Dalhousie Law Journal

Volume 45 | Issue 1 Article 3

6-7-2022

You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-Wastech and the Potential for a Duty to Renegotiate

Vanessa Di Feo
University of Toronto Faculty of Law

Recommended Citation

Vanessa Di Feo, "You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-Wastech and the Potential for a Duty to Renegotiate" (2022) 45:1 Dal LJ 35.

Vanessa Di Feo*

You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-*Wastech* and the Potential for a Duty to Renegotiate

This paper argues that the organizing principle of good faith should be judicially developed to include a duty to renegotiate in situations of hardship. It looks to the French Civil Code and the UNIDROIT Principles for guidance, in addition to Canadian law's receptibility to an incrementally expanded principle of good faith. Although the Supreme Court of Canada rejected hardship in the 2018 case of Churchill Falls (Labrador) Corp v Hydro-Québec*, it did not forever close the door to this doctrine in Québec in situations of true financial peril. Given the "judicial dialogue" between Québec civil law obligations and Anglo-Canadian contract law, not to mention the Supreme Court of Canada's increasingly expansionist approach, this illustrates a slight opening for the recognition of hardship in Anglo-Canadian contract law as well. Prior to proposing a test for the duty to renegotiate, the paper assesses the trajectory of good faith in Québec civil law and Anglo-Canadian contract law, in particular the duty to exercise a discretion in good faith and abuse of contractual rights. Given the law's trend in an increasingly moral and interventionist direction, this paper argues that the time is ripe to allow for a duty to renegotiate in good faith where parties experience contractual hardship.*

Dans le présent article, nous soutenons que le principe organisateur de la bonne foi devrait être développé judiciairement pour inclure une obligation de renégociation dans les situations de « hardship ». Il s'inspire du Code civil français et des principes d'UNIDROIT, ainsi que de la réceptivité du droit canadien à un principe de bonne foi progressivement élargi. Bien que la Cour suprême du Canada ait rejeté le « hardship » dans l'affaire Churchill Falls (Labrador) Corp c. Hydro-Québec *en 2018, elle n'a pas fermé à jamais la porte à cette doctrine au Québec dans les situations de véritable péril financier. Compte tenu du « dialogue judiciaire » entre les obligations de droit civil québécois et le droit des contrats anglo-canadien, sans compter l'approche de plus en plus expansionniste de la Cour suprême du Canada, cela illustre une légère ouverture pour la reconnaissance du « hardship » en droit des contrats anglo-canadien également. Avant de proposer un test pour l'obligation de renégocier, nous examinons la trajectoire de la bonne foi en droit civil québécois et en droit des contrats anglo-canadien, en particulier l'obligation d'exercer un pouvoir discrétionnaire de bonne foi et l'abus des droits contractuels. Compte tenu de la tendance du droit à s'orienter de plus en plus vers la morale et l'interventionnisme, le présent article soutient que le moment est venu de permettre une obligation de renégociation de bonne foi lorsque les parties éprouvent des difficultés contractuelles.*

* BA, JD, BCL, LLM. I would like to thank all those who provided feedback on this article, in particular Professor Stephen Waddams, for his invaluable guidance, and the anonymous reviewers and editors of the Dalhousie Law Journal for their constructive comments. All beliefs presented and any errors in this article are my own.

> *"Arguably, the world of contracts has never suffered such an unforeseeable, global, intense interference. Extraordinary situations require extraordinary solutions, and there is a global need to ensure the economic value enshrined in commercial exchanges is not destroyed."*[1]
>
> *–UNIDROIT Secretariat*

Introduction[2]

From its inception, Covid-19 has devastated commerce, impacting contracting parties' ability to fulfill their obligations. Although contract law has traditionally been cautious about intervening to undermine the parties' control over their agreements, Covid-19 has renewed conversations about potential legal recourses in response to supervening events. Many of these discussions have focused on the doctrine of frustration and *force majeure* clauses.[3] Yet, as they are understood in Anglo-Canadian contract law, these concepts are insufficient to address hardship resulting from Covid-19.[4] The lack of flexibility in the law illustrates the need to develop another mechanism to respond to Covid-19's impacts.

The legal literature and jurisprudence seldom ponder the relationship between good faith and frustration. This paper aims to fill this scholarly gap by arguing that the organizing principle of good faith ought to be incrementally expanded to include a common law duty to renegotiate in

---

1. UNIDROIT Secretariat, "UNIDROIT Principles of International Commercial Contracts and the Covid-19 Health Crisis" (2020) at para 53, online (pdf): *UNIDROIT* <www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf> [perma.cc/L5XD-6QCQ].

2. A brief note on language: the author uses the term "Anglo-Canadian contract law" to refer to the laws of the common law Canadian provinces. "Hardship" refers to the private law rule that some civilian jurisdictions recognize where an unforeseen event of a fundamental character, beyond the parties' control, renders contractual performance excessively onerous: Clive Schmitthof, "Hardship and Intervener Clauses" (1980) J Bus L 82 at 85. This term was used interchangeably with "unforeseeability" and "*imprévision*" in *Churchill Falls (Labrador) Corp v HydroQuébec*, 2018 SCC 46 at paras 6, 88 [*Churchill Falls* SCC]. Generally, the basis for relief in situations of hardship is informed by good faith.

3. See e.g. Klaus P Berger & Daniel Behn, "*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study" (2020) 6:4 McGill J Dispute Resolution 76 at 79; Michael Douglas & John Eldridge, "Coronavirus and the Law of Obligations" [2020] 3 UNSWLJ Forum 1; Peter J Wiazowski & Trevor Zeyl, "Contract Performance in a Coronavirus World: Force Majeure Clauses and the Doctrine of Frustration" (18 March 2020), online (blog): *Norton Rose Fulbright LLP* <www.nortonrosefulbright.com/en-ca/knowledge/publications/844d7cf4/contract-performance-in-a-coronavirus-world-force-majeure-clauses-and-the-doctrine-of-frustration> [perma.cc/3759-PBGC].

4. The Supreme Court of Canada has set a high threshold for frustration. See e.g. *Naylor Group Inc v Ellis-Don Construction Ltd,* 2001 SCC 58 at para 53 [*Naylor Group*] and *Peter Kiewit Sons' Co v Eakins Construction Ltd,* [1960] SCR 361 at 368, 22 DLR (2d) 465 [*Peter Kiewit Sons' Co*]. With regard to *force majeure* clauses, there is no explicit rule that a contract with such a clause cannot be frustrated: *Petrogas Processing Ltd v Westcoast Transmission Co*, [1988] 4 WWR 699 at para 79, 59 Alta LR (2d) 118 (Alta QB).

the face of hardship. The organizing principle is a flexible tool that has the potential to resolve legal inconsistencies.[5] Seeing that the current duties that flow from this principle are inadequate to assist contracting parties experiencing hardship, as this article later explains, the courts ought to build off of this flexibility to expand the organizing principle. Imposing a corresponding duty to renegotiate would allow for flexibility where frustration is too rigid to respond. Where renegotiations fail and the parties request judicial intervention, this paper proposes that the courts should resort to good faith as a residual power "to modify highly unreasonable contracts even where…they are clear and unambiguous."[6]

This paper is divided into three main parts. First, it explains that there is a gap in the law of frustration. Second, it illustrates how Article 1195 of the *Code civil des français* (CCF) and Articles 6.2.1–6.2.3 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT) address contractual hardship. Third, it establishes that Anglo-Canadian contract law is moving in a direction that prioritizes reasonable contracting behaviour and approves of the courts' powers to provide relief where contracts are unfair. Although tensions in the law persist, this paper submits that Anglo-Canadian contract law possesses the flexibility to one day include a duty to renegotiate in good faith to allow for fairness absent recourse under the doctrine of frustration. Ultimately, this paper highlights a key question in contract law: "the extent to which enforcement will be withheld of contracts that are very burdensome, or highly unreasonable"[7] but do not amount to contracts that have been frustrated.

I. *Frustration as an inadequate solution to changed circumstances*

The doctrine of frustration's inadequacy to respond to hardship buttresses the argument that good faith should be developed to allow parties to renegotiate. While there is a rich history involving the doctrine of frustration—"from a theory based on implied terms into an open recognition that sanctity of contract must yield…to countervailing considerations of justice"[8]—this paper focuses on Anglo-Canadian contract law's modern

5. *Bhasin v Hrynew,* 2014 SCC 71 at para 92 [*Bhasin*].

6. Stephen Waddams, "Good Faith in the Supreme Court of Canada" in Michael Furmston, *The Future of the Law of Contract*, 1st ed, (Milton: Taylor and Francis, 2020) 28 at 47 [Waddams, "Good Faith"].

7. Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge: Cambridge University Press, 2019) at vii [Waddams, "Sanctity of Contracts"].

8. *Ibid* at 2. It is important to also note that Anglo-Canadian contract law's conception of frustration has been heavily influenced by English contract law, which has undergone a significant evolution from absolute loyalty to contractual terms to implied terms to the modern-day concept of frustration. For more information, see: *Paradine v Jane*, [1647] EWHC KB J5, 82 ER 897 ; *Taylor v Caldwell*, [1863] EWHC QB J1; *Krell v Henry,* [1903] 2 KB 740, [1900–1903] All ER 20 (CA); John D McCamus,

stance for the sake of brevity. Anglo-Canadian contract law sets a very high threshold for frustration,[9] and does not accept that hardship constitutes a frustrating event (however, scholars have argued that the two are not mutually exclusive).[10]

Anglo-Canadian contract law has embraced Lord Radcliffe's approach of the "radical change" in the nature of the obligation, as enunciated in *Davis Contractors Ltd v Fareham Urban District Council.*[11] In *Davis*, a contractor was hired to build 78 houses for £92,424 over the course of 8 months.[12] Due to labor shortages, the contract took 22 months to complete and the costs to build each house rose to £115, 233.[13] The court denied the contractor's claim for frustration, seeing that the turn of events was not unforeseeable.[14] Lord Radcliffe stated the test as follows:

> It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would if performed, be a [radically] different thing from that contracted for.[15]

The Supreme Court of Canada ("SCC") has affirmed this test in the seminal cases of *Peter Kiewit Sons' Co*[16] and *Naylor Group*.[17] Thus, not only must the supervening event render the obligation radically different, but hardship is insufficient to ground relief in Anglo-Canadian contract law.

> As Professor John McCamus has observed, the doctrine of frustration raises legal tensions:

The Law of Contracts, 2nd ed (Toronto: Irwin Law, 2012) at ch 14; Gerald HL Fridman, *The Law of Contract in Canada,* 6th ed (Toronto: Carswell, 2011) at ch 17; Stephen Waddams, "Mistake in Assumptions" (2014) 51:3 Osgoode Hall LJ 749.

9. Professor John McCamus has distinguished three standard categories for the doctrine of frustration: (1) the frustrating event has rendered performance impossible; (2) performance remains possible but the purpose underlying the contract has been undermined; and (3) temporary impossibility: McCamus, *supra* note 8 at 606-612.

10. *Ibid* at 566; Larry A Di Matteo, "Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines" (2015) 27:1 Pace Intl L Rev 258 at 263.

11. *Davis Contractors Ltd v Fareham Urban District Council,* [1956] 2 All ER 145, [1956] AC 696 (HL (Eng)) [*Davis* cited to All ER].

12. *Ibid* at para 700.

13. *Ibid* at paras 700-701.

14. Lord Radcliffe elaborated that "the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each:" *ibid* at para 731.

15. *Ibid* at para 729.

16. *Peter Kiewit Sons' Co*, *supra* note 4.

17. *Naylor Group, supra* note 4.

> […] The frustration doctrine must find an appropriate balance between the inclination to hold people to their bargains, notwithstanding the fact that the bargain has become unexpectedly less attractive to them and, on the other hand, an inclination to relieve the parties from their bargains where a refusal to do so appears unjust and may result in the unjust enrichment of the other party.[18]

Given these tensions, judges have been cautious and confined the doctrine of frustration to rare circumstances.[19] This narrow approach—which bears similarities to Québec's[20]—supports the argument that there is a gap in the law pertaining to changed circumstances, and that it would be appropriate to develop good faith to assist parties facing hardship arising from extenuating circumstances (such as the Covid-19 pandemic).

1. *The relationship between good faith and frustration*: Klewchuk v Switzer[21]

Generally, there is very little case law that addresses the relationship between frustration and good faith. *Klewchuk* offers a rare example. The impugned contract was a long-term agreement whereby Switzer rented his casino to charities looking to host events and Klewchuk provided them with equipment and employees.[22] The charities paid the parties directly; however, seven years after the contract was formed, Alberta amended the *Casino Terms & Conditions and Operating Guidelines*.[23] This amendment affected the contract's payment and registration methods, so the parties decided to renegotiate their agreement.[24] When Klewchuck experienced

18. McCamus, *supra* note 8 at 600.
19. Michael P Theroux & April D Grosse, "Force Majeure in Canadian Law" (2011) 49:2 Alta L Rev 397 at 400.
20. In Québec, changed circumstances will not be sufficient to overturn contractual terms, unless they cause a substantial failure of performance: *Canada Starch Co c Gill & Duffus (Canada) Ltd*, [1990] RL 602, 23 ACWS (3d) 986 CA Qc). The rules governing "*force majeure*" (referring to a superior force rather than actual *force majeure* clauses) is set out under Article 1470 of the CCQ. To constitute *force majeure* in Québec, an event must be both unforeseeable and irresistible. The jurisprudence has defined unforeseeability as meaning that the party owing the obligation could not foresee or reasonably be expected to foresee the supervening event. See e.g. *Bénard v Hingston* (1917), 56 SCR 17 at 18-19, 39 DLR 137; *Groupe CGU Canada ltée c Ste-Marie de Beauce (Ville de),* 2006 QCCS 2899 at para 126. To be considered irresistible, the event must be of such a nature that it would be impossible for the disadvantaged party to take reasonable measures to avoid the event. See e.g. *Québec Métal Recyclé (FNF) Inc c Transnat Express Inc,* [2005] JQ no 17323 at paras 16, 31 (CS Qc), EYB 2005-98179; *Derouin c Legault,* 2010 QCCQ 10001 at para 51. See also Jean Pineau, Danielle Burman & Serge Gaudet, *Théorie des Obligations,* 4th ed (Montréal: Éditions Thémis, 2001) at 802-803; Marel Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Québec and its Common Law Equivalent" (2011) 90:1 Can Bar Rev 69 at 70.
21. *Klewchuk v Switzer*, 2003 ABCA 187 [*Klewchuk*].
22. *Ibid* at para 3-4.
23. *Ibid* at para 7.
24. *Ibid* at para 9.

financial distress, however, the renegotiations failed.[25] In response, Switzer notified Klewchuk and the Gaming Commission that the contract was frustrated and he attempted to assume Klewchuk's portion of the business.[26] Klewchuk claimed that Switzer's actions were in bad faith.[27]

Although Klewchuk won at trial, the Alberta Court of Appeal allowed the appeal in part.[28] Moore J found that the supervening legislation frustrated the contract.[29] Further, good faith required the parties to negotiate, but not to reach any formal agreement.[30] Given that the parties had nearly reached a new agreement, and that Switzer had evidently made good faith efforts to negotiate, Moore J found that Switzer did not breach his duty of good faith.[31]

Klewchuk indicates that, if the parties to a frustrated contract decide to renegotiate their agreement on their own accord, then they must do so in good faith. In her paper on the impacts of Covid-19 on commercial leasing, Ms. Meg Heesaker construed the finding in *Klewchuk* as concerning a "discretionary power which arose from 'the long-standing business arrangement carried on by the two parties,'[32] their 'original agreement and […] expectation […] that their exclusive arrangement would continue for their mutual benefit.'"[33] Given that so few Canadian cases address the intersection between good faith and frustration, a novel duty to renegotiate would serve as a useful addition to Anglo-Canadian contract law.

II. *Assessing the duty to renegotiate in situations of hardship outside of Canada*

Brown J has written that Anglo-Canadian contract law should only look to foreign jurisdictions to fill "gaps" in the law.[34] The doctrine of frustration creates one such "gap." In response, Anglo-Canadian contract law should look to Article 1195 of the CCF and Articles 6.2.1–6.2.3 of UNIDROIT to incrementally advance good faith to include a duty to renegotiate.

25. *Ibid* at para 10.
26. *Ibid* at paras 11-12.
27. *Ibid* at para 13.
28. *Ibid* at para 1.
29. *Ibid* at para 21.
30. *Ibid* at para 39.
31. *Ibid.*
32. Meg Heesaker, "Covid-19 & Commercial Leases: Rethinking Frustration and Contractual Discharge in the Canadian Common Law" (2021) at 39 [unpublished, archived at SSRN], DOI: <10.2139/ssrn.3801951>.
33. *Ibid.*
34. *CM Callow Inc v Zollinger,* 2020 SCC 45 at paras 123, 171 [*Callow*].

1. *Article 1195 of the French Civil Code*

In 2016, French law formally recognized the doctrine of hardship.[35] In particular, Article 1195 stipulates as follows:

> If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.[36]

French practitioners have noted that hardship is intended to play a preventive role, since the risk of judicial revision encourages the parties to renegotiate a mutually beneficial bargain.[37]

It is necessary to emphasize two features of Article 1195. First, contracting parties must face an extreme and unforeseeable increase in performance costs or decrease of the benefits they expected to derive from the other side's performance.[38] In relation to Covid-19, this task will be increasingly challenging as the world learns more about the virus

---

35. Prior to the *Ordonnance no 2016-131* of 10 February 2016, which came into force on 1 October 2016, French law explicitly rejected hardship. This rejection can be traced back to 1876, in the seminal *Cour de Cassation* case of Cass civ 1re, 6 March 1876, *Canal de Craponne*, [1876] D 193 [*Canal de Craponne*]. In *Canal de Craponne*, France's highest court refused to adapt a maintenance fee for a canal. Rather, it upheld the binding force of contracts, in accordance with Article 1134 of the *Code Napoléon* of 1804. The court emphasized that, even though the fee required an adaptation (it had been agreed upon in 1567), it was not its place to modify a contractual provision because there was no legislative provision that allowed it to do so: 197. The Court was also concerned that modifying the contract would undermine contractual stability and impinge upon the parties' freedom of contract. For hundreds of years, this case led the French courts to jealously protect the absolute nature of contracts and the parties' autonomous wills, with the exception of administrative law cases. For more information, see Berger & Behn, *supra* note 3; Pierre Bienvenu, "A Comparative Look at Good Faith and Changed Circumstances, Hardship and More" (September 2019), online: *Norton Rose Fulbright LLP* <www.nortonrosefulbright.com/en-ca/knowledge/publications/759728ff/a-comparative-look-at-good-faith-and-changed-circumstances-hardship-and-more> [perma.cc/5HRY-ANX6].

36. Article 1195 CcF, as translated in John Cartwright et al, "The Law of Contract, the General Regime of Obligations, and Proof of Obligations: The New Provisions of the *Code Civil* created by *Ordonnance no 2016-131* of 10 February 2016 Translated into English" (2016) at 18, online (pdf): <www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> [perma.cc/567L-U6VU].

37. "Force Majeure and Imprévision Under French Law" (26 March 2020), online: *Shearman & Sterling LLP* <www.shearman.com/Perspectives/2020/03/Force-Majeure-and-Imprevision-under-French-Law-COVID-19> [perma.cc/XZ6Z-DWXY].

38. Berger & Behn, *supra* note 3 at 119.

and its medical treatment. For example, the Basse-Terre Court of Appeal dismissed a claim involving the chikungunya epidemic because the illness was manageable, and the respondent did not invoke an extreme medical issue sufficient to excuse performance.[39] In another case, the Besançon Court of Appeal refused to assist parties impacted by an amended sanitary regulation during the H1N1 epidemic.[40] This case preceded Article 1195's adoption; however, the Court's reasoning regarding unforeseeability is instructive. It emphasized that the epidemic had been widely announced; therefore, the regulation's amendment could not be said to be unforeseeable, nor could it justify non-performance.[41] These cases illustrate that hardship in France does not lightly allow for deviation from contractual terms.

Second, Article 1195 is rooted in the parties' autonomous wills: the parties can only invoke this article if they have not already allocated the risk.[42] For example, the Paris Court of Appeal dismissed a case involving a loan agreement between a state entity and a bank.[43] The state entity entered into a "swap agreement" with another bank, whereby the interest rate would be exchanged in foreign currency.[44] Following a twofold increase of the foreign currency's interest rate, the state entity refused to pay the balance and argued that it should be revised due to the unpredictable events that caused the increase.[45] The Court held that the state entity could not rely on Article 1195 because the parties had already allocated the risk in their contract.[46] This indicates the primacy of contractual terms, despite the flexibility that hardship permits.[47]

2. *Articles 6.2.1–6.2.3 of the UNIDROIT Principles*

UNIDROIT's conception of hardship is also instructive, given its treatment by courts and arbitral tribunals.[48] The affirmation of *pacta sunt servanda*

39. CA Basse-Terre, 17 December 2018, No 17/00739.
40. CA Besançon, 8 January 2014, No 12/02291.
41. *Ibid.*
42. Article 1195 of the CcF, *supra* note 36.
43. CA Paris, 16 February 2018, No 16/08968.
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. The text of this paper only reviews two features that illustrate the value that French courts place on contractual terms. For example, Article 1195 also requires the parties to continue to perform their obligations during renegotiations. If they fail to do so, they will be in breach of contract: CA Paris, April 2017, No 20160760927.
48. Various courts and arbitral tribunals have turned to UNIDROIT for guidance and suggested that contracting parties can select to be governed by them. UNIDROIT's conception of hardship is flexible, given that it does not tie the possible excuse for non-performance to strict impossibility or "frustration" of purpose. It also allows the parties to preserve the value of the contract and address the supervening imbalance created by the hardship event. For more information, see: IBA Working Group on the Practice of the UNIDROIT Principles 2016, "Perspectives in Practice of the UNIDROIT

in Article 6.2.1 is subject to the exception of hardship when a supervening event "fundamentally alters the equilibrium of the contract."[49] Hardship will be present if the disadvantaged party can demonstrate that either the cost of performance has increased or that its value has decreased, and that (a) the events took place post-formation, (b) the events could not reasonably have been considered at formation, (c) the events were beyond the parties' control, and (d) the disadvantaged party did not expressly or tacitly assume the risk.[50] With regard to the specific language of a "fundamental" alteration of the contractual equilibrium, UNIDROIT does not specify any quantitative measures. Rather, the analysis is based on the circumstances surrounding the contract.[51] As the SCC noted in *Churchill Falls,* hardship under UNIDROIT cannot be relied upon to "redress a disequilibrium that harms no one but seems to unduly benefit one party."[52] It is reserved for situations of "true financial peril"[53] in which the courts must "avert the ruin of a party."[54]

Principles 2016" (2019) at 4, 38, online (pdf): *International Bar Association* <www.ibanet.org/MediaHandler?id=D266F2AF-3E0B-4DC0-AFCE-662E5D49BB7E> [perma.cc/9A3U-CTFS] [IBA Perspectives].

49. "UNIDROIT Principles of International Commercial Contracts 2016" (2016) art 6.2.1, online (pdf): *UNIDROIT* <www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf> [perma.cc/5WPF-Y6L5] [UNIDROIT Principles].

50. *Ibid*, art 6.2.2. To rely on hardship under UNIDROIT, the parties must not have assumed the risk. Article 6.2.2 of the UNIDROIT Principles stipulates that parties who enter into speculative transactions are deemed to accept a certain degree of risk, regardless of their awareness at the time of formation. Further, the UNIDROIT Secretariat provides additional guidance about both tacit and express assumption of risk. For example, with regard to tacit assumption of risk, the Secretariat gives the hypothetical of an opera singer who accepts to sing in an opera in a foreign country, where early Covid-19 cases have been reported. She accepts to sing, even though a few days before the performance, two other singers test positive and must be replaced. Ultimately, the singer is infected and must quarantine for two weeks. Consequently, she suffers substantial loss of income and cannot perform in other concerts. Even though the parties' agreement did not expressly allocate the risk in case of a supervening event, the singer took the risk when she decided to travel to a Covid-19 "hotspot." As such, despite the absence of an express contractual stipulation allocating risk, she would not be entitled to a remedy under the Principles. For more information, and to read this hypothetical, see: UNIDROIT Secretariat, Covid-19 Guidance, *supra* note 1 at para 39. With regard to express assumption of risk, an Italian case offers a useful example. A municipality contracted with a company for revenue collecting services. In 2011, the tax system was amended to replace the current municipality tax and the current methods used to collect taxes was rendered inappropriate and ineffective by the new law. The company claimed that the municipality breached its contractual obligations when it failed to renegotiate the contract; however, its claim was dismissed. Specifically referring to UNIDROIT, the tribunal based its finding on the renegotiation clause that the parties had agreed upon at the time the contract was formed. Given the pre-emptive allocation of risk, the company could not rely on the doctrine of hardship. See Tribunal of Bergamo, Case No 2342/2017, as cited in IBA Perspectives, *supra* note 48 at 251.

51. UNIDROIT Secretariat, *supra* note 1 at para 35.

52. *Churchill Falls* SCC*, supra* note 2 at para 90.

53. Marie Annik Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (Cowansville, QC: Yvon Blais, 2010) at 237, as cited in *Churchill Falls* SCC*, supra* note 2 at para 91.

54. Jean-Louis Baudouin, Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations,* 7th ed

Beyond the significance of the event, the parties must conduct themselves in good faith throughout renegotiations. This means that the disadvantaged party must genuinely believe that they are experiencing hardship. Further, they must not wield hardship as a "purely tactical manoeuvre" to rewrite their bargain with the benefit of hindsight.[55] The parties must participate in a constructive manner, refrain from obstructing the process, and provide all necessary information.[56] If they fail to reach a revised bargain, they may request judicial intervention.[57] The judge's role, however, is not to inject their own sense of justice into the contract, but rather to impose a "fair distribution of the losses between the parties."[58] If neither solution is appropriate, then a judge may direct the parties to resume renegotiations or confirm the contract's present terms.[59] Overall, UNIDROIT's perception of hardship is informed by good faith. Given that good faith continues to evolve in Anglo-Canadian contract law, this paper argues for its development to encompass a similar scheme to accommodate contractual hardship.

III. *Using good faith to open the door to a potential duty to renegotiate in Canada*

Before proposing a test for a potential duty to renegotiate, it is necessary to review the law pertaining to good faith contractual performance in Canada and to explain why this doctrine provides an appropriate response. In its 2018 decision in *Churchill Falls*, the SCC found that hardship does not constitute part of Québec civil law; however, in *obiter,* it sowed the seeds for recourse in situations involving "true financial peril."[60] Given the "judicial dialogue"[61] across Canada, it is necessary to take a transsystemic approach to illustrate that there is an area of permissibility and great

(Cowansville, QC: Yvon Blais, 2013) at n 446.

55. UNIDROIT Principles, *supra* note 49, art 6.2.3. Article 6.2.3 of the UNIDROIT Principles at Comment 3 stipulates that the disadvantaged party has a duty of good faith to evaluate honestly whether hardship has truly taken place. This is buttressed by the fact that the request for renegotiations and the conduct of the parties at renegotiations are subject to good faith, fair dealing, and the duty to cooperate under Articles 5.1.3 and 1.7 of the UNIDROIT Principles.

56. *Ibid*, art 6.2.3 at Comment 5.

57. *Ibid* at Comments 6, 7. According to these Comments, there is no specific waiting time before the parties may resort to the court, given that this decision will hinge on the complexity of the issues and the dispute's circumstances.

58. *Ibid* at Comment 7. Generally, the effect of the adaptation cannot be a better deal than the one initially concluded as a result of mutual concessions, accommodations, and withdrawals of initial demands during negotiations.

59. *Ibid.*

60. Grégoire, *supra* note 53.

61. Rosalie Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019) 1:1 J Commonwealth L 83 [Jukier, "Good Faith"].

potential growth to address hardship in Anglo-Canadian contract law through the avenue of good faith (as opposed to other doctrines, such as that of interpretation, which in any event exceeds the scope of this article).

1. *Québec Civil Law*

As a limitation on contractual consensualism, good faith forms the cornerstone of Québec private law obligations.[62] An omnipresent principle that applies from the very birth of the obligation, good faith in Québec allows judges to temper interpretations of contractual terms and intervene based on notions of fairness.[63] Good faith originally emanated from Article 1024 of the *Civil Code of Lower Canada,* which Québec courts often used to modify unambiguously drafted contracts.[64] It is now set out in Articles 6, 7, and 1375 of the *Civil Code of Québec* (the "CCQ").

Since the CCQ does not define good faith, jurisprudence continues to colour Québec's broad and flexible framework of good faith, which continuously evolves with Québec society's moral fabric: it is "the legal equivalent of the moral concept of goodwill, and closely related to the application of equity"[65] and "serves to connect legal principles with fundamental concepts of fairness."[66] Given that the SCC left the door open to one day recognize hardship in *Churchill Falls,* this broad, flexible, and evolving principle has the potential to protect parties whose performance is rendered unduly burdensome due to supervening events. This narrow opening, paired with Québec's flexible approach to contracts (as demonstrated by the doctrine of abuse of rights), supports the argument for a cautiously developed duty to renegotiate in good faith.

a. *Good faith and abuse of rights*

Good faith includes the doctrine of abuse of rights, which "states essentially that a person may incur civil liability through a certain act, even though such act is within the bounds of a legal right."[67]According to Professor

62. In Québec, the binding force of contracts is set out in Article 1434 of the CCQ. Exceptions allow for the derogation from terms, such as good faith and abuse of rights. See Vincent Karim, *Les obligations*, vol 1, 5th ed (Montréal: Wilson & Lafleur, 2020) at 64 at para 171; Didier Lluelles, "La révision du contrat en droit québecois" (2006) 36:1 RGD 25.

63. *Churchill Falls* SCC, *supra* note 2 at para 103.

64. Rosalie Jukier, "*Banque Nationale du Canada v Houle* (SCC): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law" (1992) 37 McGill LJ 221 at 234 [Jukier, "*Banque Nationale*"].

65. Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. I, *Le Code civil du Québec—Un mouvement de société* (1993) at 832, as cited at para 104 of *Churchill Falls* SCC*, supra* note 2.

66. *Ibid.*

67. David Angus, "Abuse of Rights in Contractual Matters in the Province of Québec" (1962) 8:2 McGill LJ 150 at 151. While it exceeds the scope of this paper, the SCC used the doctrine of abuse of rights in the context of its analysis of the duty of honesty in *Callow, supra* note 34 to illustrate that a

Pierre-Gabriel Jobin, "the justification by the courts through contractual liability to check abuse of rights in contracts is the higher and more general standard of good faith in contracts."[68] Both abuse of rights and good faith are instrumental to Québec's morally infused regime for contractual behaviour. Abuse of rights, in particular, must strike a delicate balance. Courts must be wary about undermining the parties' express contractual terms on the basis that "equity ought to be the overriding norm."[69]

A trilogy of SCC decisions has cemented the roles of good faith and abuse of rights in Québec, illustrating "a gradual increase of judicial intervention in the contractual sphere."[70] This trilogy demonstrates Québec civil law's move in a direction that values reasonable and fair contractual behaviour, which parallels Anglo-Canadian contract law's trajectory. Consequently, it is valuable to briefly review two of these three decisions.[71]

First, *National Bank v Soucisse et al* involved a contract of suretyship that stipulated that the guarantor's heirs would pay his debts after his death.[72] This contract, while revocable, was expressly binding on his heirs.[73] Upon the guarantor's death, the Bank tried to collect the debts from his heirs.[74] The legal issue was whether the heirs should be forced to pay these debts, even though they had never been told about the guarantee or its revocable nature.[75] According to the SCC, the Bank had an implied obligation to inform the heirs of the agreement and its revocable nature before demanding payment.[76] Consequently, the SCC prevented the Bank from collecting the debt. *Soucisse* illustrates the flexibility that abuse of rights allows judges: as Professor Jukier has observed, the obligation to inform was not stipulated in the contract, nor could it be gleaned through contractual interpretation principles.[77]

Second, in *Houle v Canadian National Bank,* the Bank and a family company contracted for a commercial demand loan.[78] When the Bank

condominium corporation's exercise of a termination clause breached its duty of honesty.

68. Pierre-Gabriel Jobin, "L'abus de droit contractuel depuis 1980" in *Congrès annuel du Barreau du Québec* (Montréal: Service de la formation permanente Barreau du Québec, 1990) 127 at 133.

69. Jukier, "*Banque Nationale*," *supra* note 64 at 233.

70. *Ibid.*

71. The third case in the trilogy is *Bank of Montréal v Bail Ltée,* [1992] 2 SCR 554, 93 DLR (4th) 490. This case extended good faith's application to pre-contractual conduct, it is thus tangential to this paper's thesis, which focuses on supervening events following formation.

72. *National Bank v Soucisse et al,* [1981] 2 SCR 339, 15 ACWS (2d) 309 [*Soucisse* cited to SCR].

73. *Ibid* at 341.

74. *Ibid* at 343.

75. *Ibid* at 341.

76. *Ibid* at 357.

77. Jukier, "*Banque Nationale*," *supra* note 64 at 233.

78. *Houle v Canadian National Bank*, [1990] 3 SCR 122, 74 DLR (4th) 577 [*Houle* cited to SCR].

demanded repayment without notice—as allowed under the contract—the borrower suffered significant financial loss.[79] As such, the SCC assessed the *manner* in which the Bank exercised its express contractual right.[80] In finding that the Bank's decision to recall the loan without reasonable notice was in breach of good faith, the SCC went beyond punishing intentional bad faith behaviour. Rather, it extended liability for the unreasonable exercise of the right.[81] Although *Houle* led the law in a more equitable direction, it has been criticized for effectively converting a demand loan into one that requires reasonable notice.[82] As such, *Houle* highlights a fear that persists across Canada: that judges will use equitable doctrines to transform contractual bargains for the sake of fairness.

The facts in *Houle* can be contrasted with the English case of *Çukurova Finance Int Ltd v Alfa Telecom Turkey Ltd,* which involved a high-interest loan secured by shares of a Turkish company.[83] Under this contract, certain events of default allowed the lender to demand immediate repayment of the loan, and on default of immediate repayment, the company's shares.[84] When an event of default occurred, the lender demanded payment; however, it rejected the borrower's payment because it was rendered too late.[85] The Privy Council rejected the borrower's arguments on good faith, given that the lender had a contractual right to advance the date of repayment—and in these circumstances, seize its security—in an event of default.[86] While this approach differed from Québec civil law's, *Çukurova* demonstrates the tension between honouring contractual certainty and the desire for fairness in situations concerning the exercise of contractual rights.[87] According to Professor Stephen Waddams, the approach in *Çukurova* "might be said, from an equitable perspective, to allow form to prevail over substance."[88] This is the exact theoretical tightrope that this paper walks.

At this juncture, it is necessary to note the parallels between abuse of rights and the common law duty to exercise a contractual discretion in good faith (which will be further developed below). In Québec, this link is demonstrated by judicial findings that parties attempting to exercise seemingly unfettered rights can be liable for abuse of rights (even when

79. *Ibid* at 130-132.
80. *Ibid* at 135.
81. *Ibid* at 150.
82. Jukier, "*Banque Nationale*," *supra* note 64 at 228, 230-231, 233, 235.
83. *Çukurova Finance Int Ltd v Alfa Telecom Turkey Ltd*, [2013] UKPC 2 [*Çukurova*].
84. *Ibid* at paras 7, 13, 74-76.
85. *Ibid* at para 7.
86. *Ibid* at para 74.
87. Waddams, "Good Faith," *supra* note 6 at 35 at para 3.18.
88. *Ibid* at 33 at para 3.13.

acting within the four corners of the agreement).[89] Both concepts, rooted in the morally infused doctrine of good faith, concern the extent to which judges can intervene and limit the parties' ability to exercise the rights for which they bargained. Regardless of the label, these concepts effectively allow judges to subordinate the contract's terms to equitable concerns. Some courts have tempered this development through their view that good faith should not "permit a judge to exercise moral control over the performance of a contract to the point of adding an element of distributive justice into contractual relationships."[90] This concern can be alleviated, however, by grounding the analysis in the parties' intentions as expressed in the contract. In any case, the tension between loyalty to the contract's terms and notions of fairness can never be fully resolved.[91]

In relation to this paper's thesis, denying a counterparty in hardship the opportunity to renegotiate could be considered "excessive and unreasonable" in the light of a supervening event, and "therefore contrary to the requirements of good faith."[92] There is sufficient flexibility in the law to one day insert the duty to renegotiate "into today's trend towards a just and fair approach to rights and obligations."[93] Yet, as Professor Jukier has indicated, it is ironic that, despite its willingness to "ignore, add to, vary and rewrite parties' contracts in the name of equity and good faith," Québec civil law remains "wedded to the notion of autonomy of the wills in other aspects of contract law," including hardship.[94] The following section attempts to resolve this irony to indicate an opening for hardship not only in Québec, but also in the rest of Canada.

b. *Addressing the SCC's decision in* Churchill Falls Labrador (Corp) v Hydro-Québec

In *Churchill Falls,* the SCC rejected hardship in Québec civil law. Churchill Falls ("CFLCo") and Hydro-Québec embarked on a 65-year contract for the construction and operation of a hydro-electric plant.[95] At negotiations, the parties decided against including a formula to adjust to market changes.[96] After the contract was formed, the price of hydroelectricity skyrocketed.[97]

89. Jukier, "*Banque Nationale*," *supra* note 64 at 235.
90. Jukier, "Good Faith," *supra* note 61.
91. Mindy Chen-Wishart, "Humble Good Faith 3x4" (12 March 2021), online (video): *Oxford Law Alumni: Meet the Dean* <www.law.ox.ac.uk/node/26432> [perma.cc/9B8Y-VLLZ].
92. Art 7 CCQ.
93. *Houle, supra* note 78 at 145.
94. Jukier, "*Banque Nationale*," *supra* note 64 at 237.
95. *Churchill Falls* SCC*, supra* note 2 at para 1.
96. *Ibid* at para 14.
97. *Ibid* at para 17.

Consequently, Hydro-Québec made an enormous profit.[98] Although its profits were disproportionate to Hydro-Québec's, CFLCo continued to reap the benefits for which it contracted (including a plant worth over $20 billion).[99] CFLCo claimed that Hydro-Québec was legally required—according to equity and good faith—to renegotiate the contract.[100]

The lower courts found that CFLCo's case could not support renegotiation or contractual revision.[101] Explicitly referring to UNIDROIT, the Québec Court of Appeal found that the two basic requirements of hardship were not met.[102] First, the changed market price of hydroelectricity did not increase the cost of CFLCo's performance, nor did it reduce the value of Hydro-Québec's. Second, the change was a "known unknown."[103] The parties knew that the price of hydroelectricity fluctuated, yet they proceeded without an adjustment mechanism, "which confirms that the contract was to apply regardless of the magnitude of the fluctuations."[104]

Hydro-Québec was also successful in a 7:1 decision at the SCC. Writing for the majority, Gascon J found that CFLCo's claim had no basis in Québec civil law.[105] A notable factor in this decision was that the legislator had explicitly rejected hardship during the CCQ's reform.[106] As Professor Waddams has written, however, "leaving the matter to legislation is not a satisfactory response."[107] This is insufficient to forever close the door to hardship in Québec.

Beyond the legislative rejection, the SCC emphasized that Hydro-Québec did not have a duty to renegotiate the contract when the unforeseen market changes led it to reap significant profits.[108] While good faith allows courts to intervene and ensure that parties execute their obligations equitably, the majority maintained that this could not extend to redistributing the profits for which the parties initially bargained—especially when CFLCo did not face financial peril.[109] Nonetheless, the majority did not completely close the door to hardship. In "true" cases of hardship, the SCC wrote that

98. *Ibid* at paras 17-18.
99. *Ibid* at para 2.
100. *Ibid* at para 40.
101. *Churchill Falls (Labrador) Corporation Ltd c Hydro-Québec*, 2014 QCCS 3590 at paras 542, 551 [*Churchill Falls*QCCS]; *Churchill Falls (Labrador) Corporation Ltd c Hydro-Québec*, 2016 QCCA 1229 at para 62 [*Churchill Falls* QCCA].
102. *Churchill Falls* QCCA, *supra* note 101 at para 152.
103. *Churchill Falls* QCCS, *supra* note 101 at paras 374-376; *Ibid* at para 46.
104. *Churchill Falls* SCC*, supra* note 2 at para 80.
105. *Ibid* at para 6.
106. *Ibid* at para 93.
107. Waddams, "Sanctity of Contracts," *supra* note 7 at 200.
108. *Churchill Falls* SCC*, supra* note 2 at para 105.
109. *Ibid* at para 91.

a party refusing to exhibit reasonable flexibility regarding the other party's obligations could be in breach of good faith:

> What constitutes unreasonable conduct contrary to the duty of good faith must be determined on a case-by-case basis. For example, in a situation of "hardship" that corresponds to the description of that concept set out in the UNIDROIT Principles, the conduct of the contracting party who benefits from the change in circumstances cannot be disregarded and must be assessed.[110]

As such, there is potential for good faith to allow for renegotiations in cases where, despite the possibility of continued performance, the parties face financial ruin due to an unforeseeable event. This development will depend on the passage of a case with the appropriate factual matrix. This article contends that the outcome in *Churchill Falls* might have been different if the company faced bankruptcy because of a completely unforeseeable event like Covid-19 (which could not have been predicted in 1969).

2. *Anglo-Canadian Common Law*

Although *Churchill Falls* involved Québec civil law, its message is pertinent to Anglo-Canadian contract law because Cromwell J (as he then was) looked to Québec when he opened the door to good faith in Anglo-Canadian contract law in *Bhasin v Hrynew*.[111] Despite warnings that "the courts must be wary of rescuing parties from deals which turn out to be unfavourable,"[112] the cautious development of this principle would allow for fairness when changed circumstances render performance excessively onerous.

a. *Good faith's evolution: from "contortion and subterfuge"*[113] *to organizing principle*

Good faith in Anglo-Canadian contract law has a complex history. Prior to the seminal case of *Bhasin,* this doctrine developed in a "piecemeal"[114] manner. Good faith generally applied in scenarios in which one party had the "power to unilaterally defeat the other's contractual objectives."[115]

110. *Ibid* at para 113.
111. *Bhasin, supra* note 5 at paras 32, 41-42, 82-83, 85. One of Cromwell J's objectives was to bring Anglo-Canadian contract law more in line with its key trading partners. In particular, he noted that "experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability:" (*ibid* at para 85).
112. *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 355 [*IFP Technologies*].
113. Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at 169.
114. *Bhasin, supra* note 5 at para 32.
115. *Bhasin,* 2014 SCC 71 (Factum of the Appellant at para 38) [*Bhasin* FOA].

As such, the courts often rationalized their application of good faith by appealing to notions of fairness.[116]

In *Bhasin,* the SCC attempted to settle the law pertaining to good faith. Before delving into any analysis, it is useful to set out the facts of this seminal case. Mr. Bhasin worked as an enrollment director for Can-Am, which marketed education savings plans to investors.[117] Mr. Bhasin had a three-year contract with Can-Am, which was set to automatically renew at the end of the three-year term unless one of the parties provided six months' written notice of termination.[118] Mr. Hrynew and Mr. Bhasin were competitors, and the former wanted to capture his lucrative market and actively encouraged Can-Am to merge their agencies (even though Mr. Bhasin had already refused to do so).[119] When Mr. Hrynew was appointed the provincial trading officer for Can-Am, he was allowed to conduct audits of Can-Am's enrollment directors, including Mr. Bhasin.[120] Mr. Bhasin objected to having Mr. Hrynew review his confidential business records. Meanwhile, Can-Am had been planning to restructure its agencies, including Mr. Bhasin's (without his knowledge). Can-Am repeatedly misled Mr. Bhasin regarding this matter and, when he directly asked whether the merger would proceed, it responded equivocally.[121] When Mr. Bhasin continuously refused to allow Mr. Hrynew to audit his records, Can-Am gave him notice of non-renewal under the contract. As a result, at the expiry of the contract's term, Mr. Bhasin lost the value in his business in his assembled workforce and Mr. Hrynew's agency solicited most of his sales agents.[122] Mr. Bhasin sued Can-Am and Mr. Hrynew. At first instance, the trial judge found in favour of Mr. Bhasin; however, the Court of Appeal for Alberta allowed the appeal and dismissed Mr. Bhasin's lawsuit.[123]

Despite the prior categorization of good faith's application according to certain kinds of relationships, the Supreme Court found in favour of Mr. Bhasin. In particular, the Supreme Court incrementally advanced the common law of contract to allow for a fair outcome in this case:

---

116. See McCamus, *supra* note 8 at 839; *CivicLife Inc v Canada (Attorney General) (*2006), 149 ACWS (3d) 417, 215 OAC 43 (Ont CA) [*CivicLife*]; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1; *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd* (1994), 19 Alta LR (3d) 38, 149 AR 187 (CA) [*Mesa* cited to Alta LR].
117. *Bhasin, supra* note 5 at para 2-3.
118. *Ibid* at para 6.
119. *Ibid* at para 9.
120. *Ibid* at para 10.
121. *Ibid* at para 12.
122. *Ibid* at para 13.
123. *Ibid* at paras 15-16.

> In my view, *it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just*. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations [emphasis added].[124]

While this "modest, incremental step"[125] has been criticized, the author supports its underlying premise of deterring poor contracting behaviour in which the parties may hide behind the contract's express terms (as the Appellant attempted to do in *Callow* close to a decade later).

Key to the *Bhasin* decision is that the SCC recognized good faith as a general, organizing principle that underpins all contracts.[126] Cromwell J defined the principle as "simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."[127] This umbrella-like concept now encompasses four specific duties (three of which applied prior to *Bhasin*): (a) the duty of honest performance,[128] (b) the duty of cooperation,[129] (c) the duty to exercise a contractual discretion in good faith,[130] and (d) the duty not to evade contractual obligations.[131] That said, this list of duties is not exhaustive. In particular, Cromwell J noted in *Bhasin* that:

---

124. *Ibid* at para 33.
125. *Ibid* at para 73.
126. *Ibid* at para 33.
127. *Ibid* at para 63.
128. Cromwell J established the duty of honest performance, "which requires the parties to be honest with each other in relation to the performance of their contractual obligations," as one of the two incremental steps taken in *Bhasin* (*ibid* at para 93). This specific duty was recently reviewed in *Callow, supra* note 34*;* however, questions remain as to the scope of this duty and the boundaries between it and a potential duty to disclose.
129. Cromwell J described this duty as a situation involving "contracts requiring the cooperation of the parties to achieve the objects of the contract:" *Bhasin,* supra note 5 at para 49. See also *Dynamic Transport Ltd v OK Detailing Ltd,* [1978] 2 SCR 1072, 85 DLR (3d) 19; *Arton Holdings Ltd et al v Gateway Realty Ltd* (1991)*,* 106 NSR (2d) 180, [1991] NSJ No 362 (NSSC (TD)); *CivicLife, supra* note 116.
130. The exercise of a discretion will be further discussed below, given its relevance to this paper's thesis. This duty provides that, where a party to a contract holds a discretionary power under the contract, they must exercise it reasonably. Specifically, they ought to exercise it in a manner connected to the purpose of the contract's grant of discretion. See e.g. *Mitsui & Co (Canada) Ltd v Royal Bank of Canada,* [1995] 2 SCR 187, 123 DLR (4th) 449 [*Mitsui*]; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*].
131. This duty arises "where a contractual power is used to evade a contractual duty" (*Bhasin, supra* note 5 at para 51). See also *Mason v Freedman,* [1958] SCR 483, 14 DLR (2d) 529.

> …[T]his list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.[132]

On the whole, then, although *Bhasin* attempted to clarify the law, questions remain about good faith's scope and application, not to mention whether it should be analyzed subjectively or objectively.[133] While these questions are of great value to Anglo-Canadian contract law, they exceed the scope of this paper, which effectively argues that the courts should add to this list a specific duty to renegotiate in situations of hardship.

In concrete terms, *Bhasin* introduced three steps that Anglo-Canadian courts must follow in disputes involving allegations of lack of good faith. First, when faced with an alleged breach of one of the specific manifestations of good faith, the courts must identify whether the claim falls within any of the existing manifestations listed above. Second, if the claim does not fit within any of these manifestations, the courts must assess whether the situation before them justifies the creation of a new duty as a specific instantiation of the general organizing principle of good faith. Third, once the courts have determined that it is appropriate to develop a new duty, they should identify the content of the new duty in question by looking to the general organizing principle for guidance.

Applied to the framework of this article, the current manifestations of good faith—namely, the duty of honesty, the duty of cooperation, the duty to exercise a contractual discretion in good faith, and the duty not to evade contractual obligations—do not serve to assist contracting parties experiencing hardship. Parties faced with hardship do not find themselves in such a situation because of their lack of honesty in performing their

---

132. *Bhasin, supra* note 5 at para 66.

133. *Bhasin* can be said to reflect Québec civil law's notion of good faith, given that the SCC looked beyond the parties' objective intentions by deciding in favour of Bhasin (this is the author's own interpretation of the decision). Numerous scholars have commented on the disconnect between the objective and the subjective in *Bhasin*. For example, Professor Waddams has noted that "it is a little surprising that the court should go to such lengths to establish a principle of good faith only to declare that the motives of the parties are irrelevant" (Waddams, "Good Faith," *supra* note 6 at 41). Traditionally, the common law of contract has remained loyal to contractual interpretation based on the parties' objective intentions. Lord Hoffman opined that "interpretation according to subjective intent is a logical contradiction:" Lord Hoffman, "The Intolerable Wrestle with Words and Meanings" (1997) 114:4 SALJ 656 at 661. Anglo-Canadian contract law has illustrated its loyalty to its English roots in this sense: *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at para 54, 161 DLR (4th) 1. Québec has recognized this tension and recognizes both a subjective and objective element of good faith: Francois Gendron, *L'interpretation des contrats*, 2nd ed (Montréal: Wilson & Lafleur, 2016) at 76.

contractual obligations, but rather due to outside circumstances outside of their control. The duty to cooperate requires "the cooperation of the parties to achieve the objects of the contract,"[134] making it unlikely that this duty could save parties in situations of hardship (especially seeing that the object of the contract, not to mention the entire contract itself, has been thrown off-kilter due to extenuating circumstances). The duty not to evade a contractual duty also does not apply in such situations, seeing that situations of hardship are also triggered by outside circumstances, as opposed to the parties' attempts to evade their duties. Finally, the duty to exercise a discretion in good faith does not apply either; however, this article briefly discusses it next, given its relevance to this article's point.

In relation to this article's central thesis, a broad canvassing of the general organizing principle shows that the duty to renegotiate would entail an incremental addition to the current list of manifesting duties and allow good faith to fill the void left by the doctrine of frustration. It would be assessed in a similar manner as the concepts of abuse of rights and the duty to exercise a discretion in good faith, namely as a limit to the parties' right to continue under the contract as originally planned. The remainder of this article justifies the creation of a potential duty to renegotiate as a specific manifestation of the general organizing principle of good faith and identifies its context.

b. *The duty to exercise a discretion in good faith*

It is useful to discuss the duty to exercise a discretion in good faith, given the judicial emphasis on reasonableness when deciding whether to limit a seemingly unfettered contractual right. This duty was rooted in reasonableness long before *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*.[135] For example, in *Greenberg v Meffert et al,* even though the disbursement of a real estate commission was technically at the company's discretion*,* the Court of Appeal for Ontario found that the defendant had a duty to act reasonably and exercise its discretion honestly and in good faith:

> 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

134. *Bhasin*, *supra* note 5 at para 49.

135. *Wastech, supra* note 130. The seminal case in this line of precedent is *Mitsui, supra* note 130. See also *Greenberg v Meffert et al* (1985), 18 DLR (4th) 548, 50 OR (2d) 755 (Ont CA) [*Greenberg* cited to DLR]; *Kaban Resources Inc v Goldcorp Inc*, 2020 BCSC 1307; *Alectra Utilities Corporation v Solar Power Network Inc*, 2018 ONSC 4926.

> is to require the discretion […] to be reasonable…Apart altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith…The clause in issue…ought not to be construed so as to shield the company's improper exercise of discretion from any review.[136]

Greenberg was part of a line of precedent for applying a standard of reasonableness, based on the purpose of the contract, to the exercise of a discretionary right.[137] Even where a party adheres to the contract, the unreasonable exercise of a right will violate the principle of good faith.[138]

Mesa offers another example, given that this dispute arose from the defendant's decision to pool its properties for royalty payments in adherence with the agreement of sale.[139] The exercise of this right effectively reduced the plaintiff's royalties.[140] At the Alberta Court of Appeal, Kerans J did not explicitly appeal to good faith, which was "not an obvious part"[141] of the law at the time. Rather, he framed his reasoning in the following terms:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that 'substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties.'[142]

Kerans J's acknowledgment of the need to limit parties' exercise of discretionary rights can be said to be in the same "spirit" as good faith.

A 19th Century English case, *Blisset v Daniel,* also illustrates the limitation of contractual rights to ensure their reasonable exercise, in line with the contract's purpose. The court held that the power to expel a partner in articles of partnership had to be exercised in good faith and in accordance with the "truth and honour"[143] of the contract. The court's reasoning paralleled the values underlying the exercise of a discretionary

136. *Greenberg, supra* note 135 at para 19.
137. *Ibid* at para 22.
138. *Ibid* at para 23.
139. *Mesa, supra* note 116 at para 6.
140. *Ibid* at para 3.
141. *Ibid* at para 16.
142. *Ibid* at para 22.
143. *Blisset v Daniel*, [1853] 10 Hare 493 at 403, as cited by Nathaniel Lindley, *A Treatise On The Law of Partnership,* 5th ed asst by William C Gull & Walter B Lindley, eds (Chicago: Callaghan and Company, 1888) vol 1 at 477.

right, abuse of rights, and good faith. As Lord Hoffman observed in *O'Neill v Phillips*, "these are all different ways of doing the same thing."[144]

Both the duty to exercise a discretionary right and the proposed duty to renegotiate are founded on the reasoning that the parties' intentions as expressed in the contract may be overridden by a common thread (that is, good faith). As such, it is necessary to briefly discuss the recent *Wastech* decision, which illustrates the SCC's current tenor in this area of the law.

c. Wastech: *another incremental step*

Wastech was the SCC's most recent pronouncement on the duty to exercise a discretion in good faith. *Wastech* concerned a long-term relational contract between a waste management company (Wastech) and the District of Vancouver ("Metro").[145] When Metro exercised its contractual discretion to reallocate waste,[146] Wastech failed to meet its target operating ratio under the contract.[147] Wastech instituted arbitral proceedings on the basis that Metro's exercise of discretion made it impossible for it to earn the level of profit for which it bargained.[148]

The arbitrator found that Metro's reallocation of waste was honest and reasonable, but that it failed to exercise its discretionary right with appropriate regard for Wastech's legitimate expectations. Thus, Metro's actions constituted a breach of good faith.[149] In its decision (which was upheld by the British Columbia Court of Appeal),[150] the British Columbia Supreme Court set aside the award and warned against using *Bhasin* to rewrite the parties' bargain:

> The arbitrator attempted to do what is fair, not as grounded in the Comprehensive Agreement, but in a more general sense. *Bhasin* is not authority for the proposition that contracts may be adjusted to accommodate situations where one party regrets the contract in

144. *O'Neill v Phillips*, [1999] 1 WLR 1092 at 1101, [1999] 2 All ER 961, Hoffmann LJ (HL (Eng)). He, continued, however, that "on the contrary, a new and unfamiliar approach could only cause uncertainty" (*ibid*). He cited, with approval, Parker J in *In re Astec (BSR) Plc,* [1998] 2 BCLC 556: "to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former" (*ibid* at 588).

145. *Wastech, supra* note 130 at paras 1-7.

146. *Ibid.*

147. *Ibid* at para 17.

148. *Ibid* at para 18. In particular, Wastech claimed $2, 888, 162 in compensatory damages, representing the additional sums that it would have earned in 2011 if it had had the opportunity to achieve its target operating ratio.

149. DCA-1560 (2015), BCICAC at para 28 (Arbitrator: Gerald W Ghikas).

150. *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd*, 2019 BCCA 66.

hindsight.[151]

This comment reflects the deep-seated judicial concern about undermining contractual terms based on general notions of fairness. The question of having "appropriate regard"[152] for one's counterparty is also a challenging element of this duty, and relevant to the proposed duty to renegotiate: to what extent should a party insist on their own rights under a contract when their counterparty experiences hardship? There is no clear answer, but *Wastech* (while it discussed a different duty) suggests that the determination could be grounded in the reasonableness of the exercise, looking to the circumstances surrounding the contract and its purpose.[153]

In *Wastech,* Kasirer J, writing for the majority, found that Metro's exercise of discretion was reasonable (and, therefore, in good faith).[154] While it disadvantaged Wastech, the contract did not guarantee a given volume of waste to be allocated annually.[155] Reading the contract as a whole, its purpose was "to allow Metro the flexibility necessary to maximize efficiency and minimize costs of the operation."[156] Given that Metro's exercise was consonant with its purpose, it was reasonable and in good faith.[157]

Brown and Rowe JJ's concurrence is noteworthy, given their disagreement with the notion that courts must form a "broad view of the purposes of the venture to which the contract gives effect."[158] They perceived this invocation as a suggestion that judges must use their discretion, even where the parties choose for it to be unfettered.[159] Such an approach would undermine freedom of contract and distort the parties' bargain by imposing constraints to which they did not agree.[160] Brown and Rowe JJ opined that, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, then the courts must give it effect.[161] Fundamental to their reasoning was the primacy of the contract's text.[162] This is relevant to this paper's thesis: the parties can only

151. *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd*, 2018 BCSC 605 at para 63.
152. *Wastech, supra* note 130 at para 24.
153. *Ibid* at para 63.
154. *Ibid* at para 113.
155. *Ibid* at paras 97-107.
156. *Ibid* at para 99.
157. *Ibid* at para 113.
158. *Ibid* at paras 72, 132.
159. *Ibid* at para 107.
160. *Ibid* at para 132.
161. *Ibid* at para 133.
162. *Ibid* at para 132.

derogate from the contract's text in narrow circumstances under the CCF and UNIDROIT, and only if they have not already assumed the risk. As will be discussed below, the analysis for the proposed duty to renegotiate, while informed by good faith and reasonableness, should be grounded in the contract's terms (in accordance with the concurrence's stance).

Overall, the SCC's decision in *Wastech* confirms that a party's discretionary power does not give them the right to do whatever they please. Conversely, the parties that do not hold the discretionary right cannot retrospectively ask judges to force their counterparties to now subvert their interests. Doing so would effectively recalibrate the contractual equilibrium in a manner that the parties failed to do at the negotiating stage. As Kasirer J remarked, the parties' only necessary loyalty is to "the bargain"[163] in exercising their discretion. Judges can only "intervene where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties,"[164] rather than to provide them with benefits for which they never bargained. Accordingly, and in relation to the thesis, judges should not lightly derogate from the parties' agreement to revise their terms following changed circumstances. Rather, absent an unforeseeable, supervening event post-formation, judges should not be permitted to intervene.

Wastech demonstrates that Anglo-Canadian contract law's approach increasingly views contractual endeavours as cooperative and mutually beneficial undertakings, rather than mere economic vehicles of purely self-interested actors. Still, questions remain about the exact scope and applicability of the duty and how judges should ascertain the contract's purpose.[165] In particular, it remains unclear the extent to which good faith will protect contracting parties' legitimate expectations, as opposed to the explicit terms of the contract.[166] This could complicate the imposition of the proposed duty to renegotiate in good faith.

3. *The proposed duty to renegotiate*

This paper suggests that the organizing principle of good faith should be judicially developed to encompass a specific manifestation that requires the parties to renegotiate in the event of contractual hardship. This duty would be triggered where (i) a supervening event rendered performance excessively onerous, and (ii) the parties did not allocate the risk if such an event were to occur. Each will be discussed below, in addition to (iii) the

163. *Ibid* at para 107.
164. *Ibid* at para 71.
165. See generally Daniele Bertolini, "Toward a Framework to Define the Outer Boundaries of Good Faith in Contractual Performance" (2021) 58:3 Alta L Rev 573.
166. *Ibid* at 620.

conduct at renegotiations and (iv) judicial intervention. While this paper advocates for the incremental expansion of good faith, it does not argue that this principle should undermine contracting parties' ability to rely on the contract's express terms. Such a derogation should only take place where, similar to the concepts of abuse of rights and the duty to exercise a discretion in good faith, the insistence on that right becomes unreasonable in relation to the contract's purpose and the changed circumstances.

a. *The supervening event must render performance excessively onerous*

The proposed duty to renegotiate in good faith would only be triggered in narrow circumstances. This duty would be restricted to situations of true hardship, in the sense of "true financial peril,"[167] where the supervening event rendered the parties' obligations excessively onerous. This opening for redress in situations of hardship would be broader than Anglo-Canadian contract law's current stance; however, it would not be so malleable as to undermine the contract's express terms at any turn of events. This proposal is in line with Gascon J's reasoning in *Churchill Falls,* which recognized the need for equity and fairness but warned that these concepts should not be "detached from the will of the parties and their common intention as revealed in and established by a thorough analysis of the whole of the relevant evidence."[168] The proposed duty to renegotiate should not be used to disrupt the contractual equilibrium unless absolutely necessary. In other words, it should not become a tool for "charity or distributive justice."[169]

b. *The parties must not have pre-emptively allocated the risk*

To alleviate concerns that the proposed duty might be incompatible with the central tenets of contractual stability and freedom of contract, this paper suggests that the proposed duty only be triggered where the parties failed to pre-emptively allocate the risk. If the parties foresaw the risk and addressed it at the drafting stage, then requiring them to renegotiate—after they already turned their minds to the possibility—would undermine the contract's terms and threaten contractual stability. It would also undercut the very purpose of the initial negotiations. The same would be true if the parties discussed the likelihood of the event at negotiations, and purposely decided *not* to pre-emptively allocate the risk. This was the case in *Churchill Falls* and *Wastech*, where the SCC was clear that the parties should not be able to seek rights, ex ante, for which they specifically did

167. Grégoire, *supra* note 53.
168. *Churchill Falls* SCC*, supra* note 2 at para 109.
169. *Ibid* at para 107.

not bargain.[170] While the use of evidence from negotiations is an important legal question, it exceeds the scope of this paper.[171]

In a similar vein, this paper suggests that the parties should be able to contract out of the proposed duty to renegotiate. This aspect of the duty is likely to be controversial, given that the operation of good faith in relation to the parties' intentions has caused disagreement at the SCC. Even within the unanimous decision in *Bhasin*, Cromwell J first stated that good faith "operates irrespective of the intentions of the parties,"[172] yet, at another passage, that "any modification of the duty of honest performance would need to be in express terms."[173] Recent SCC judgments have perpetuated confusion about whether good faith can be excluded by clear contractual language. For example, in *Wastech,* Kasirer J stated that the principle of good faith (and its specific manifestations) should apply irrespective of the parties' intentions.[174] On the other hand, Brown and Rowe JJ argued that the application of such duties should be grounded in the contract's terms:

> The purpose of a discretion is always defined by the parties' intentions, as revealed by the contract. It follows that, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, *must* give effect to that intention. With careful drafting, parties can largely immunize the exercise of discretion from review on this basis… In either instance, their intention should be given effect and not subverted.[175]

Although *Wastech* concerned discretionary rights, these comments are pertinent to the proposed duty to renegotiate. Not only would it constitute another specific manifestation of the organizing principle, but it would also raise questions about the extent to which judges should intervene in contracts to ensure fairness. If the parties explicitly chose to preclude

---

170. *Churchill Falls* SCC*, supra* note 2 at paras 107, 131; *Wastech, supra* note 130 at paras 101-107.
171. Although evidence of negotiations can be useful for judges to objectively assess the circumstances surrounding the contract, this could have a chilling effect on the parties' participation in negotiations. Generally, evidence of pre-contractual negotiations will not be accepted. In *IFP Technologies*, the Alberta Court of Appeal explained that evidence of the contract's surrounding circumstances and evidence of the parties' pre-contractual negotiations can overlap; however, evidence of the parties' subjective intentions will always be inadmissible (*supra* note 112 at paras 58, 79-87). See also Geoff R Hall, *Canadian Contractual Interpretation Law,* 3rd ed (Toronto: Lexis Nexis, 2016) at 3.3.1; Waddams, "Sanctity of Contract," *supra* note 7 at ch 6; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 57; *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4 at para 28.
172. *Bhasin, supra* note 5 at para 74.
173. *Ibid* at para 78. Professor Waddams made this observation in Waddams, "Good Faith," *supra* note 6 at 39.
174. *Wastech, supra* note 130 at paras 91, 94.
175. *Ibid* at para 133.

the proposed duty to renegotiate in their contract (or some variation of it), judges should respect their express terms. Since good faith requires "consideration of the spirit of the law or the agreement"[176] as the parties have expressed in the contract, this paper takes the stance that the subordination of contractual terms must be contingent upon the parties' will as reflected in the contract's text. As Professor Jobin has observed, "a court cannot have the power to redraft the agreement, to itself adapt the agreement to the circumstances; as an outsider to the negotiations and to the specific context of the parties, it could well impose inappropriate terms if it were to modify the agreement itself."[177] Of course, this endeavour will be complicated by ambiguously drafted terms. In such a scenario, judges may have to take a broader view of the venture to assess the whole of the factual matrix and to better understand what the parties truly intended. As discussed above, however, this judicial approach risks subverting the parties' intentions to the court's own ideas of fairness.

c. *The parties must behave in good faith at renegotiations*

The proposed duty to renegotiate would require the parties to conduct themselves in good faith throughout renegotiations, similar to the requirements under UNIDROIT. Concretely, this means that the disadvantaged party must evidence their genuine belief that they are experiencing hardship when they request renegotiations.[178] Beyond this belief, both parties must behave reasonably and in good faith during the renegotiation process.[179] Concretely, this means that they must make efforts to participate in the renegotiations and provide any information necessary to facilitate the process.[180]

Beyond good faith efforts to renegotiate, the proposed duty would not require the parties to successfully reach a new agreement. This remains loyal to the central tenet of freedom of contract because it allows the parties to retain control over the process. If they cannot come to a mutually favourable agreement, forcing them to do so would undermine their contractual power and it would probably be ineffective. As the proverb goes, "you can bring a horse to water, but you can't make it drink."

176. Baudouin, Jobin & Vézina, *supra* note 54 at n 127.
177. Gabriel Jobin, "L'imprévision dans la réforme du Code civil et aujourd'hui" in Benoît Moore, ed, *Mélanges JeanLouis Baudouin* (Cowansville, QC: Yvon Blais, 2012) 375 at 387.
178. This requirement is based on Article 19954 of the CCF and Comment 5 of Article 6.2.3 of the UNIDROIT Principles. (Art 1195 CcF, *supra* note 36; UNIDROIT Principles, *supra* note 49, art 6.2.3).
179. This requirement is based on Article 1195 of the CCF and Comment 5 of Article 6.2.3 of the UNIDROIT Principles.
180. This requirement is based on Comment 5 of Article 6.2.3 of the UNIDROIT Principles (*supra* note 49, art 6.2.3).

If an appropriate agreement is not reached, then the parties should be able to withdraw following reasonable attempts to renegotiate (a bright line rule would be too rigid). As a practical matter, this possibility considers the reality that negotiations are time-consuming and expensive. Protracted renegotiations would not be conducive to lubricating the wheels of commerce. If the parties were forced to reach a proverbial goal post to satisfy the proposed duty, then they may merely participate until that point to check a proverbial box. This would undermine the purpose of renegotiations, which is to "preserve the contract and the contractual relationship."[181]

d. *Judicial intervention should be a tool of last resort*

If the renegotiations failed, this paper proposes that the parties should be entitled to *jointly* request judicial intervention. As such, any changes made to the contract would be, in a sense, rooted in *both* parties' consent. This is crucial because "allowing a contract to be modified by a judge at the request of a single party would conflict seriously with the principles of the binding force of contracts and freedom of contract."[182]

If judges were asked to modify the contract, then the paper suggests that there should be two components to their legal analysis. First, if the disadvantaged party claimed that the other side breached their duty to renegotiate, judges must assess whether the impugned party made reasonable efforts to renegotiate and conduct themselves in good faith. If the party insisted on their contractual right in an unreasonable manner, despite the disadvantaged counterparty's hardship, then this could indicate a breach of the duty to renegotiate in good faith.

Second, judges must address the disequilibrium that resulted from the supervening event. This paper suggests that judges should implement a frustration-like recourse allowing for partial relief from performance. Professor Waddams has observed the significance of partial enforcement: "the underlying objection to full enforcement is not lack of consent to the transaction as a whole, but the unreasonable consequences that would flow from enforcing a particular part of the contract."[183] This analysis should consider what courses of action would be reasonable in the light of the changed circumstances, remaining loyal to the contract's purpose as expressed in its terms: after all, "judicial decision-making is not an open-ended pursuit of the judge's personal views of right and wrong."[184]

---

181. *Di Matteo, supra* note 10 at 263.
182. *Churchill Falls* SCC*, supra* note 2 at para 131.
183. Waddams, "Sanctity of Contracts," *supra* note 7 at 220.
184. Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto

Such a test would affirm the courts' inherent power to set boundaries for the exercise of contractual rights—but only where absolutely necessary.

Another option might be for judges to recalibrate the contractual equilibrium by making a reasonable modification. This would be useful where partial enforcement cannot be implemented for practical reasons. For example, in a long-term construction contract impacted by Covid-19, judges could assist a contractor facing financial hardship by reasonably increasing payments from the other side to account for unforeseen expenses during a key phase of construction. This recalibration—limited to the terms impacted by the supervening event—would facilitate their ability to pursue their mutual objectives. Generally, though, judges' power to intervene should be exercised cautiously and as a last resort.

Conclusion

As it stands, Anglo-Canadian contract law does not allow parties to seek recourse when supervening events render contractual performance exceedingly onerous.[185] Given that good faith has the potential to resolve inconsistencies in the law as a broad and flexible principle, its use as a residual power may better protect contracting parties impacted by Covid-19. A corresponding duty to renegotiate would allow the parties to retain some level of control over their own arrangements while bending (cautiously) to the need for fairness. Seeing that Covid-19 has disrupted global economies, the time is ripe to further develop good faith to fill the gaps created by the doctrine of frustration.

Press, 2018) at 125.

185. *Churchill Falls* SCC*, supra* note 2; Berger & Behn, *supra* note 3.