The New(ish) Doctrines of Good Faith in Contract Law – The Recent Teachings of the Supreme Court of Canada

By Lisa A. Peters, Q.C.

The recent decisions in *C.M. Callow Inc. v. Zollinger*[1] ("*Callow*") and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*,[2] ("*Wastech*") are a "must read" for commercial lawyers (barristers and solicitors) in all practice areas. In these two decisions, the Supreme Court of Canada ("SCC") built on the foundation laid six years earlier in *Bhasin v Hrynew*[3] ("*Bhasin*").

In *Callow*, the Court expanded on the duty of honest performance first described and applied in *Bhasin*. In *Wastech*, the Court addressed one of the scenarios falling under the organizing principle of good faith it outlined in *Bhasin* – specifically, the duty to exercise contractual discretion in good faith.

While there were cases imposing or rejecting duties of good faith in relation to categories of contracts and in relation to specific powers or behaviours exercised by contracting parties, there were no coherent unifying principles at the appellate court level prior to *Bhasin* and these latest SCC decisions. These decisions articulate doctrines of good faith relevant to those who negotiate and draft contracts, those who perform contracts, and those who litigate claims of breach of contract.

While the SCC has at least begun to articulate a Canadian common law playbook for contractual good faith, there are still many uncertainties. After I review the two decisions and their implications, I will outline some of the uncertainties in the law that remain.

The Duty of Honest Performance and the Decision in *Callow*

In *Callow*, the SCC zeroed in on what is meant by "knowingly misleading" a counterparty in the context of the duty of honest performance articulated six years earlier in *Bhasin*.

As you may recall, in *Bhasin*, the SCC articulated a duty of honesty in contractual performance. Simply put, it was described as a duty not to lie or otherwise knowingly mislead the counterparty about matters directly linked to the performance of the contract. The duty is not, the Court emphasized, a fiduciary duty of loyalty or disclosure, and does not require a party to subordinate his or her interest to that of the other party or forego advantages flowing from the contract. The duty of honest performance operates irrespective of the intentions of the parties and therefore cannot be excluded by an express term.

Post-*Bhasin*, application of the duty of honesty in contractual performance appeared relatively straightforward, particularly where the allegation was that one party had lied in relation to contract performance. What was less clear was the range of conduct that was

[1] 2020 SCC 45. Unless I state otherwise, when I refer to the reasons of the Court, I am referring to the reasons of the majority.
[2] 2021 SCC 7. Unless I state otherwise, when I refer to the reasons of the Court, I am referring to the reasons of the majority.
[3] 2014 SCC 71.

captured by the phrase "knowingly misleading". The decision in *Callow* provides some clarity on this question.

The facts

C.M. Callow Inc. ("C Inc.") entered into a two-year winter maintenance contract (the "Winter Contract") with the defendants, a group of condominium corporations, in 2012. The parties also entered into a separate contract for summer maintenance (the "Summer Contract").

The Winter Contract contained a termination clause that allowed the defendants to terminate (without cause) on giving 10 days' written notice. In early 2013, on the advice of a new property manager, the defendants decided to terminate the Winter Contract but waited until September 2013 to inform C Inc. of the decision and provide the written notice. In the meantime, C. Inc. formed the impression that the defendants were satisfied with its services and that it was likely to get a two-year renewal of the Winter Contract. During the summer of 2013, C Inc. provided free services to the defendants, above and beyond what was required in the Summer Contract, hoping that this would incentivize the defendants to renew the Winter Contract.

The trial judge made certain key findings of fact:

- A representative of the defendants made statements to the principal of C Inc. suggesting that a renewal of the Winter Contract was likely.
- In accepting the freebies under the Summer Contract, the defendants were made aware by C Inc. that its motive in performing them was to encourage a renewal of the Winter Contract.
- Internal communications within the defendant corporations revealed that they knew that C Inc. was under the impression that it would be performing the Winter Contract in the winter of 2013 and that a renewal also was probable, but chose not to disabuse C Inc. of that impression.

C Inc. was successful in its claim for damages for breach of the duty of honest performance at trial. That result was overturned on appeal. The key findings of the Ontario Court of Appeal were that: (a) the dishonesty of the defendants was not connected to the contract then in effect, *i.e.*, the Winter Contract, but rather related to future contracts not yet negotiated or entered into; and (b) while the facts suggested a failure to act honourably by the defendants, they did not rise to the level required to establish a breach of the duty of honest performance.

Key rulings of the SCC

- The duty of honest performance, while having similarities with civil fraud and estoppel, is distinct from and not subsumed by them.

- As the duty applies in the context of unqualified rights to terminate a contract, it does not bar the counterparty from exercising the termination right, but can give rise to damages if that right is exercised dishonestly.

- There was a sufficient link between the dishonesty and the exercise of a contractual right under the existing contract, *viz.*, the right to terminate the Winter Contract. A direct link exists when a party performs an obligation or exercises a right dishonestly.

- As stated in *Bhasin*, the duty is not a free-standing duty to disclose information to a counterparty. It is a negative obligation (not to act dishonestly) as opposed to a positive obligation to disclose.

- Again, as stated in *Bhasin*, the duty is imposed as a matter of contractual doctrine rather than by implication or interpretation, and parties are not free to exclude it. Thus, even where parties have agreed to a term that provided for an unfettered right to terminate a contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by the duty.

- While the determination of whether a party has actively misled their counterparty is a highly fact-specific determination, it can include lies, half-truths, omissions and even silence, depending on the circumstances.

- The defendants had intentionally withheld information in anticipation of exercising their termination right, knowing that such silence, when combined with its active communications, had deceived C Inc. By failing to correct C Inc.'s misapprehension, the defendants breached the duty of honest performance.

- The appropriate measure of damages for a breach of the duty of honest performance is the usual expectation measure of damages for breach of contract, putting the innocent party in the position that they would have been had the duty been performed. Damages are to be measured against a defendant's least onerous means of performance. On the facts, that would have required the defendants to correct C Inc.'s misunderstanding. Had they done so, C Inc. would have had the opportunity to secure another contract for the upcoming winter and would have made an amount at least equal to the profit it would have made on the Winter Contract. The SCC upheld the trial judge's award of damages made up of this profit plus the cost of leasing a piece of equipment to be used under the Winter Contract.[4]

What remains uncertain

- While the Court endeavoured to draw a bright line between fiduciary duties of disclosure and the duty of honest performance, it seems to me that trial courts will face challenges in drawing that line on particular facts in future cases.

- We do not yet know whether the duty of honest performance will apply in the context of unilateral, as opposed to bilateral, contracts, such as stand alone options.

Implications for contract negotiation and drafting

Since the SCC has made it clear that you cannot contract out of the duty of honest performance, there are no direct implications for contract negotiation and drafting.

[4] The concurring minority would have awarded damages based on a reliance measure.

However, parties will still want to be clear on what disclosure obligations they want to impose on each other by way of express terms and negate, to the extent possible, reliance by one party on the other in relation to information that the party in question could obtain on its own.

Implications for contract performance

The principled exercise of self-interest in performing obligations or exercising rights under a contract has not been outlawed. But organizations will want to educate persons within the organization who represent it and communicate on the organization's behalf about the risks arising from *Callow* in terms of lying to or misleading the other party.

Some guidance I would suggest:

- ✓ Answer direct queries from the counterparty about matters of contract performance. For example, respond directly and accurately to questions like, "Do you intend to renew the contract for a second term?" or "Do you intend to exercise your discretion to increase the quotas under the contract this year?"[5]

- ✓ If you are aware of a misunderstanding of the counterparty in relation to how or when the organization is going to perform an obligation or exercise a right, take steps to correct the misunderstanding.

Implications for litigation

In some cases, it will make sense to pair a tort action for misrepresentation with an action alleging breach of the duty of honest performance.[6]

A key factor in assessing whether a claim for a breach of the duty of honest performance is worth making will be the measure of damages that will be available. The amount that the expectation measure will yield will depend on what the plaintiff is able to prove as to the position it would have been in if the defendant had performed honestly. There will be cases where the plaintiff would not been in any different position and will not have suffered a loss compensable in damages.

Discovery strategy should include a search for tangible evidence of lies, half-truths or damning silence by the other party in relation to the performance of key contractual obligations and rights.

The Duty to Exercise Contractual Discretion in Good Faith and the Decision in *Wastech*

In addition to articulating the duty of honesty in contract performance, the SCC in *Bhasin* expounded on what it called the "organizing principle" of good faith, namely that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. The Court explained that this organizing principle was not a stand-alone doctrine

[5] If the person asked the question does not have authority to make the relevant decisions on the organization's behalf, they should make that clear, and refer the counterparty to the person with authority.

[6] In a concurring judgment, Justices Moldaver, Brown and Rowe drew a closer link between the law of misrepresentation and the duty of honest performance in contract, suggesting that one could rely on the former to help demarcate when silence and half-truths will breach the latter.

or rule, but rather manifested itself through existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance.

The Court in *Bhasin* identified the following types of situations and relationships in which the organizing principle had been found to manifest itself in an existing doctrine (while stating that the list was not closed):

(a) Where the parties must cooperate in order to achieve the objects of the contract;

(b) Where one party exercises a discretionary power under the contract;

(c) Where one party seeks to evade contractual duties;[7]

(d) In the employment law context, when dealing with the manner of termination;

(e) In the insurance law context, where insurers are required to deal with their insureds' claims fairly and insureds must act in good faith by disclosing facts material to the insurance policy; and

(f) In the tendering context, where a company that tenders a contract comes under a duty of fairness in considering the bids submitted.

Wastech deals with (b): the duty to exercise contractual discretion in good faith.

The facts

Wastech is a B.C. company engaged in waste transportation and disposal. It had a longstanding commercial relationship with the Greater Vancouver Sewerage and Drainage District ("GVSDD"), having entered into contracts for the disposal of waste from the Metro Vancouver Regional District in multiple time frames dating back to 1986.

The relevant contract, entered into in 1996 after 18 months of negotiations, replaced all prior contracts (the "Contract"). It was for a 20-year term and is described by the SCC as complex. The Contract contemplated waste being hauled to three facilities: one in Vancouver, one in Burnaby and one in Cache Creek. The rate in relation to the Cache Creek Landfill, which was further from the Lower Mainland, was higher.

The Contract defined a Target Operating Ratio and an Actual Operating Ratio. The Target OR was a ratio of .890, reflecting a scenario where Wastech's operating costs were 89% of its total revenues, resulting in an operating profit of 11 percent.

Actual Operating Ratio was the ratio that Wastech, in fact, achieved annually. The Contract provided for adjustments in certain situations where Actual OR exceeded Target OR (adjustment in favour of Wastech) or the Actual OR was less than the Target OR (adjustment

[7] The first three categories are drawn, in part, from the second edition of Professor McCamus's textbook on the law of contracts. They are outlined in the third edition as well; see John D. McCamus, *The Law of Contracts*, 3rd ed. (Toronto: Irwin Law, 2020) at 927-50.

in favour of the GVSDD). But GVSDD did not guarantee that Wastech would achieve the Target OR in any given year.

Each year, GVSDD was required to provide a detailed forecast of allocation of the waste for the next year to Wastech. However, the Contract gave GVSDD the absolute discretion to determine and amend the minimum amount of waste to be transported to the Cache Creek Landfill.

Both parties were aware, during the negotiations, that the amount of waste transported to Cache Creek in a given year might decrease, including based on a decision to redirect waste to the local sites by GVSDD, and that this eventuality could prevent Wastech from achieving the Target OR. However, both believed this scenario to be unlikely and they did not include a specific adjustment to deal with this eventuality.

Waste reallocation by GVSDD in the 2011 operating year resulted in Wastech achieving an Actual OR of 1.045. After taking into account the adjustments expressly provided for in the Contract, Wastech achieved an operating ratio of .960 and made a profit of 4% (*i.e.,* not the profit of 11% achieving the Target OR would have given it).

Wastech pursued arbitration, alleging that GVSDD had breached the Contract by allocating waste among the facilities in a way that prevented it from achieving the Target OR. It alleged an implied term that would have required the parties to reset various rates and payment if GVSDD allocated waste in a manner that made achieving the Target OR impossible. In the alternative, it alleged that GVSDD's discretion to allocate waste was subject to a duty of good faith such that it could not be exercised in such a way as to deprive Wastech of the opportunity to achieve the Target OR.

The arbitrator found for Wastech on the second ground. While he found that GVSDD had reallocated the waste guided by the objectives of maximizing the Burnaby facility's efficiency, preserving remaining land capacity at the Cache Creek Landfill and operating the system in the most cost-effective manner, he concluded that GVSDD had failed to have "appropriate regard" to Wastech's interests under the Contract. Relying on *Bhasin*, he said that the exercise of a bargained-for right was dishonest when it was wholly at odds with the legitimate expectations of the counterparty. Wastech, he said, had a legitimate contractual expectation that GVSDD would not exercise its power in a way that would deprive Wastech of the opportunity to achieve the Target OR. The breach, according to the arbitrator, was not in making the reallocation decision, but rather in failing to compensate Wastech for the lost opportunity to achieve the Target OR.

GVSDD, not surprisingly, sought leave to appeal under s. 31 of the former *Arbitration Act*, R.S.B.C. 1996, c. 55. Leave was granted and an appeal of the leave order was dismissed.[8]

The chambers judge hearing the case on the merits allowed the appeal.[9] The case then went to the B.C. Court of Appeal, where, in unanimous reasons written by Madam Justice Newbury, the appeal was dismissed.[10] Wastech sought and obtained leave to appeal to the SCC.

[8] 2016 BCSC 68 and 2016 BCCA 393.
[9] 2018 BCSC 605.
[10] 2019 BCCA 66.

The SCC took fourteen months to issue reasons – a significant time lapse even in COVID times – and did not issue the reasons at the same time as the reasons in *Callow*, even though the cases were heard together. The SCC ultimately issued a six-justice majority decision and concurring reasons of the three remaining justices. The appeal was dismissed.

Given the facts of the case, in particular the fact that the parties had provided for adjustments based on variations from the Target OR, and had contemplated, but decided against, an adjustment for the eventuality that occurred, the result is not startling.

The reason that the case is so important to commercial contracting is because the SCC majority expounded at length on what it called the contours of the duty to exercise contractual discretion in good faith.

Key rulings of the SCC

- The duty to exercise contractual discretion in good faith is a general doctrine, not an implied term, and operates in every contract irrespective of intention of the parties. Recognizing this duty as a doctrine, said the majority, interferes very little with freedom of contract.

- The duty requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract. In *Bhasin*, this was described as exercising the discretion "reasonably".

- "Reasonable" has specific meaning in this context and should not be equated with the use of that term in other contexts, such as in administrative law.

- Exercising discretion reasonably means exercising it in a manner consistent with the purpose for which discretion was granted in the contract.

- Exercising it capriciously or arbitrarily in light of the purpose of the discretion is wrongful and constitutes a breach of contract.

- Sometimes the text of the discretionary clause itself will make the purpose underlying the discretion clear. Otherwise, the purpose will have to be determined by reading the clause in the context of the contract as a whole. In either case, the determination of what is a reasonable exercise of discretion will be context specific.

- The exercise of discretion should not be assessed from the perspective of whether it was morally opportune or wise from a business perspective.

- Further, you do not work backwards from substantial nullification or evisceration of all or substantially all of a benefit for which the other party bargained to conclude that there is a breach. Such an outcome is not a necessary prerequisite to finding a breach. Instead, it may be relevant to show that that the discretion was exercised in a manner unconnected to the relevant contractual purposes.

- The range of outcomes that will be found to be reasonable (and therefore not the product of a bad faith exercise of discretion) will be broader where the discretion is in relation to matters not susceptible to objective measurement.

- As the SCC said in *Bhasin*, claims of breach of good faith will usually not succeed if they do not fall within an existing doctrine of good faith. However, the list of existing doctrines is not closed. The majority in *Wastech* took pains to say that any new developments should be consistent with the structure of common law contracts and give due weight to the importance of private ordering through agreements as well as certainty in commercial affairs.

What remains uncertain

- Whether the duty to exercise contractual discretion in good faith will apply only in the context of bilateral contracts or may also apply in relation to unilateral contracts.

- What the courts (and in particular the SCC) will say about the content of Professor McCamus's other categories of case where a good faith duty applies: where the parties must cooperate in order to achieve the objects of the contract and where one party seeks to evade contractual duties.

- Whether there will be refinement of existing good faith duties in relation to the specific types of contracts and contexts listed in *Bhasin* (employment, insurance and tendering).

- What new categories of obligations or relationships will be found to manifest (to use the Court's word) new doctrines of good faith, given that the Court implicitly rejected the idea of an overarching duty of good faith imbuing all contractual rights and obligations, indicating that doctrines under the umbrella of the organizing principle are to be developed incrementally.

- How courts are meant to distinguish between motive and purpose. The SCC has said that good faith should not be used as a pretext for scrutinizing motive and that the role of the courts is not to ask whether the discretion was exercised in a morally opportune fashion. In my view, however, motive and purpose are closely related and it will be challenging for litigants and courts to draw a bright line between the two.

- The types of obligations or powers of a contracting party that will be characterized properly as "discretionary" and therefore subject to this doctrine. Almost any power under a contract could be described, in a general way, as discretionary (a party can choose to exercise it or not). The lower court decisions characterizing particular contractual powers as entailing exercises of discretion are not consistent. In my view, the SCC did not intend to label every contractual power as a discretion; if they had so intended, surely they would have made this intention more explicit. Drawing from the cases that make sense to me, I would suggest that the doctrine applies to contractual terms that permit a singular party, in its sole discretion, to determine the contractual rights of another. Examples would include a term that allows one party to fix a price

or some component of consideration[11] or a term that allows a party to rescind a contract based on their unilateral assessment of the other party's performance. In *Wastech,* it was the power to allocate waste and thereby determine a critical input into consideration.

- How exactly the impact on the counterparty of the exercise of discretion will weigh into the assessment of whether the duty is breached. The SCC said that nullification or evisceration of the benefit of the contract is not the focal point of the analysis nor is that outcome a prerequisite to finding a breach (as lower court cases suggested). However, according to the Court, such an outcome is nonetheless relevant. Yet the Court also said (at paragraph 83) that "absent some infringement of the non-exercising party's rights, there is no actionable wrong for the court to correct," and alluded to the need for the plaintiff to prove a fault or default by the discretion-exercising party (without explaining what this statement means).

- What the majority meant at paragraph 95 when it said that the "entire agreement clause in this Contract…does not exclude the duty, although, in any particular case, the contract as a whole will guide the analysis of what the duty requires." Does it mean that the duty to exercise contractual discretion in good faith can never be excluded (which is what the Court has said about the duty of honest performance) or just that this particular entire agreement clause did not suffice?[12]

- Whether the Court will reconsider in the future the question of whether there is any duty to negotiate contracts in good faith. Canadian courts have generally rejected the proposition that such a duty exists,[13] but there are cases articulating exceptions to this general rule. For example, there are cases where a duty to negotiate in good faith was enforced on the basis that: (a) the obligation to negotiate was situated in an existing contract; (b) the obligation related to a single (or possibly a few) terms; and (c) the contract contained an objective standard against which the negotiations could be judged. Both the scope of the exceptions to the current rule and whether the current rule will prevail are open questions.

Implications for contract negotiation and drafting

If you are including a contractual discretion, it would be advisable to outline the purpose or purposes for which it is intended to be exercised. I suspect this will not be easy to do.

Expressly stating that discretion is absolute is apparently acceptable and will inform the analysis of whether the exercise of discretion is reasonable (absolute discretion exercised in aid of the underlying purposes for which the discretion was granted will not be unreasonable and therefore will not breach the duty).

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[11] Such as a clause granting one party the discretion to determine fair market value of a helicopter upon the counterparty exercising its option to purchase the leased helicopter: *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187.

[12] The text of this clause is not reproduced in reasons at any level.

[13] In *Martel Building Inc. v. R.*, 2000 SCC 60, the SCC said that whether or not negotiations are to be governed by a duty of good faith is a question for another time. That time may come soon if the issue is raised in a case that is dealt with by an appellate court and leave to appeal to the SCC is sought.

Parties may still want to include language providing that the discretion can be exercised arbitrarily or capriciously, although it is unclear the effect that such language will have. At times, the SCC seems to be equating unreasonable exercise of discretion with arbitrary or capricious exercise.

If a subjective standard for the exercise of discretion makes sense in the specific context, such a standard will give your client a wider range of permissible outcomes.

Implications for contract performance

Where a party has a discretion to perform an obligation or exercise a power, they cannot perform it indiscriminately without considering the duty of good faith.

When exercising a contractual discretion, it will be prudent in every case to paper the legitimate purposes underlying the exercise of discretion.

Parties will not be able to use discretionary power to achieve unrelated business objectives (or will do so at their peril, risking litigation). For example, where a landlord of a shopping mall has discretion as to whether or not to approve a tenant entering into a sublease, if it can be shown that the landlord's refusal to approve proposed subtenants was based not on the solvency of the proposed subtenants or their suitability (the underlying purpose of the discretion being to ensure that any tenant was both solvent and had a business consistent with the tenant mix in the mall), but rather on a plan to force the tenant to renegotiate lease terms, a good faith claim may well succeed.

Implications for litigation

In many cases, it will be difficult to assess whether there is a viable claim for bad faith exercise of discretion prior to discovery. It is likely only through discovery that a plaintiff will be able to demonstrate that a defendant exercised a contractual discretion for purposes other than those contemplated.

Unless the contract explicitly outlines the purposes for which the discretion was granted, counsel will have to build a cogent submission as to what those purposes must have been, based on the contract as a whole and the factual matrix.

Defendant's counsel will have to build a competing submission as to what the purposes underlying the discretion were meant to be. They will want to characterize the plaintiff as seeking to create new unbargained-for rights and obligations, or to alter the contract, and as asking the court to adjudicate on commercial morality and business objectives, none of which the ruling in *Wastech* supports.

Other points of interest

Standard of review

Arbitration and appellate counsel were awaiting the decision in *Wastech* because the parties raised, as preliminary issues, the standard of review applicable on appeal from a commercial arbitration award and the proper character of the questions of law on appeal in the case.

The decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, setting out a revised framework for determining the standard of review a court should apply when reviewing the merits of an administrative decision, was released shortly after the appeal in *Wastech* was heard. While flagging the potential tension between the decision in *Vavilov* and the Court's earlier decisions on standard of review on appeals from commercial arbitration awards,[14] the majority said they were leaving the effect of *Vavilov* on the principles in the arbitration cases for another day.

In their concurring reasons, Justices Brown, Rowe and Côté took the view that the Court ought to provide guidance on the standard of review issue, and stated that where the legislature has provided for a statutory right of appeal, appellate standards of review apply as a matter of statutory interpretation.

It seems inevitable that the SCC will revisit this issue some time soon, when a suitable case for its determination comes before it.

The role of civil law in common law appeals

In both *Callow* and *Wastech*, the majority considered good faith duties in the context of the *Civil Code of Québec* (the "Code") even though both cases originated in common law provinces.

In *Callow*, C Inc. raised the theory of abuse of contractual rights set out in specific articles of the Code alluded to by Mr. Justice Cromwell in *Bhasin*. The majority agreed that looking to Quebec law was useful, particularly as regards the link between the dishonest conduct and the exercise of the termination right. The majority specifically stated that "the influence of bijuralism is not and need not be confined to appeals from Quebec or to matters relating to federal legislation."

In *Wastech*, the majority embarked on a consideration of the doctrine of abuse of rights under Quebec law as a matter of "observation" flowing from GVSDD's argument that Wastech's position would not be treated more favourably under Quebec law. The majority concluded that invoking the substantive content of what constitutes an abuse in the exercise of a discretionary contractual clause in Quebec law was of no assistance to Wastech on the facts, *i.e.,* that an analogy to Quebec law did not advance Wastech's position.

In both *Callow* and *Wastech*, the minority concurring reasons are sharply critical of the majority's reliance on civil law concepts on the basis that it departs from the Court's accepted practice in respect of comparative legal analysis. *Inter alia*, in the minority's view, external legal concepts should only be drawn on where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing rule.

But in light of the majority decisions in both of the cases, I expect to see more submissions in factums on appeal drawing analogies to civil law concepts, not just in cases dealing with good faith, but in any case where such an analogy might bolster a party's position.

[14] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32.