 149 AR 187 (CA); *Barclays Bank PLC v Devonshire Trust*, 2013 ONCA 494 at paras 129–34.

17. CCQ.

18. See *National Bank v Soucisse et al*, [1981] 2 SCR 339 at 356–57, 43 NR 283.

19. [1990] 3 SCR 122 at 154, 175–76, 74 DLR (4th) 577 [*Houle*].

20. Arts 6, 7, 1375 CCQ.

underlying thread and were (or were not) implied terms of the contract, Quebec civil law instead accepted a broad, fundamental, normative role for good faith.

It therefore came as a surprise to many that the Supreme Court of Canada in *Bhasin* eschewed both the jurisprudence and the common law's general stance on good faith by finding that the duty of honesty in performance was not to be understood as an implied term, but rather as a doctrine that operates *irrespective of the parties' intentions*. As argued below, this move represents a fundamental shift in how good faith fits within the Canadian common law system, reflecting a more civilian-inspired normative framework rather than one centred purely upon empirical (albeit contextual) examination of the bargain. Indeed, *Bhasin* arguably fits far more comfortably within the civilian tradition than it does within that of the common law. Combined with the recognition of the broader organizing principle of good faith, the overall effects of *Bhasin* may suggest a greater willingness to recognize similarly normative good faith doctrines in future that relegate questions of interpretation to secondary status. In other words, the fundamental question on this point is this: is good faith still a matter of implication or not?

B. The Empirical Common Law and the Normative Civil Law

In order to evaluate the significance of establishing a good faith doctrine that does not inhere in the parties' bargain, as has previously been the case, it is useful to compare the common law approach to contractual interpretation with the civilian framework so as to adequately appreciate the paradigmatic difference between fact-based and norm-based approaches. As Professor Catherine Valcke notes, the relationship between empirical and normative considerations in contract law is very different in English-inspired common law as opposed to French Code-inspired civil law: "English law . . . assesses the parties' claims against standards that are *inherent to their particular contractual interaction*, whereas French law is 'external' in that it makes the same assessments *by reference to standards lying outside that interaction.*"[21] From this, it is apparent that these bases upon which contracts are evaluated are fundamentally different. Indeed, this paper here employs the term "evaluated" advisedly: the common law approach fundamentally requires *interpreting* the specific interaction. On the other hand, the normative backdrop against which a civilian approach occurs allows for an *evaluation* distinct (to some extent) from a strictly contextual

21. Catherine Valcke, "*United Rentals v Ram Holdings* as Transplant Failure: Strategic Ambiguity, Good Faith and the Forthright Negotiator Principle in US Contract Law" (2015) 15 Asper Rev Intl Bus & Trade L 49 at 53 [emphasis added]. See also Lucinda Miller, "Penalty Clauses in England and France: A Comparative Study" (2004) 53:1 ICLQ 79 at 100.

approach. The specific form of the bargain may influence how the external standard is applied, but the civilian approach is very much one that occurs from the outside in, rather than the inside out, of the common law. In this respect, it is noteworthy to observe that Cromwell J makes a similar point about the new duty of honest performance:

> *I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context*. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.[22]

It is worth noting at this point that Cromwell J did directly compare this new Canadian duty to that of the *UCC* in the United States by reference to subsection 1-302(b), as a means of providing comparative justification within the common law.[23] The *UCC* states the following:

> The obligations of good faith, diligence, reasonableness, and care . . . may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.[24]

This is something of a sleight of hand, however, since this comparison is not one of like for like. The *UCC* is a model *statute*, and one that has been adopted in most states with various amendments. At face value, this distinction between statute law and the common law context of *Bhasin* raises some suspicion as to the validity of a comparative approach, even if only at the level of distinguishing between the internal logic of the common law and the expression of a legislature's will through statute (the latter not needing to adhere to the common law's logic). Such a comparison becomes arguably more suspect, however, when considering the historical context in which the *UCC* was written: as noted above, the *UCC*'s principal architect, Llewellyn, was familiar with and an admirer of the German *Civil Code*'s provision on good faith.[25] While this does not suggest that the *UCC* more generally used the German civil law as its basis, it nonetheless bears some support for the claim that a civilian flavour is readily

22. *Bhasin v Hrynew, supra* note 1 at para 77 [emphasis added].

23. See *ibid*.

24. § 1-302(b) (2017–2018).

25. McCamus, "Abuse of Discretion", *supra* note 12 at 73.

apparent in the sections on good faith. Accordingly, Cromwell J's use of the *UCC* for comparative purposes instead foregrounds the fact that his solution is remarkable as a *common law* development.

In view of all of the above, it is difficult to overstate the potential significance that the new (and novel) duty of honesty in performance has with respect to the fundamental principles of the Canadian common law of contracts. The decision to divorce this manifestation of good faith from an origin *within* the contract is, in a word, unprecedented in Canadian common law good faith doctrine and likely across all common law jurisdictions in the world.[26] Although it is too early to tell whether this move to a normative framework signals the start of a trend in Canadian common law, it is nonetheless an important affirmation of the twentieth-century trend away from rules of strict construction, towards a more equitable approach overall that does not fetishize freedom of contract as the *sine qua non* of contract law.[27] While still a fundamental tenet of the law of contracts, it no longer overrides all other concerns as a matter of course.[28]

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26. This is not to say, however, that such a move is *entirely* without precedent in common law contract law. The doctrine of frustration underwent a similar (though not identical) change throughout its history. See generally John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 601–06 [McCamus, *The Law of Contracts*]. That being said, one United Kingdom court recently explicitly and categorically rejected *Bhasin.* See *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*, [2016] EWCA Civ 789 at para 45.

27. While this assertion might warrant detailed discussion all on its own, it must suffice here to make reference to three cases in the contractual interpretation context. First, *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, in which Lord Denning MR famously remarked upon the surreptitious fashion in which judges of his generation arrived at more equitable interpretations of contractual terms while ostensibly "worship[ping]" the idol of freedom of contract. See (1982), [1983] QB 284 at 297, [1983] 1 All ER 108 (CA). Second, *Investors Compensation Scheme Ltd v West Bromwich Building Society*, in which the House of Lords established that a contextual approach is to be taken in contractual interpretation. See (1997), [1998] 1 All ER 98 at 113–15, [1997] UKHL 28 (BAILII). Third, *Sattva Capital Corp v Creston Moly Corp*, where the Supreme Court of Canada adopted the same approach to interpretation. See 2014 SCC 53 at paras 46–48. Taken together, these three cases are illustrative of the trend to look beyond the words of the contract and seriously examine the bargain in its full context.

28. One might dispute the claim that freedom of contract ever occupied this position in the first place, but classical contract law, from which freedom of contract drew its prominence in the first place, was developed in the context of rapid industrialization and the desire to stoke the fires of capitalism. English courts accordingly produced the rules of strict construction in order to promote commercial certainty, so as to minimize transaction costs. Although such rules (and freedom of contract) no longer bear the same authority they used to, it is still apparent from a cursory examination of contracts jurisprudence that freedom of contract is still a central consideration. See generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). One need look no further than Cromwell J's statement in *Bhasin* that

C. The Future of Duties of Good Faith as Implied Terms

If the Supreme Court of Canada's turn to a more civilian flavour of good faith can at all be taken as an invitation for courts to inject a similar strain of legal reasoning into their analysis, then this approach may place greater reliance on civilian law in evaluating both new and old doctrines of good faith. Though the rationale for this change appears to have no historical basis, the precedent now exists. However, subsequent case law suggests that lower courts have no particular appetite to indulge in similarly profound change to good faith and the implication of terms. Courts encountering *Bhasin* have either managed to avoid addressing it in substance by applying it to already-recognized good faith duties,[29] or else refused to give it a liberal application.[30] In short, courts have refused to recognize any new implied terms, and have similarly declined to recognize any new free-standing doctrines similar to the duty of honesty in performance.[31] If any radical change is to come, then that change will likely have to come from the Supreme Court of Canada itself.

That being said, there remains one particularly interesting question: what if a litigant were to argue that the previously recognized duties of good faith, which were all implied duties, instead be migrated to free-standing status in the same vein as the duty of honesty in *Bhasin*? In other words, is it possible that certain good faith duties evolve to override express contractual terms? As a starting point, it is useful to consider perhaps the strongest judicial statement against liberal use of *Bhasin*: "*Bhasin* is no authority for unbridled creativity *in the*

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freedom of contract is a "fundamental [commitment]" and "basic principle" of common law to confirm this. See *supra* note 1 at paras 70, 79.

29. See e.g. *Keating Construction Company Limited v Ross*, 2015 NSSC 173 at paras 54–59, 76–81 (relating *Bhasin* to the duty to exercise discretionary power in good faith in order to find that a pattern of consistent minimal payments constituted a breach of said duty).

30. The case law is already ample on this point. See *Bank of Montreal v Javed*, 2016 ONCA 49 at para 12 (refusal to extend the doctrine of unconscionability to cover contractual performance); *Reserve Properties Limited v 2174689 Ontario Inc*, 2015 ONSC 3469 at para 21 (refusal to imply a duty to remind a counterparty of their contractual obligations); *Moulton Contracting Ltd v British Columbia*, 2015 BCCA 89 at para 68 (refusal to combine the test for implying terms in law with the test for implying terms in fact).

31. On the other hand, it appears that *Bhasin* has emboldened some courts to aggressively inquire into the parties' motives, using the established good faith doctrines as their framework. For example, in *0856464 BC Ltd v TimberWest Forest Corp*, the Court determined that contrary to the contract's term that the parties would renegotiate rates in good faith on a yearly basis or else terminate the contract, TimberWest's dominant motive was actually to terminate the contract. The Court therefore found that TimberWest was acting in bad faith by trying to defeat the very purpose and objectives of the contract. See 2014 BCSC 2433. However, such scrutiny of motives is not necessarily a new phenomenon. See *Deere (John) Ltd v GAEL Inc et al* (1994), 96

creation from whole cloth of obligations in a contractual context which the parties have not provided for or have addressed in a fashion which one party regrets in hindsight."[32] Respectfully, Dunphy J overstepped the mark somewhat in his strong aversion to a liberal application of *Bhasin*. In a strict sense, duties of good faith typically arise where the contract has not provided for such obligations, although a contextual approach would suggest that the parties' interactions *not* memorialized in the contract provided for good faith duties. But, to take just one example, the duty to exercise contractual discretion in good faith is not a creation from whole cloth; there is a long line of jurisprudence that affirms such a duty is well within parties' reasonable expectations.[33] Indeed, if ever there was an instance of an obligation being cut from whole cloth, then Dunphy J would need to look no further than *Bhasin* itself for proof. Justice Cromwell relied on very little jurisprudence[34] and no empirical evidence to recognize such a duty, yet this posed no problem.

Thus, a similar argument for migrating the duty to free-standing status would not face the hurdle that other novel arguments have taken. Instead, the only guidance available for evaluating such an argument is from *Bhasin* itself, in which Cromwell J contrasted the creation of a mandatory rule with the potential for interference with freedom of contract. But, to borrow from Cromwell J's own line of reasoning in favour of the duty of honesty, if a party already expects such behaviour to be covered by a legal duty, then it makes little sense to say that it will interfere with a freedom of contract that is not really exercised in the first place.[35] Applying this rationale to the duty to exercise contractual discretion in good faith, it would appear quite simple to argue that because parties expect good faith behaviour, that duty therefore minimally

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Man R (2d) 106, 1994 CarswellMan 323 (WL Can) (QB); *Valley Equipment Ltd et al v Deere (John) Ltd* (2000), 223 NBR (2d) 264, 4 BLR (3d) 282 (QB (TD)).

32. *Addison Chevrolet Buick GMC Limited et al v General Motors of Canada Limited et al*, 2015 ONSC 3404 at para 116 [emphasis added], rev'd on other grounds 2016 ONCA 324.

33. See *Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd* (1992), 129 AR 177, [1992] AJ No 287 (QL) (QB), aff'd (1994), 19 Alta LR (3d) 38 (CA), leave to appeal to SCC refused, [1994] 3 SCR v; *Gateway Realty Ltd v Arton Holdings Ltd (No 3)* (1991), 106 NSR (2d) 180, 288 APR 180 (SC (TD)) [*Gateway Realty*], aff'd (1992), 112 NSR (2d) 180 (SC (AD)); *LeMesurier et al v Andrus* (1986), 54 OR (2d) 1 at 6–7, 25 DLR (4th) 424 (CA) [*LeMesurier*], leave to appeal to SCC refused, [1985] 2 SCR v; *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621, rev'd 2017 ABCA 1; *Greenberg v Meffert et al* (1985), 18 DLR (4th) 548 at 554, [1985] OJ No 2539 (QL) (Ont CA), leave to appeal to SCC refused, [1985] 2 SCR ix.

34. See *Bhasin v Hrynew*, *supra* note 1 at para 73.

35. See *ibid* at para 76.

impairs freedom of contract and would therefore face no hurdle to becoming a free-standing duty.

In fact, if the test for recognizing a free-standing duty is as simple as minimal impairment of freedom of contract, then one could make a compelling argument that any and all good faith duties, *by virtue of being good faith duties*, would minimally impair freedom of contract since it is behaviour that contracting parties already expect. By virtue of being a good faith duty, that duty would therefore meet the threshold for free-standing status. It therefore appears that while good faith remains largely within the domain of implied terms, the door is now open to migrating good faith into free-standing status by following the logic employed in *Bhasin*. As noted above, such a change is unlikely to come from lower courts, but if the issue makes its way to the Supreme Court of Canada again, then the Court may be persuaded on the same grounds to give good faith doctrines the same treatment.[36]

D. A Comparative Case: The View from Quebec in Churchill Falls (Labrador) Corp v Hydro-Québec

As noted, good faith is and long has been a core feature of Quebec civil law. Earlier case law (e.g., *National Bank v Soucisse et al*,[37] *Houle*[38]) marked significant developments in the civil law on good faith—yet, contrary to the school of thought that restrictions on freedom of contract are catastrophic, these changes did not bring contracting to a grinding halt. The civil law incorporated these new doctrines and commerce continued apace. Yet, subsequent to the introduction of the *Code civil du Québec* in 1994, the Supreme Court of Canada did not render a major decision on civilian good faith. An observer unfamiliar with civil law might therefore be forgiven for thinking that good faith is a topic largely settled in Canadian civil law. Yet one need only look as far as the Supreme Court of Canada's recent decision in *Churchill Falls (Labrador) Corp v Hydro-Québec*[39] to see that the topic has taken on new life and has raised new questions regarding its role in a modern theory of contracts. Notwithstanding the ultimate result reached at the Supreme Court of Canada, *Churchill Falls* offers a mirror image to *Bhasin* at the doctrinal level in the possibility of civil law moving from a dominantly external mode of good faith to one that incorporates duties

36. Granted, the Supreme Court of Canada is not necessarily required to follow its own precedent. See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 38–47. That being said, it seems unlikely that the reasonable expectations of commercial persons will fundamentally change any time soon so as to reverse decades of good faith jurisprudence.

37. See e.g. *supra* note 18.

38. See e.g. *supra* note 19.

39. 2018 SCC 46 [*Churchill Falls* SCC].

emerging from the contract itself. In turn, the general theoretical questions raised by *Churchill Falls* highlight a fundamental debate over the suitability of classical contract theory in twenty-first century Canadian commerce and the growing recognition of relational contracts as a substantial part of the landscape.

In brief, the facts of *Churchill Falls* were (if oversimplified) as follows: in 1969, after several years of negotiation, the Churchill Falls (Labrador) Corporation Limited and Hydro-Québec signed a power contract in which Hydro-Québec undertook to purchase in excess of eighty-five per cent of the electricity produced by the Churchill Falls hydroelectric plant. The contract provided that Churchill Falls would receive a fixed price for the electricity, and that the price would decrease over the contract's forty-year term (as well as a subsequent twenty-five-year renewal contract). However, the oil-related inflation of the 1970s and United States' government-endorsed wholesale electricity markets (which opened Canadian electricity exports to United States' markets) changed the circumstances of the Churchill Falls contract such that Hydro-Québec received a massive windfall from the contract; by some estimates, it would obtain a value of $250 billion by reselling the electricity, in exchange for the $5.8 billion that it would pay over the course of the contract.

While Churchill Falls had tried over the years to force Hydro-Québec into renegotiating the terms of the contract, Hydro-Québec had repeatedly refused and been successful in litigation initiated by Churchill Falls.[40] The most recent case began with Churchill Falls submitting that at the time the contract was signed, the parties' interdependence and the circumstances surrounding the execution of the contract demonstrated a mutual intention to share equitably the risks and benefits flowing from it. According to Churchill Falls, the extent of profits received by Hydro-Québec upon resale of the electricity was unforeseeable, and this disproportionate division of profits was incompatible with their interdependent relationship and divorced from the original division of risks and benefits. Churchill Falls argued that Hydro-Québec's obligation to act in good faith, to cooperate, and to exercise its contractual rights reasonably required that the pricing under the contract be renegotiated.

The trial judge rejected Churchill Falls' arguments, concluding that the relationship between the parties *was not* based on an equal sharing of the risks and benefits flowing from the contract. To the contrary, Hydro-Québec incurred the majority of the risk to enable Churchill Falls to debt finance the construction of the plant without any reduction in Churchill Falls' equity in the project. In consideration of the risk assumed, Hydro-Québec obtained the guarantee of fixed stable pricing as well as the protection against inflation of operating costs. On appeal at the Court of Appeal of Quebec, Churchill Falls argued that the long-term, interdependent nature of the contract (in other

40. See *Hydro-Québec v Churchill Falls (Labrador) Corp*, [1988] 1 SCR 1087, 86 NR 3; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297, 8 DLR (4th) 1.

words, its *relational* nature) justified heightened duties of collaboration and good faith that required the parties to adapt and adjust over the life of the contract.[41] However, the Court rejected the suggestion that the contract bore a relational character on the grounds that the parties were sophisticated, the negotiations were lengthy, and the contract was complex.[42]

On further appeal to the Supreme Court of Canada, Churchill Falls adopted largely the same approach, relying on the general civilian duty of good faith and the premise that the parties' relationship was relational in nature.[43] However, a seven-judge majority of the Supreme Court of Canada (Rowe J dissenting)[44] dismissed the appeal, upholding the trial judge's factual findings and both lower courts' legal analysis with respect to good faith. Put briefly, the contract was not relational,[45] and the principle of good faith under the *Code civil du Québec* could not deprive Hydro-Québec of its right to rely on the words of the contract.[46] As a general proposition, the majority observed that "[g]ood faith confers a broad, flexible power to create law", and holds the potential to change the civil law over time.[47] But in the context of this case, the majority held that "because good faith is not synonymous with either charity or distributive justice, the courts cannot rely on it to order the sharing of profits that have in fact been honestly earned".[48] In essence, the majority's findings with respect to good

41. In its Supreme Court of Canada factum, Churchill Falls observed that the Court of Appeal of Quebec failed to refer to fundamental cases of Quebec law that established the heightened duties in instances of relational contracts. See *Provigo Distribution inc c Supermarché ARG inc*, [1998] RJQ 47 at 58–59, 1997 CanLII 10209 (CA); *Dunkin' Brands Canada Ltd v Bertico Inc,* 2015 QCCA 624 at paras 59–65, leave to appeal to SCC refused, 36475 (17 March 2016); *Churchill Falls* SCC, *supra* note 39 (Factum of the Appellant at paras 15–16) [FOA].

42. See *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec*, 2016 QCCA 1229 at para 140.

43. See *Churchill Falls* SCC, *supra* note 39 at paras 5, 40.

44. Chief Justice McLachlin took no part in the judgment, thus leaving an eight-judge panel.

45. See *Churchill Falls* SCC, *supra* note 39 at paras 65–71. This conclusion appears to flow primarily from the majority's reliance on Jean-Guy Belley's definition of relational contracts, which, on the majority's interpretation, "provide[s] for economic coordination *as opposed to* setting out a series of defined prestations" (*ibid* at para 68 [emphasis added]). It is unclear from the decision why these two are mutually exclusive, a fact that is troublesome in view of it being the basis for the trial judge's finding (upheld on appeal) that the contract was not relational.

46. In particular, the majority noted that Churchill Falls' arguments were by their very nature related to the civil law doctrine of unforeseeability, notwithstanding Churchill Falls' submission that it was not pleading the doctrine of unforeseeability. As such, the majority's analysis of good faith was closely linked to its analysis of unforeseeability. See *ibid* at paras 84–85.

47. *Ibid* at para 104, citing Marie Annik Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (Cowansville, QB: Yvon Blais, 2010) at 173.

48. *Ibid* at para 107.

faith ultimately rested on two premises: first, the contract was not relational, because the parties' respective benefits and obligations were clearly defined from the start; and second, Hydro-Québec was perfectly reasonable to insist that the terms of the contract be followed, because doing so did not deprive Churchill Falls of any of the benefits to which it was entitled—in fact, it maintained the established contractual equilibrium.[49]

Doctrinally, *Churchill Falls* offers a mirror image to *Bhasin* in the possibility of civil law moving from a predominantly external mode of good faith to one that incorporates duties emerging from the contract itself.[50] The analysis above has focused on the common law's move from an "internal" good faith—that is, one traditionally understood as emerging (at least ostensibly) from within the contract itself—to an "external" one that imposes mandatory terms from outside the contract. By contrast, *Churchill Falls* offered up the potential—notwithstanding its ultimate result—for the opposite: a move away from externally imposed duties of good faith towards a duty understood as *internal* to the contract (that is, flowing from the nature of the contract[51]). Specifically, the majority's evaluation of Hydro-Québec's behaviour as gauged against the full nature and scope of the contract suggests that, even from the external perspective, the internal aspect plays a crucial role in good faith civil law. This comparison between *Churchill Falls* and *Bhasin* is therefore an interesting one for approaching good faith from opposite directions; at least in the present day, categorical boundaries between the internal and the external, the common law and the civil law, are more fluid than they first appear. Insofar as the civil law's move from external to internal incorporates an evaluation of the reasonableness of the parties' behaviour,[52] however, this discussion of *Churchill Falls* anticipates the discussion below of reasonable expectations as a doctrinal concept and highlights the extent to which it pervades theorization of good

49. The majority also reiterated (in passing) its concern that to find in favour of Churchill Falls would indirectly admit the doctrine of unforeseeability into the civil law, a proposition that the majority had already rejected in its decision. See *ibid* at para 123.

50. Interestingly, Gascon J (writing for the majority) observed that "good faith and equity . . . are incompatible with a rule [e.g., unforeseeability] that would depend on external circumstances rather than on the conduct and the situation of the parties". See *ibid* at para 98. At least to this extent then, the civil law recognizes that good faith emerges from the contract itself, although one might nevertheless still query the extent to which this paints the full picture, so to speak, in light of good faith being imposed by the *Code civil du Québec*.

51. One might debate the extent to which the proposed duty derives from the *specific* contract insofar as it is still part of a class of contracts (relational contracts), but the fact remains that the proposed duty flows from the contract itself. Indeed, the classification of the contract in question in *Churchill Falls* plays an important part in both the majority decision and the dissent.

52. See *ibid* at paras 113, 118–19.

faith—notwithstanding how conceptually uncertain and problematic it is (as argued below in section II.B).[53]

At a more general theoretical level, *Churchill Falls* thus raises an important and interesting question about whether and how the character of a contract can influence the duties that attach to it, and indeed whether the classical theory of contracting as a discrete economic transaction is still appropriate as a dominant basis for interpretation in twenty-first century Canada. As noted above, the majority of the Supreme Court of Canada in *Churchill Falls* addressed classification of the contract at length in order to arrive at its ultimate conclusions,[54] and indeed the rejection of the contract at issue as relational appears to have gone some way towards rejecting the possibility of any new good faith duty in the circumstances. Regardless of the fact that this question was posed in the civil law context, its fundamental nature makes it relevant (and perhaps binding) to common law contract law (and therefore good faith). Interestingly, then, the potential ramifications of a civilian good faith case may yet yield further significant influence on the future of common law good faith. While one of the central questions of this paper rests on the extent to which *Bhasin* has injected a civilian strain into common law good faith, the more important issue may soon be over the very terms that govern the debate over good faith in both common law and civil law.

Notwithstanding Churchill Falls' failure in its own case, its argument for greater recognition of relational contracting may portend an even greater convergence between the civilian and common law versions of good faith. As Churchill Falls observed quite fascinatingly in its factum on appeal to the Supreme Court of Canada, it is equally true in civil law that the notion of relational contracting is itself supported by good faith (as well as equity and abuse of rights), insofar as the latter displaces the centrality of classical contract theory (indeed, the majority observed similarly[55]).[56] The end result, then, may be akin to a positive feedback loop in which a theory of relational contracts strengthens doctrines of good faith, which in turn reinforce the importance of relational contracts. While the majority did not go so far as to endorse relational contract theory as a central part of civilian contract theory—indeed, the majority appears to take relational contracts as simply one category of contracts

53. See also Sébastien Grammond, "Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions" (2010) 48:3 Can Bus LJ 345. Grammond compares the viability of reasonable expectations as an interpretive tool at common law and civil law, and briefly raises the possibility that good faith and reasonable expectations are to some extent analogous tools (*ibid* at 362–63).

54. See *Churchill Falls* SCC, *supra* note 39 at paras 51–71.

55. See *ibid* at paras 103–04.

56. See FOA, *supra* note 41 at paras 98–111. See also *Gestion Segi ltée c 8277346 Canada inc,* 2014 QCCS 4113 at para 37; *ABB Inc v Domtar Inc*, 2007 SCC 50 at para 1.

among many others—the majority decision nevertheless represents a modest step towards judicial recognition of relational contracts as part of the landscape of civilian contract theory. If one accepts the premise that this modest step might be applicable to common law contracts, it may then signal an even more prominent role for good faith in Quebec—which, flowing from Cromwell J's endorsement of aligning Canadian common law with Quebec law, would itself suggest the potential for greater instability in common law good faith doctrine. In sum, the potential state of good faith law in Quebec may continue to exert a strong pull on common law good faith, albeit by modest increments—making it all the more imperative to forecast common law good faith's current trajectory as it currently stands.

E. The Doctrine of Frustration Provides a Precedent of Stability

One view suggests that even in light of the radical basis on which the change in *Bhasin* occurred, and even in light of the significant change it may produce in future, those long-term consequences will not necessarily bring incoherence and instability. Rather, there is precedent for a similar migration to free-standing status that already exists in the history of common law—one that avoided causing doctrinal or commercial turmoil. One need look no further than the doctrine of frustration and its historical development, moving from life as an implied term to a more generally equitable approach that is now at some distance (though not entirely divorced) from interpreting the parties' intentions.[57] While the early common law was reluctant to accommodate any doctrine of frustration,[58] the mid-nineteenth century saw a move towards interpreting frustration as an implied term of a given contract. The seminal case on this point was *Taylor v Caldwell*.[59] There, a music hall burned down shortly after the creation of a contract to rent it, preventing the renters from carrying out their use of the hall. The renters sued the music hall owners for breach of contract for failing to rent the music hall to them. Lord Justice Blackburn, relying in large part on Roman law and (perhaps not coincidentally as it pertains to this paper) the French *Civil Code* for authority, found that "the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor".[60] Much like duties of good faith, frustration therefore spent much of its life as an implied term, carrying with it an underlying civilian influence.

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57. See McCamus, *The Law of Contracts*, *supra* note 26 at 601–06.

58. See *ibid* at 601. See also *Paradine v Jane* (1647), 82 ER 897 (KBD); *Walton v Waterhouse* (1673), 85 ER 1233 (KBD); *Hadley v Clarke* (1799), 101 ER 1377 (KBD); *Atkinson v Ritchie* (1809), 103 ER 877.

59. (1863), 122 ER 309 (QBD).

60. *Ibid* at 312–14.

But the deficiencies in this iteration of the frustration doctrine quickly became apparent for the strained logic that was required to find the implied term. It was often evident that the interpretation did not concern the actual intent of the parties, given that it would be far-fetched to understand the parties as having implied something they neither expected nor foresaw.[61] Accordingly, the law on frustration progressed to a more intellectually candid stage in which courts were (and are) more apt to ask, on construction of the agreement, whether a party's contractual obligation(s) can no longer be performed because the circumstances are so radically different that the contract is now fundamentally different or impossible to execute.[62] As such, it was not divorced from the contract in the same way as occurred with the new duty of good faith in *Bhasin*, but the application of frustration migrated away from a highly empirical analysis (albeit in an artificial sense) towards a more equitable approach that included normative considerations of what would be reasonable in the circumstances.[63]

The evolution of frustration might thus be aptly characterized as a milder version of good faith's current move from implied terms to free-standing status, given that the more nakedly normative framework of good faith's potential future is not matched by the history of frustration. That being said, what was true of frustration may be equally true of good faith: insofar as the intellectually candid approach of frustration's current phase is more desirable as a matter of theoretical coherence and logical clarity, so too may it be more candid to say that good faith imports a much more significant normative dimension than

61. McCamus, *The Law of Contracts*, *supra* note 26 at 603, citing *Davis Contractors Ltd v Fareham Urban District Council*, [1956] 2 All ER 145 at 159, [1956] AC 696 (HL (Eng)) [*Davis*].

62. See *Davis*, *supra* note 61 at 159–60.

63. Interestingly, there have actually been two lines of cases addressing frustration in very different ways, as discussed by McCamus. See McCamus, *The Law of Contracts*, *supra* note 26 at 603–05. In the first, the applicability of frustration depends on the construction of the agreement, meaning an express term may in fact serve to exclude or limit frustration. For an outline of this, see the text accompanying note 62. This approach is the law in Canada. See *Peter Kiewit Sons' Co v Eakins Construction Ltd*, [1960] SCR 361 at 368, 22 DLR (2d) 465; *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58 at paras 53, 56. This is unlike the new duty of good faith, except to the extent that duty can be modified. See *Bhasin v Hrynew*, *supra* note 1 at paras 77–78. The other line of cases, however, advocated a more radical approach similar to that in *Bhasin*, proposing that a court holds discretion to qualify the terms of the contract in order to do what is just and reasonable. Lord Denning, unsurprisingly, was an advocate of this approach. See *British Movietonews Ld v London and District Cinemas Ld* (1950), [1951] 1 KB 190 at 200, [1950] 2 All ER 390 (CA), rev'd (1951), [1952] AC 166 (HL (Eng)). This approach has not caught on though, in either Canada or the UK. See McCamus, *The Law of Contracts*, *supra* note 26 at 605–06.

an implied terms framework would suggest. Admittedly, a claim to greater theoretical coherence and clarity in this respect might be more contentious, given that it is much more plausible under an implied terms framework to say that parties implicitly intend for contractual discretion to be exercised reasonably, for example. Notwithstanding this fact, bringing doctrines of good faith under the aegis of a free-standing normative framework would greatly simplify matters by obviating the need to distinguish between terms implied in law versus implied in fact. Additionally, removing the need to address the matter in contractual drafting may very well reduce transaction costs. As an analogue for present-day good faith, it bears noting that there is no indication in the literature that changes to frustration negatively affected either commercial certainty or the coherence of contract law, notwithstanding the arguably significant nature of that change. To the extent that frustration is at all valuable as historical precedent for the current (and possible future) changes to good faith, then, it is therefore clear that moving away from a strictly empirical approach is not necessarily fraught with peril.

II. The Second View of the Cathedral: Reasonable Expectations as a Basis for Change

Because such a change in *Bhasin* was drastic and unprecedented, the question quite naturally follows: *why* make such a change? At a most basic jurisprudential level, the common law on good faith was incoherent and unable to provide any guidance as to its development, making it ripe for analysis by the Supreme Court of Canada. But of the same token, Cromwell J was careful not to stray too far from the available case law's reliance on an underlying principle of protecting parties' reasonable expectations. Accordingly, Cromwell J summarized the Court's rationale for these developments as follows:

> First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States . . . While these developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.[64]

64. *Bhasin v Hrynew*, *supra* note 1 at para 41.

While the first two of these three justifications are likely uncontentious, Cromwell J's recourse to reasonable expectations warrants closer scrutiny for the reason that, despite being a problematically vague concept, reasonable expectations escapes such examination in *Bhasin*. Such problems are twofold, and in fact serve to undermine each of Cromwell J's three priorities.

First, the literature on reasonable expectations demonstrates that, although the concept of reasonable expectations has underpinned the development of common law good faith, the standard by which we measure reasonableness has never been consistent in either the academic literature or the jurisprudence—nor is it likely to become so. Because the shape of reasonable expectations shifts from case to case, the problems of incoherence in common law good faith are reshuffled rather than resolved. In each case, the fact remains that a judge must decide which conception of reasonable expectations to adopt in such a way that it is adequately specific to the circumstances, if that is in fact possible. The coherence and certainty that Cromwell J seeks are likely illusory, since the malleability of reasonableness may take it in unforeseen and inconsistent directions.

Second, and flowing from the first problem, Cromwell J's decision to conceive of reasonable expectations largely according to common law Canada's trading partners divests the common law of autonomy and self-actualization, thereby recalling and re-instantiating the unresolved American debate over incorporating foreign law. The result, depending on which position one adopts, is a problematic fettering of judicial discretion if courts are forced to rely on foreign law in future, the long-term results of which may run contrary to the commercial certainty that Cromwell J was attempting to protect in the first place. In short, reliance on reasonable expectations of this sort may have the problematic effect of defeating the reasonable expectations of Canadian common law actors in the long term.

A. Survey of the Academic Literature and Common Law Jurisprudence[65]

As noted above, the literature on good faith has never succeeded in pinning down a clear, stable definition of reasonable expectations, notwithstanding the central role of reasonable expectations in developing common law good faith. This is largely because of the tension between expectations generated by

65. This section (especially subsection (iv)), borrows and quotes extensively from, as well as adds to, what I have written elsewhere. Rather than cite to each instance of my other article however, I would direct the reader to the entire section of the other article, given that it is relatively short. See Nicholas Reynolds, "The New Neighbour Principle: Reasonable Expectations, Relationality, and Good Faith in Pre-Contractual Negotiations" (2018) 60:1 Can Bus LJ 94 at 102–05.

the particular interaction, and those imposed according to external standards (those external standards themselves being very malleable according to any given judge). From a review below of three important theories of good faith in the academic literature (all of which Cromwell J cites in *Bhasin*), it is apparent that no matter how they are conceived, reasonable expectations defy a specific description.

(i) Robert Summers' Excluder Analysis

Summers, the first modern academic author to substantially treat good faith performance, somewhat ironically proposed the view that a specific definition of good faith is impossible, and therefore it is best defined as an "excluder".[66] That is, good faith only takes on specific meaning in contrast to a specific form of bad faith, which is manifested in certain forms of conduct that are prohibited by existing doctrines.[67] Notwithstanding Summers' opposition to ascribing a specific definition, he nonetheless accepted that underpinning good faith in its many manifestations was the notion that it "'is not to be measured always by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with one another'".[68] In other words, the underlying standard of good faith is an objective one, and, as such, relies on the expectations that may reasonably arise in a member of the community. Indeed, the *Restatement (Second) of Contracts*, which adopted Summers' analysis, bears this out:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an *agreed common purpose* and consistency with the *justified expectations* of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' *because they violate community standards of decency, fairness or reasonableness.*[69]

In short, the emphasis in Summers' analysis is on a set of expectations based on community standards, irrespective of the parties' subjective understandings.

66. See Robert S Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54:2 Va L Rev 195 at 201.

67. See *ibid* at 201, 203 (including arbitrary and capricious exercise of power to terminate contract, overreaching interpretation of contract language, and lack of diligence in mitigating another party's damages).

68. *Ibid* at 204, citing *First National Bank of Chicago et al v Trebein Company et al*, 59 Ohio St 316 at 324–25, 52 NE 837 (1898).

69. § 205 (1981) [emphasis added].

Much as Valcke proposes that the common law understands normative reasonable expectations (e.g., "community standards") as part of the parties' factual reasonable expectations (e.g., "faithfulness to an agreed common purpose"[70]),[71] so too can it be said that Summers' reasoning accommodates a similar implication. The problem, however, is that neither Summers nor the *Restatement* ever clearly explain what is meant by community; the concept's shape and scope are never doctrinally stable, relying on interpretation of the particular contract to crystallize in that particular instance. Accordingly, this understanding of reasonable expectations is problematic for its conceptual instability; whenever a judge employs community standards, there is very much a choice being made as to what those standards will look like, according to how broadly or narrowly community is defined (e.g., in a narrow trade or technical sense versus a broader societal sense of community). On this account, there is little theoretical coherence and stability to be found.

(ii) Steven Burton's Foregone Opportunities Analysis

A second definition, proposed by Burton, offered a law and economics-based definition of a contracting party attempting to recapture an opportunity that is foregone as a consequence of entering into the contract,[72] without explicitly defining reasonable expectations according to community standards or other external normative frameworks. One might understand Burton's definition as a scenario in which both parties have developed reasonable expectations based on the other's representations, though those expectations have not been memorialized in contract form;[73] as such, reasonable expectations are ostensibly generated in the specific interactions of the contracting parties. Doctrines of good faith, in this view, accordingly serve to ensure those reasonable expectations are met.[74]

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70. *Ibid*.

71. See Valcke, *supra* note 21 at 54–57.

72. See Steven J Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94:2 Harv L Rev 369 at 373.

73. Indeed, though Burton does frame his argument as focusing narrowly on the economic elements of the contract, he too expressly relies on the expectations of reasonable persons in the position of a contracting party as a means of determining when a duty of good faith has been breached. See *ibid* at 391.

74. Indeed, this is largely congruent with Posner's law and economics account of contract law, which holds that the purpose of contract law is to prevent opportunistic behaviour. See Richard A Posner, *Economic Analysis of Law*, 6th ed (New York: Aspen, 2003) at 94.

Interestingly, though, Burton's definition arguably does not speak to a problem that is of the contract itself, i.e., of its words; doctrines of good faith operate as gap fillers to ensure that situations arising out of the relationship that are *not* covered by the words of the contract still meet a certain level of conduct that can reasonably be expected of both parties. Put differently, the gap-filling function of good faith as it is imposed to contracts may stem from the implied terms of the contract itself, and in this sense skews closely to Valcke's explanation of normative reasonableness being recognized as *flowing from* an assessment of factual reasonableness. In this sense, Burton's theory fails to push against the normative aspect more prevalent in other literature and jurisprudence—Burton cannot escape the premise that recapturing foregone opportunities is foreclosed *not strictly* as a result of the contract's words. Rather, the words of the contract import external, objective standards of what the parties could reasonably expect from their relationship. Again, the problem remains unresolved as to what those standards are or how they can be established, leaving ample room for jurisprudential inconsistency and incoherence.

(iii) Allan Farnsworth's Objective Standard

A third definition, proposed by Farnsworth, relies heavily on an objective standard for assessing the quality of contractual behaviour:

> Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what *cooperation* was required has always been an *objective standard, based on decency, fairness or reasonableness of the community* and not on the individual's own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance.[75]

Farnsworth's theory similarly emphasizes cooperative behaviour that is not necessarily bound up in the terms of the contract itself. Even if a contract calls for cooperation between the parties, the content of cooperation is measured by an objective standard that is based in large part on reasonable expectations of the community. The problem, of course, is that Farnsworth too fails to define community—indeed, his definition is perhaps even more problematic in view

75. E Allan Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963) 30:4 U Chicago L Rev 666 at 672 [emphasis added].

of his evaluative framework incorporating "decency, fairness *or* reasonableness of the community";[76] it is anyone's guess how these three different concepts interact, if at all, to inform this external evaluative framework.

(iv) Canadian Literature and Common Law Jurisprudence

Somewhat surprisingly, the Canadian academic literature on good faith has in some sense historically been less robust than its American counterpart and has had difficulty finding purchase in the case law. This state of affairs is best illustrated by reference to Angela Swan and Jakub Adamski's commentary on good faith, common law Canada's most authoritative and sophisticated thinking on the topic. Swan also identifies protection of the parties' expectations as nearly synonymous with good faith.[77] Swan argues compellingly that given the historical pedigree of honesty and fairness as shared norms for facilitating commerce, it is puzzling that Canadian common law courts have historically been apt to reject good faith as a concept that embodies these norms (and that is therefore well within the parties' expectations).[78] Thus, Swan explains good faith as underlain, at a minimum, by a standard of honesty and fairness.

Interestingly, Swan distinguishes between good faith and reasonableness, suggesting that the latter imports more restrictive requirements:[79] whereas reasonableness focuses on rationality or the absence of subjective whim (in other words, to defend rationally an action or decision), the requirements of honesty and fairness inherent in good faith are less demanding. While one might quibble with drawing a distinction between fairness and reasonableness (insofar as the two are largely empty of consistent conceptual content), Swan rightly points out that good faith and reasonableness largely overlap.[80] The only criticism that this paper would make here is that good faith is perhaps better understood as a *subset* of reasonableness; honesty is in some sense a less-demanding prerequisite for rationality, while fairness, it seems safe to say, requires some measure of rationality to be understood. Put differently, honesty

76. *Ibid* [emphasis added].

77. See Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham, ON: LexisNexis, 2012) at §§ 9.181–9.206. Regrettably, this statement necessarily oversimplifies Swan's position in the interest of brevity. A more detailed exposition of Swan's position can be found in the original text (*ibid* at §§ 9.168–9.206).

78. See *ibid* at §§ 9.181–9.186.

79. See *ibid* at § 8.135. Recently, the Court of Appeal of Alberta drew this same distinction, quoting from Swan's treatise. See *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 at para 59.

80. See Swan & Adamski, *supra* note 77 at §§ 9.181–9.183.

and fairness are reasonable because they are implicitly rationally defensible—they are simply so self-evident that they do not require defence. Thus, Swan identifies, both implicitly and explicitly, that reasonable expectations underpin good faith.[81]

The common law jurisprudence on good faith, although similarly consistent in relying on reasonable expectations as a central component in developing good faith (as the analysis below suggests), is unfortunately just as vague and inconsistent in conceptualizing reasonable expectations.[82] Yet this should perhaps come as no surprise, given that the American literature discussed above formed part of the basis upon which Canadian common law good faith law developed in its current, modern incarnation;[83] the first moves towards accepting a broad role for good faith in common law contracts occurred via the Ontario Law Reform Commission, in two separate reports, both of which drew on the American literature.[84] Notwithstanding this problematic conceptual basis, however, it remains clear that Canadian common law good faith law has relied on reasonable expectations as a central feature. As Geoff Hall observes, there have been at least six circumstances in which duties of good faith performance have arisen.[85]

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81. Grammond explores the use of reasonable expectations as an interpretive tool at common law and civil law, and briefly raises the possibility that the concept accomplishes much the same analytical work that good faith does under the *Code civil du Québec*. See Grammond, *supra* note 53. This discussion is even more germane now in light of the arguments raised in *Churchill Falls*.

82. This may be attributable to a number of factors other than those which I discuss. As Swan and Adamski point out, Canadian common law courts have had tremendous difficulty with the concept of good faith in general, likely due in part to their conflating the concept with its fiduciary roots. See Swan & Adamski, *supra* note 77 at §§ 4.186–4.193.1.

83. For case law on good faith as having been inherited from early English common law, *cf* *Aleyn v Belchier*, *supra* note 10; *Mills v Mills*, *supra* note 10; *Mellish v Motteux*, *supra* note 10; *Carter v Boehm*, *supra* note 10.

84. See OLRC, *Report on Sale of Goods*, *supra* note 13 at ch 7; OLRC, *Report on Amendment*, *supra* note 13 at 170–72.

85. Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis Canada, 2016) at 39–45 [Hall, *Contractual Interpretation*]. The six circumstances are:

1. Duty to exercise a discretionary power in good faith;
2. Duty to act in good faith in complying with a condition precedent;
3. Duty to act in good faith when invoking a rescission clause in an agreement of purchase and sale for real property;
4. Duty of good faith in respect of a right of first refusal;
5. Duty of good faith in the performance of franchise agreements; and
6. Duty of good faith in employment contracts at least in respect of termination by the employer.

With respect to four of those duties,[86] reasonableness and reasonable expectations have been integral to articulating these duties' content; despite this, the concept of reasonable expectations has remained poorly defined (if at all) both on its own and in relation to good faith. *Greenberg v Meffert*, a case concerning the duty to exercise discretionary power in good faith, is illustrative of this confusion:

> In any given transaction, the category into which such a provision falls will depend upon the intention of the parties as disclosed by their contract. In the absence of explicit language or a clear indication from the tenor of the contract or the nature of the subject-matter, *the tendency of the cases is to require the discretion . . . to be reasonable*.[87]

While the contract can import a subjective form to contractual discretion, the default standard is reasonableness. Confusingly, the Court of Appeal for Ontario also stated that "[a]part altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith", but indicated that good faith was so fundamental that it "require[s] no elaboration".[88] Thus, although the Court distinguished good faith from reasonableness, it was in fact reasonableness that drove the Court's analysis in the absence of any actual definition of good faith.[89] The Court, however, only went so far as to say that reasonableness entailed an objective standard; it is unclear whose objective standard that was. Similarly, other seminal cases such as *Gateway Realty Ltd v*

Hall suggests that there may possibly be a duty of good faith renegotiation within an existing contract, but the case law is inconsistent (*ibid*). See e.g. *Empress Towers Ltd v Bank of NS* (1990), 50 BCLR (2d) 126 at 130, 73 DLR (4th) 400 (CA), leave to appeal to SCC refused, [1991] 1 SCR vii. It additionally bears noting that the tendering process incorporates a duty of good faith to treat all bids fairly and equally. See *Chinook Aggregates Ltd v Abbotsford (Mun Dist)* (1989), 40 BCLR (2d) 345 at 350, [1990] 1 WWR 624 (CA); *Kencor Holdings Ltd v Saskatchewan* (1991), 96 Sask R 171 at 173, 6 Admin LR (2d) 110 (QB).

86. The other two, performance of franchise agreements and the termination of employment contracts by the employer, are duties implied in law as a means of protecting against power imbalances. See *Shelanu Inc v Print Three Franchising Corp* (2003), 64 OR (3d) 533 at paras 64–74, 226 DLR (4th) 577 (CA); *Honda Canada Inc v Keays*, 2008 SCC 39 at paras 56–59.

87. *Supra* note 33 at 554 [emphasis added].

88. *Ibid* at 556.

89. See generally McCamus, "Abuse of Discretion", *supra* note 12 at 83 (for a similar argument that reasonableness in this context implies a duty to exercise discretion honestly and in light of the purposes for which it was conferred).

Arton Holdings Ltd (No 3)[90] and *LeMesurier et al v Andrus*[91] relied on "community standards of honesty, reasonableness, and fairness"[92] to ground a duty of good faith performance,[93] but, much like the *Restatement*, failed to explain what those terms meant and how they relate to good faith. This same pattern was present across the other manifestations of good faith in Canadian common law.[94]

As such, and despite the lack of an explicit connection between reasonableness and good faith, reasonableness has always stood as an analytical placeholder for the development of good faith in Canadian common law. The problem (identical to the academic literature) remains that reasonable expectations and reasonableness are never precisely defined—indeed, they are often not defined at all—but they nonetheless have been central in shaping common law good faith.

(v) Conclusion

Reasonable expectations, for better or worse, thus underpin the content of good faith performance in the literature surveyed above.[95] But, as is clear, the concept is of limited utility as a means of measuring theoretical coherence and

90. *Supra* note 33.

91. *Supra* note 33 at 6–7.

92. *Gateway Realty*, *supra* note 33 at 191–92.

93. As McCamus importantly observes with respect to *Gateway Realty*, however, the result of the case rested on Arton's express undertaking to use best efforts, meaning this finding of good faith was *obiter* and therefore not authority. See McCamus, "Abuse of Discretion", *supra* note 12 at 79. Indeed, it is equally true that the body of Canadian case law on good faith pre-*Bhasin* did not *require* reference to good faith in order to resolve the issues, making none of it binding (*ibid* at 90).

94. For greater detail regarding each manifestation of good faith, see *Dynamic Transport Ltd v OK Detailing Ltd*, [1978] 2 SCR 1072 at 1084–85, 85 DLR (3d) 19 (condition precedent); *LeMesurier*, *supra* note 33 at 6–7, citing *Mason v Freedman,* [1958] SCR 483 at 486, 14 DLR (2d) 529 (rescission clause in purchase and sale of real property); *GATX Corp v Hawker Siddeley Canada Inc* (1996), 27 BLR (2d) 251 at 276, 1996 CanLII 8286 (Ont Ct J (Gen Div)); *Landymore v Hardy and White Rose Properties Ltd* (1991), 110 NSR (2d) 2 at 16–17, 299 APR 2 (SC (TD)) (right of first refusal).

95. Indeed, explicitly grounding good faith in reasonable expectations is not without support in the academic literature. As Feinman observes, reasonable expectations are exactly that which link the Summers-*Restatement* definition and the Burton definition, notwithstanding their differing approaches to formulating a definition. See Jay M Feinman, "Good Faith and Reasonable Expectations" (2014) 67:3 Ark LR 525 at 529.

justifying legal developments as Cromwell J does in *Bhasin*. Employing the term inevitably requires some value judgment on a court's part, be it explicit or implicit. Justice Cromwell's approach favours the latter, as his appeal to the reasonable expectations of major trade partners evinces a clear but unjustified decision to embrace a wide scope for the concept. In view of the above, it therefore seems difficult to claim that Cromwell J succeeds in bringing coherence and certainty to the law of good faith, given that the incoherent and uncertain nature of reasonable expectations is not remedied by *Bhasin*'s developments. It should therefore come as little surprise that commentators have remarked on the ample measure of uncertainty that *Bhasin* has produced.[96] As will be argued below, the ostensible commercial sensibility of Cromwell J's approach instead belies a problematic forsaking of legal self-determination in Canadian common law that could produce even greater uncertainty in Canadian law.

B. The Is-Ought Problem and Forsaking Autonomy

(i) A Descriptive Approach to Reasonable Expectations Does Not Justify What They Ought to Be

One way in which this problem of reasonable expectations manifests itself is in Cromwell J's decision to conceive of reasonable expectations largely according to common law Canada's trading partners. This move is highly problematic for highlighting the "is-ought" fallacy that underlies Cromwell J's reasoning: namely, the argument that because circumstances *are* a certain way, circumstances *should be* that way. In *Bhasin*, this problem manifests in a more sophisticated fashion: because good faith is treated in a certain way in Quebec and the United States, it should therefore be treated the same way in common law Canada.[97]

At a most fundamental level, it is worth noting that a dogmatic acceptance of commercial considerations as *the* central tenet of contract law precludes a meaningful discussion of its place in contract law, as well as how that law *should* evolve (e.g., in *Bhasin*). In other words, this is where the is-ought problem first manifests. There may indeed be strong arguments to be made in its defence; after all, it was not for no reason that freedom of contract became the dominant

96. See Hall, *Contractual Interpretation*, *supra* note 85 at 46–49.

97. It is worth observing here that while Cromwell J is in one respect referencing Quebec and the United States as points of comparison to prove that duties of good faith can work without impeding commercial activity, it is equally true that he explicitly defines reasonable expectations as including those of Quebec and the United States, not just common law Canada. See *Bhasin v Hrynew*, *supra* note 1 at paras 32, 41, 82–85.

consideration of contract law alongside the rise of capitalism and laissez-faire economics in nineteenth-century liberalism. But Cromwell J's unquestioning embrace (and insistence at several points) of commercial expectations as arguably the most fundamental tenet of contract law troubles the Court's reasoning, especially given the common law's move away from a strict, hands-off approach. Simply because commercial expectations are a certain way does not necessarily mean that those expectations warrant protection. If it was reasonably expected that commercial parties would actively mislead one another in contractual performance, *should* that behaviour be protected? To take a more extreme example, if one comes to reasonably expect police to conduct warrantless wiretapping or mass surveillance, *should* that behaviour be protected? Ultimately, the Court's recourse to reasonable expectations of commercial parties in *Bhasin* presents exactly this problem without a satisfactory resolution, calling into question whether the good faith end products are indeed justifiable or desirable.

(ii) A Multi-Jurisdictional Approach to Reasonable Expectations Re-Instantiates the Debate over Foreign Influence on Domestic Judgments

But perhaps it is unduly harsh to consider Cromwell J's logic fallacious, since an implicit premise of his reasoning seems to be (to put it roughly) that Ontario *should* adapt its law according to an international perspective so as to maximize commercial efficacy and economic welfare (because wealth maximization is good, presumably). After all, one would be hard-pressed to argue against Cromwell J's attractive rationale that a duty of honest contractual performance would enhance certainty among commercial parties precisely because it is what they already expect. However, the issue then becomes the scope by which the Court defines those expectations. In the present case, that scope is (rightly or wrongly) international, according to the laws of Quebec and the United States. The selection of Quebec and the United States as the primary points of comparison is problematic for a number of reasons. Firstly, it is curious that Cromwell J relies solely on Quebec and the United States for his comparative analysis; foremost among the exclusions is the European Union, Canada's second-largest trading partner (if it can indeed be considered as a single entity).[98] The EU, of course, largely accommodates good faith across all

98. See Statistics Canada, *International Merchandise Trade for All Countries and by Principal Trading Partners, Monthly (x 1,000,000)*, Table 12-10-0011-01 (Ottawa: Statistics Canada, 2019), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1210001101>.

of contracting, including the negotiation phase (except for its possibly soon-to-be-erstwhile member, the United Kingdom).[99]

Secondly, and more interestingly, relying on a comparative analysis to guide the development of common law good faith arguably cedes the autonomy and self-actualization of Canadian common law in favour of following the trends of other jurisdictions. This is not to say that a comparative analysis is never useful, of course; it is trite in many respects to say that considering different perspectives helps to sophisticate and refine one's own. But the Court in *Bhasin* takes this approach even further by expressly tying "reasonable expectations of commercial parties" to parties whose expectations are not shaped by Canadian common law.[100] The issue again arises that choosing the scope of reasonable expectations is at least semi-arbitrary, but more importantly, the internal development of Canadian common law is perhaps subordinated to foreign law. In the broadest sense, such an approach may be in keeping with the trend of twenty-first-century globalized commerce, but it runs counter to basic notions of national self-determination and independence on the international stage.[101]

In this respect, the question of foreign sources' influence on Canadian commercial law recalls the debate in human rights and constitutional contexts, more prevalent in the American jurisprudence,[102] over the use of foreign and international law as tools for judicial interpretation. Though not perfectly germane to consideration of a commercial topic such as good faith, the debate between Kennedy and Scalia JJ of the Supreme Court of the United States in the constitutional law context is nonetheless instructive of the controversial role of foreign sources. While Kennedy J was of the view that there is an underlying social and moral framework among nations that validates recourse to international law, Scalia J was staunchly of the view that the United States' moral framework was distinct from the rest of the world, meaning foreign

99. This is of course due to the fact that most of the European Union is comprised of civil law jurisdictions.

100. *Supra* note 1 at para 41.

101. This particular claim might warrant a political theory or international law paper unto itself, but in the interest of keeping the focus of this paper squarely on the legal ramifications of Cromwell J's comparative approach, it must suffice to say that it is generally accepted in academic discussion that self-determination and autonomy are important national attributes, in this instance as expressed through the judiciary.

102. There has been some debate in the Canadian context, albeit to a lesser extent. See, for example, the debate between L'Heureux-Dubé and Iacobucci JJ in *Baker v Canada (Minister of Citizenship and Immigration)* over the applicability of United Nations treaties ratified by the executive but not incorporated into domestic law. See [1999] 2 SCR 817 at paras 69–71, 78–81, 174 DLR (4th) 193.

and international law should not be used.[103] Notions of comity and judicial reciprocity, as well as a shared moral framework, inform Kennedy J's view:

> 'Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some *underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway*.' In other words, Kennedy believes that by invoking foreign law the United States Supreme Court sends an implicit message to the rest of the democratic world that *our society shares its values*.[104]

In light of Scalia J's view, however, it is apparent that Kennedy J's approach to incorporating foreign and international law is very much a normative enterprise that requires its own justification—whether it be through an appeal to comity or any other theoretical perspective.

Given the normative implications of choosing foreign sources in the human rights and constitutional context, the debate and its attendant questions are therefore equally germane to the same issue in the commercial context (e.g., good faith)—notwithstanding the distinction one might draw between relying on foreign *law* in the constitutional context, as opposed to relying on foreign *commercial expectations* as Cromwell J does in *Bhasin*. Justice Cromwell appears to take as a given that Canadian good faith should be guided to some extent by foreign sources, yet he does not assess how the underlying moral and social framework of Canadian commercial law compares to that of the United States, for example. In other words, he presupposes that Canada and the United States share the same basic "rules of the game" when it comes to commerce—but is this correct? The intuitive answer might be yes, given how intimately the Canadian and United States economies are linked. Yet one need only consider that the EU (Canada's second largest trade partner[105]) has very different rules of the game with respect to good faith (e.g., good faith in negotiations) in order to suggest that, in a modern, global context, it would be reductive to tie Canada's framework to that of the United States alone. Instead, privileging American influence requires some normative justification. The most readily apparent justification is on commercial grounds, given that Cromwell

103. See Jeffrey Toobin, "Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court", *The New Yorker* (12 September 2005), online: <www.newyorker.com/magazine/2005/09/12/swing-shift>.

104. *Ibid* [emphasis added].

105. See Statistics Canada, *supra* note 98.

J makes a convincing argument that uniformity with certain trade partners will increase commercial certainty and efficiency—in effect, his argument is a utilitarian one.

Yet in using reasonable expectations as the vehicle by which the judiciary may inject foreign norms into Canadian common law good faith, Cromwell J's approach is problematic for the precedent that it sets, and the uncertain state in which it leaves the law doctrinally. If one accepts the utilitarian or commercial rationale as the normative justification for incorporating foreign norms into Canadian good faith doctrine, then the way to predict how good faith law will develop seems to be reducible to "whichever way will produce the greatest commercial utility". Thus, in one sense, Canadian good faith would be predictable. But from a doctrinal perspective, such an approach would create uncertainty by failing to identify exactly *how* future Canadian law would flow from and fit within the existing case law. If reasonable expectations now includes a foreign element, then this will in future bind courts to incorporate foreign sources when analyzing those expectations. While the weight assigned to these foreign norms is unclear as a general principle, it would nonetheless fetter a court's discretion in choosing how Canadian common law develops, lest the court contradict the foreign elements that make up part of its analysis. Foreign norms would accordingly exert an undefined measure of control over the development of Canadian common law. The alternative is equally unappealing, though, as rejecting foreign norms will instead create the very incoherence in the law that Cromwell J sought to remedy in *Bhasin.*[106] In sum, then, this utilitarian justification leaves good faith law in an uncertain state, undermining *Bhasin*'s stated objective of clarity.

(iii) A Multi-Jurisdictional Approach May Frustrate Commercial Expectations of Common Law Canada

In short, there is no clear or satisfactory answer to this problem. While the short-term result in *Bhasin* may indeed have aligned with commercial expectations in common law Canada, the long-term effects of this multi-jurisdictional approach may in fact work against that objective. Consider, for example, the issue of good faith in negotiations. While it is commonly accepted in civil law jurisdictions in Europe,[107] and in Quebec,[108] that a duty of good faith is owed in the negotiation phase, Canadian common law has made no

106. See *supra* note 1 at para 33.

107. See art 1104 C civ; art 1337 Civil Code (Italy).

108. See *Pegasus Partners Inc v Groupe Laurem Inc*, 2007 QCCS 476 at paras 29–32; *Friedman v Ruby*, 2012 QCCS 1778 at para 49.

such accommodation. The closest the issue has come to being addressed by the Supreme Court of Canada was in *Martel Building Ltd v Canada*, where the Court denied the existence of a duty of care in negotiations not as a matter of principle but on policy grounds.[109] In its reasons, the Court expressly noted that such a duty of care resembles a duty to bargain in good faith, but since a breach of that specific duty was not alleged, it was therefore "a question for another time".[110] However, the rationale for denying the duty of care is nonetheless instructive on the common law's stance towards good faith in negotiations. The Court indicated, among other concerns, that recognizing a duty of care would be contrary to the very nature of negotiations, which are typically meant to "realize a financial gain at the expense of the other party", and that "socially and economically useful conduct could be deterred by depriving a party of any advantageous bargaining position".[111] This concern was similarly expressed in the earlier English case of *Walford v Miles* in stronger terms:

> [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.[112]

The gap between the common law and civil law on good faith in negotiations is clear. As such, any application of this multi-jurisdictional reasonable expectations test would run up against the problem of competing and

109. 2000 SCC 60 at paras 54–73 [*Martel*]. This is not to say, however, that the issue of good faith in negotiations has not been canvassed by common law scholars. On the contrary, it has received attention both within Canada and abroad. See Reynolds, *supra* note 65; Leon E Trakman & Kunal Sharma, "The Binding Force of Agreements to Negotiate in Good Faith" (2014) 73:3 Cambridge LJ 598; Tamara Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of Bhasin v Hrynew and the Organizing Principle of Good Faith in Common Law Canada" (2016) 58:1 Can Bus LJ 1; Violeta Solonova Foreman, "Non-Binding Preliminary Agreements: The Duty to Negotiate in Good Faith and the Award of Expectation Damages" (2014) 72:2 UT Fac L Rev 12; E Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87:2 Colum L Rev 217.

110. *Martel*, *supra* note 109 at para 73.

111. *Ibid* at Headnotes. See also *ibid* at paras 62–67.

112. [1992] 1 All ER 453 at 460, [1992] 2 AC 128 (HL (Eng)).

incompatible expectations with no clear resolution. Thus, the effect of ceding some measure of the Canadian common law's autonomy to foreign jurisdictions is problematic for the contradictory and incoherent results that it may produce. There is no clear solution, apart from abandoning this approach as a one-off in *Bhasin*.

Conclusion

Common law good faith post-*Bhasin* remains largely uncertain, as is its future. As the analysis above has attempted to show, however, it is unclear whether that uncertainty portends a path fraught with pitfalls, or is simply much ado about nothing. The more likely view, as this paper suggests, is *Bhasin*'s radical line of reasoning suggests potentially desirable change in the form of a uniformly normative framework of common law good faith doctrines. The other, less likely view suggests that Cromwell J's reliance on the shaky theoretical grounds of reasonable expectations may simply reinstate the same confusion and incoherence that was characteristic of good faith pre-*Bhasin*, producing a theoretical quagmire from which there is no readily apparent escape. The inevitable, unsatisfactory answer is that time will tell. In the spirit of Calabresi and Melamed's observation that a single analytical framework only gives one view of the law,[113] this paper has attempted to provide two views in order to understand the fuller picture of good faith. While the judicial response to *Bhasin* has to date been a conservative and restrained one, it is clear that this is not the end of the story. Too many questions remain unanswered, and too many perspectives unexplored for *Bhasin* to be more than just a step in the process of reconceiving the Canadian understanding of common law good faith. That process has only just begun.

113. See Calabresi & Melamed, *supra* note 7 at 1089–90, n 2, citing Hamilton, *supra* note 7 at 4–5, 19–20, 27.