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An Old Bottle for the New Wine: Understanding the Duty of Honest Performance under the Objective Theory

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Bhasin v Hrynew *has many dimensions and potentially affects almost every aspect of Anglo-Canadian contract law. This article is limited to one aspect only: the duty of honest performance ("DHP"). My article attempts to show that the objective theory can provide a solid foundation and a different thinking framework for understanding and developing the DHP. If I am right, the DHP may be placed on a sound footing, independently of the organizing principle of good faith. Section I of this article traces the duty's development from* Bhasin *to* Callow*. Section II argues that under the objective theory, reasonable expectations of the parties are symmetrical, because reasonableness, as a transactional term, merely represents the world shared between the parties. Section III discusses the DHP under the framework of symmetry. Specifically, I discuss the possible developments of the knowledge requirement, the inclusive and exclusive bases under the DHP, the interpretations of equivocation and silence, why the DHP necessarily exists, and why breach of the DHP should be reliance-based.*

L'affaire Bhasin c. Hrynew *comporte de nombreuses dimensions et a de potentielles répercussions sur presque tous les aspects du droit des contrats anglo-canadien. Le présent article se limite à un seul aspect : le devoir d'exécution honnête (« DEH »). Mon article tente de montrer que la théorie objective peut fournir une base solide et un cadre de pensée différent pour comprendre et développer le DEH. Si j'ai raison, le DEH peut être placé sur une base solide, indépendamment du principe organisateur de la bonne foi. La section I du présent article retrace l'évolution de l'obligation énoncée dans l'arrêt* Bhasin *à l'arrêt* Callow*. La section II soutient qu'en vertu de la théorie objective, les attentes raisonnables des parties sont symétriques, parce que le caractère raisonnable, en tant que terme transactionnel, représente simplement le monde partagé entre les parties. La section III examine le DEH dans le cadre de la symétrie. Plus précisément, je discute des développements possibles de l'exigence de connaissance, des bases inclusives et exclusives du DEH, des interprétations de l'équivoque et du silence, des raisons pour lesquelles le DEH existe nécessairement, et des raisons pour lesquelles la violation du DEH devrait être fondée sur la confiance.*

* BSc and MSc (Georgia Tech); JD (Toronto). I greatly appreciate the thoughtful comments of Professor Brian A Langille.

> Some have learnt many tricks of sly evasion,
> Instead of truth they use equivocation,
> And eke it out with mental reservation,
> Which to good men is an abomination.
> Our smith of late most wonderfully swore,
> That whilst he breathed he would drink no more,
> But since, I know his meaning, for I think,
> He meant he would not breathe whilst he did drink.[1]
>
> — Benjamin Franklin (1706–1790)

Introduction

As an innovation within Anglo-Canadian contract law, the duty of honest performance ("DHP") seems unstable: This duty has the potential to impact long-established doctrines such as promissory estoppel,[2] consideration,[3] and the tort of deceit. Fearing unintended consequences, courts may be too cautious when developing and applying the duty.

This article takes a bottom-up, rather than a top-down approach.[4] It attempts to show that the objective theory ("Bottom-up Approach") can help us understand and develop the DHP, but deliberately avoid the organizing principle of good faith ("Top-down Approach"). After all, "the law looks at the matter not from the standpoint of universal intelligence but from the standpoint of the parties; and as the law is made for man, not man for the law, this is the only proper attitude."[5] Specifically, my core argument is that under the objective theory, the reasonable expectations of the parties are symmetrical, because reasonableness, as a transactional term, merely represents the modified world shared between the parties (hereinafter I refer to the symmetry of reasonable expectations of the parties as the "Symmetry"). If I am right, the Bottom-up Approach can provide a sound footing for the duty, independently of the Top-down Approach.

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1. Benjamin Franklin, *Poor Richard, 1736* (Philadelphia, Pennsylvania: Benjamin Franklin, 1735).
2. Krish Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017) 55:1 Alta L Rev 199 at 209-223, DOI: <doi.org/10.29173/alr794>.
3. Claire Mumme, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins" (2016) 32 Intl J Comp Lab L & Ind Rel 117 at 124, DOI: <10.54648/ijcl2016007>.
4. Bottom-up approaches are inductive; top-down approaches, deductive. See Mitchell McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment after *Garland v. Consumers' Gas*" (2004) 42:2 Alta L Rev 399 at 401-402, DOI: <10.29173/alr1295>; Peter Jaffey, "The Unjust Enrichment Fallacy and Private Law" (2013) 26:1 Can JL & Jur 115 at 116-117, DOI: <10.1017/S084182090000597X>.
5. Samuel Williston, "Consideration in Bilateral Contracts" (1914) 27:6 Harv L Rev 503 at 527, DOI: <10.2307/1326781> [Williston, "Bilateral"].

Before making my argument, I briefly trace the DHP's development from *Bhasin v Hrynew*[6] to *CM Callow Inc v Zollinger*[7] in Section I. Section II argues for the Symmetry under the objective theory, demonstrates the operation of the Symmetry in frustration and mistake cases, and addresses some challenges. Specifically, in Section II.3, I argue that the ambiguity and instability of reasonableness may be alleviated if we understand reasonableness as a transactional term as defined by Benson in *Justice in Transactions: A Theory of Contract Law*.[8] Section III discusses the DHP under the framework of the Symmetry for understanding and further development. After explaining the possible developments of the knowledge requirement, I briefly discuss using reasonable expectations as inclusive and exclusive bases under the duty. More importantly, I explain the interpretations of equivocation and silence, why the DHP necessarily exists, and why breach of the duty should be reliance-based.

I. *The DHP from* Bhasin *to* Callow

1. *The birth of the duty in* Bhasin

Writing for a unanimous court, Justice Cromwell justified the creation of the DHP by appealing to the reasonable expectations of commercial parties:

> Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, *even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties*.[9]

In essence, because reasonable expectations include a basic level of honesty, the Court was justified in creating the duty. Cromwell J went on to state that the duty "requires the parties to be honest with each other in relation to the performance of their contractual obligations."[10] Specifically, the DHP "var[ies] with context"[11] and "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked

6. *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*].
7. *CM Callow Inc v Zollinger*, 2020 SCC 45 [*Callow* SCC].
8. Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2019) [Benson, *Justice in Transactions*].
9. *Bhasin*, *supra* note 6 at para 60 [emphasis added].
10. *Ibid* at para 93.
11. *Ibid* at para 77.

to the performance of the contract"[12] ("Matters"). While differentiating the DHP from a duty of fiduciary loyalty or disclosure, he emphasized the DHP does not require that a party "forego[es] advantages flowing from the contract," "subordinate[s] his or her interest to that of the other party,"[13] discloses information, or "intend[s] that his or her representation be relied on."[14] Perhaps most importantly, parties cannot contract out the DHP entirely and must respect its minimum core requirements, because this duty "operates irrespective of the intentions of the parties."[15]

A narrow reading of *Bhasin* equates the DHP with "just don't tell lies"[16] about the Matters, because the defendants in *Bhasin* explicitly lied. On a broader reading, equivocation may breach the duty.[17] If so, where are the stop gates? Hence, Maharaj warned, "[t]here ought to be some 'brake' to stop the expansion of liability short of the point of over-inclusivity."[18] Unsurprisingly, courts saw "increasing numbers of cases where *Bhasin* is being pleaded more as a reflex action than after detailed analysis."[19]

After *Bhasin* and before *Callow*, Canadian courts confirmed that the DHP only concerns the performance of existing contracts,[20] that the DHP is not the duty of disclosure[21] or loyalty,[22] and that the DHP does not require a party to forego advantages flowing from the contract.[23] Yet, none of these cases can be compared with *Callow. Callow*'s facts are intricate and its potential impacts on the DHP are fascinating.

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12. *Ibid* at para 73.
13. *Ibid* at para 86.
14. *Ibid* at para 88.
15. *Ibid* at para 74.
16. Angela Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015) 56:3 Can Bus LJ 395 at 395, 403.
17. E.g. Shannon O'Byrne & Ronnie Cohen, "The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015) 53:1 Alta L Rev 1 at 11, DOI: <10.29173/alr279>; Maharaj, *supra* note 2 at 222, n 117.
18. Maharaj, *supra* note 2 at 222.
19. *Evans v Paradigm Capital Inc*, 2016 ONSC 4286 at para 82. E.g., *Yongfeng Holdings Inc v Zheng*, 2019 BCSC 1534 at paras 210-213; *Aimco Realty Investors LP (General Partner for) v CHC MPAR (412 Church) Development Limited Partnership (General Partner for)*, 2019 ONSC 5864 at para 107 [*Aimco*].
20. E.g. *Albo v Winnipeg Free Press a Division of FP Canadian Newspapers Limited Partnership*, 2020 MBCA 50 at para 50 [*Albo*]; *Aimco*, *supra* note 19 at para 107.
21. E.g. *Salvation Army v Angus Partnership Inc*, 2018 ABCA 206 at para 73; *Tall Ships Landing Development Inc v Brockville (City of)*, 2019 ONSC 6597 at paras 130-135.
22. E.g. *Chen v TD Waterhouse Canada Inc*, 2020 ONSC 1477 at paras 33-34.
23. E.g. *Caldwell & Ross Ltd v New Brunswick (Minister of Transportation)*, 2018 NBQB 227 at paras 128-129.

2. *The unparalleled sequel:* Callow

a. *The factual matrix*

Callow ran a small business and provided services for lawn maintenance, snow removal, and parking lot maintenance.[24] In 2012, the defendant, CMG, entered a two-year winter service contract with Callow.[25] In either March or April 2013, CMG decided to terminate the contract early,[26] but chose "not to inform Callow of its decision"[27] until 12 September 2013.[28] The service contract permitted CMG to terminate without cause by giving ten days' notice.[29]

In the chain of events leading up to the early termination, CMG lied by representing the renewal of the ongoing contract had a positive chance.[30] For instance, CMG told Callow that "[CMG]'ll be up for it,"[31] while discussing the renewal chance. If "it" referred to an actual renewal, CMG explicitly lied, because CMG had already decided to terminate.[32] Even if "it" only referred to an internal discussion about the renewal,[33] CMG still explicitly lied: Since CMG had already decided to terminate early, CMG could not have possibly been up for such a discussion. In addition to the lies about the renewal, CMG accepted "freebie" landscaping work,[34] knowing Callow performed the work to incentivize CMG to renew.[35] Had CMG corrected its misrepresentations once it knew about Callow's misunderstandings, he would have bid on other contracts earlier than 12 September 2013.[36] Had CMG not lied or knowingly misled Callow, he could have bid on other contracts earlier[37] than 12 September 2013.

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24. CM Callow Inc, "Select a Service," online: <www.ricksgan.wixsite.com/callow4/services> [perma.cc/3Q4N-Z736].
25. *Callow* SCC, *supra* note 7 at paras 6-8.
26. *Ibid* at para 10; *CM Callow Inc v Zollinger*, 2017 ONSC 7095 at para 51 [*Callow* ONSC].
27. *Callow* SCC, *supra* note 7 at para 10.
28. *Ibid* at paras 10-14; *Callow* ONSC, *supra* note 26 at paras 37-49.
29. *Callow* SCC, *supra* note 7 at paras 1, 85.
30. *Ibid* at paras 83, 95-96, 99-100, 103 (the majority used "likely"). Positive chances may be small but are not certainties of suffering losses, see *McRae v Commonwealth Disposals Commission* (1951), 84 CLR 377 at 396, [1951] HCA 79 (AustLII) [*McRae*].
31. *CM Callow Inc v Zollinger*, 2020 SCC 45 (Factum of the Appellant at para 20 [FOA]); *CM Callow Inc v Zollinger*, 2020 SCC 45 (Factum of the Respondent at para 107 [FOR]); *Callow* SCC, *supra* note 7 at para 222.
32. FOA, *supra* note 31 at paras 19-20; FOR, *supra* note 31 at paras 106-107; *Callow* SCC, *supra* note 7 at paras 222-224. For a similar case about pronouns such as "it" or "this," see *Xerex Exploration Ltd v Petro-Canada*, 2005 ABCA 224 at paras 23-24, 50-53 [*Xerex*].
33. *Callow* SCC, *supra* note 7 at paras 219-224, Justice Cote, dissenting.
34. *Ibid* at paras 24, 97-98; *Callow* ONSC, *supra* note 26 at paras 43-48.
35. *Callow* SCC, *supra* note 7 at paras 10-14, 39, 98; *Callow* ONSC, *supra* note 26 at paras 41-48; FOA, *supra* note 31 at paras 23-24.
36. *Callow* SCC, *supra* note 7 at paras 10-14, 114-116.
37. *Ibid.*

a. *The explicit and implied lies of CMG and the damage award*

First, the majority addressed the relationship between the lie about the renewal and the deception about the early termination: "If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early."[38] Hence, Callow's inference about the chance of early termination was false but reasonable. In essence, his inference may be understood as an implied lie[39] created by CMG's explicit lies.

The majority then held CMG breached the DHP by two active communications: (1) lying about the chance of renewal, and (2) accepting the "freebie" work.[40] The active dishonesty of the first communication is more explicit. As just discussed, by lying about the renewal chance, CMG misled Callow about the chance of early termination. The active dishonesty of the second communication is more implicit. Although Callow did not make the acceptance of his "freebie" work conditional on an actual renewal, his work was not a gratuitous gift[41] and may be understood as conditional on a positive chance of renewal. Since CMG knew Callow's actual motive,[42] by accepting the "freebie," it implicitly confirmed the renewal had a positive chance. But, the actual chance was zero, because CMG had already decided to terminate. In essence, CMG's acceptance deceived Callow about the renewal chance[43] and, by extension, also about the chance of early termination.

The majority followed *Bhasin* that "breach of the duty of honest contractual performance supports a claim for damages according to the ordinary contractual measure."[44] The majority went on to state, "While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once [CMG] knew Callow had drawn a false inference."[45] Had CMG taken the least onerous means of performance, "Callow would have had the opportunity to secure another

38. *Ibid* at paras 37, 99. See *ibid* at para 135; *Queen v Cognos Inc*, [1993] 1 SCR 87 at 130-132, 1993 CanLII 146 [*Cognos*].
39. For discussions about implied misrepresentation, see *Curtis v Chemical Cleaning & Dyeing Co*, [1951] 1 KB 805 at 808-809, [1951] 1 All ER 631; *Callow* SCC, *supra* note 7 at paras 89-91; *Cognos*, *supra* note 38 at 128-132; *Opron Construction Co v Alberta*, 1994 CanLII 18362 (ABQB) at paras 495-497, 501, 504, 507 [*Opron*].
40. *Callow* SCC, *supra* note 7 at paras 5, 94-100.
41. *Supra* note 35.
42. *Callow* SCC, *supra* note 7 at paras 12-13, 39.
43. *Ibid* at paras 94-95, 97-98.
44. *Ibid* at para 106.
45. *Ibid* at para 114.

contract for the upcoming winter."[46] Consequently, the majority awarded him the profit he would have obtained, and the value of one year of an equipment lease that he would not have paid.[47]

On a narrow reading of *Callow*, the majority merely confirmed that breach of the DHP also includes implied lies. As expected for any innovation, speculations[48] arise in the wild. To provide a different thinking framework, I turn to the objective theory in the next section.

II. *The objective theory in contract law*

1. *The paradigm of the objective theory*

a. *Iteration of deductions: reasonable expectations under the objective theory*

Courts have long been troubled by a "Gordian Knot": unlike the Deity, courts are not omniscient and omnipresent and consequently cannot know retrospectively the actual expectations that the parties must have[49] agreed upon, or the hypothetical expectations the parties would have[50] agreed upon. As civilizations advance, humans accumulate knowledge and invent new paradigms to solve old problems. While the form of a paradigm may be novel, the roots, however, are always ancient. The objective theory, for instance, is based on the long-established concept of a "reasonable man."[51]

In *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*,[52] the majority described the iteration to deduce reasonable expectations of both parties for formation:

> [A]n "outward manifestation of assent by each party such as to induce a reasonable expectation in the other" is required in order to find that a binding post-incorporation contract exists…. Thus, a court should determine whether a reasonable person in the position of one party

46. *Ibid.*
47. *Ibid* at paras 23, 114, 117-119. CMG was also ordered to pay the final, unpaid invoice.
48. A common complaint is about the DHP's unclear boundaries: e.g. *Callow* SCC, *supra* note 7 at paras 197-198, Cote J, dissenting.
49. Brian Langille & Arthur Ripstein, "Strictly Speaking—It Went Without Saying" (1996) 2:1 Leg Theory 63 at 66, DOI: <10.1017/s1352325200000367> (the authors explained the approach of "must-have").
50. *Ibid* at 66-67 (the authors explained the approaches of "would have done" and "should have done").
51. The "reasonable man" started to appear in contract cases during the 19th century, if not earlier. See e.g. *Smith v Hughes* (1871), LR 6 QB 597, [1861-73] All ER Rep 632 at 637. For discussions about the origins of the reasonable person, see Simon Stern, "*R. v. Jones* (1703): The Origins of the 'Reasonable Person,'" in Philip Handler, Henry Mares & Ian Williams, eds, *Landmark Cases in Criminal Law* (Oxford: Hart Publishing, 2017) at 59-79. The idea of reasonableness in the common Law has even earlier roots. See e.g. *Tassell v Lewis* (1695), 1 LD RAYM 748, 91 ER 1397 (KB).
52. 2020 SCC 29 [*Crystal*].

> would consider that the other party's conduct constituted an offer… And, conversely, whether a reasonable person in the position of the latter would consider that the former's conduct constituted an acceptance.[53]

In essence, after placing a "reasonable person" in the shoes of one party,[54] courts deduce this party's reasonable expectations objectively based on the "outward manifestation"[55] of the counterparty[56] in each case's full context[57]; courts then repeat this step for the other party; the iteration continues until courts are satisfied with the ultimate results. After the iteration is done, the ultimate outputs are the reasonable expectations of both parties. Put more simply, a "reasonable person" in action may be understood as a fully contextualized figure in the shoes of an actual party. At the risk of stating the obvious, in legal contemplation, the reasonable expectations of the parties are not necessarily their actual expectations and vice versa.

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53. *Ibid* at para 33.

54. For operations of reasonable persons in contractual formation, see *Grant v Province of New Brunswick* (1973), 35 DLR (3d) 141 at 146-147, 1973 CanLII 1205 (NBCA); *Allergan Inc v Apotex Inc*, 2016 FCA 155 at para 32.

For contractual interpretation, see *Arnold v Britton*, [2015] UKSC 36 at paras 15-23 (the majority discussed contractual interpretation through the eyes of contextualized reasonable persons) [*Arnold*]; *Belize (AG) v Belize Telecom Ltd,* [2009] UKPC 10 at paras 16-18 [*Belize*]; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 48-49 [*Sattva*]; *Henningsen v Bloomfield Motors Inc*, 32 NJ 358 at 399-400, 402 (NJ Sup Ct 1960).

For damage, see *Satef-Huttenes Albertus Spa v Paloma Tercera Shipping Co SA* (1980), [1981] 1 Lloyd's Rep 175 at 183, [1980] 27 LMLN 88 (QB) (Justice Goff described how to put a reasonable person in the shoes of one party to deduce reasonable contemplations); *Monarch Steamship Company Ltd v A/B Karlshamns Oljefabriker* (1948), [1949] 1 All ER 1 at 13-14, 20, [1948] UKHL 1(BAILII).

For frustration, see *Re Comptoir Commercial Anversois and Power Son & Co* (1919), [1918-19] All ER Rep 661 at 666, 669, [1920] 1 KB 868 [*Comptoir*]; *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 at 728-729, [1956] UKHL 3 (BAILII) [*Davis*]; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*, [1941] 2 All ER 165 at 186, [1942] AC 154 (UKHL).

55. *Crystal*, supra note 52 at para 33. For other expressions of this "outward manifestation," see *Chartbrook Ltd v Persimmon Homes Ltd*, [2009] UKHL 38 at paras 48, 55, 60-61 [*Chartbrook*].

56. *Crystal*, supra note 52 at paras 28-33.

57. For Canadian discussions about contextualized reasonableness, see *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras 68-76 [*Wastech* SCC]; *Cowper-Smith v Morgan*, 2017 SCC 61 at para 26. For Canadian discussions about context, see *Sattva*, *supra* note 54 at paras 57-60 (the Court discussed considerations of the surrounding circumstances and the parol evidence rule); *Corner Brook (City of) v Bailey*, 2021 SCC 29 at paras 20, 33, 35-38.

For English discussions, see *Wood v Capita Insurance Services Ltd*, [2017] UKSC 24 at para 10; *Belize*, *supra* note 54 at para 16; *Investors Compensation Scheme v West Bromwich Building Society* (1997), [1998] 1 BCLC 493 at 547, [1997] UKHL 28 (BAILII) [*Investors*].

For criticisms against exclusions of external evidence, see Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge: Cambridge University Press, 2019) at 101-112.

b. *The perfect mirror-images: the symmetry of reasonable expectations*

In *The Law of Contracts*, Waddams stated, "only a reasonable expectation will be protected."[58] In *Canadian Contract Law*, the authors wrote, "the function of the law of contracts is to protect the reasonable expectations."[59] Perhaps much more importantly, they went on to explain, "The function of the word 'reasonable' is that it suggests that one party's expectations *must be* reasonably expected by the other."[60] That is, the reasonable expectations in each case are not one-sided wishes[61] but are symmetrical between the parties.

To be explicit, in legal contemplation, one party's reasonable expectations are what a "reasonable person" in the counterparty's shoes, would have expected to be responsible for simultaneously, and vice versa. Thus, Lord Hoffmann wrote, before considering the foreseeability of the losses, "one must first decide whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have accepted responsibility."[62] So understood, "one-sided reasonable expectation" is an oxymoron; a much better phrase may be "one-sided *plausible* expectation." If both parties simultaneously have plausible but completely incompatible expectations, a contract is never there.[63] Figuratively, the reasonable expectations of the parties are mirror images of each other. In comparison, unmirrored expectations are unreasonable and shall be rejected. Otherwise, the reasonable expectations proclaimed by courts will cease to be reasonable to both parties[64] and instead become

58. SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 322. See also *Tilden Rent-A-Car Co v Clendenning*, 1978 CarswellOnt 125 at para 21, 1978 CanLII 1446 (ONCA) [*Tilden*]; *Arnold*, *supra* note 54 at paras 15-23; *Pakistan International Airline Corporation v Times Travel (UK) Ltd*, [2021] UKSC 40 at para 27; *Belize*, *supra* note 54 at paras 16-25, 27; *Investors*, *supra* note 57 at 547-548; *Jacob & Youngs Inc v Kent*, 230 NY 239 at 241-244 (NY Ct App 1921); Joseph M Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation" (2000) 69:2 Fordham L Rev 427 at 476, DOI: <10.2139/ssrn.262445>.

59. Angela Swan, Jakub Adamski & Annie Y Na, Canadian Contract Law, 4th ed (Toronto: LexisNexis Canada, 2018) at §1.2.

60. *Ibid* at § 1.5 [emphasis added].

61. "One-sided wish" is one semantic expression among many possibilities. For others, see e.g. *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, [2002] EWCA Civ 1407 at para 29 [*The Great Peace*] ("at cross-purposes"); *Hong Kong (AG) v Humphreys Estate (Queen's Gardens) Ltd* (1986), [1987] AC 114 at 124, [1986] UKPC 58 (BAILII) ("unreasonable hope"); *Barclays Bank Plc v Unicredit Bank AG*, [2014] EWCA Civ 302 at para 22 ("unreasonable expectation").

62. *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia*, [2008] UKHL 48 at para 15 [*The Achilleas*].

63. See e.g. *Raffles v Wichelhaus*, [1864] EWHC Exch J19 (BAILII); *O'Neal v Harper*, 182 Okla 52 at 54-55 (OK Sup Ct 1937); *Scriven Bros & Co v Hindley & Co*, [1913] 3 KB 564 at 569, 109 LT 526. See also *The Great Peace*, *supra* note 61 at para 29 (the court explained latent ambiguity).

64. See *Greenberg v Meffert*, 1985 CarswellOnt 727 at paras 19-20, 1985 CanLII 1975 (ONCA) (the court explained the objective standard of reasonableness is not one-sided and must be fair to both contractual parties).

one-sided wishes in disguise.[65] To demonstrate the Symmetry, I start with frustration in the next subsection.

2. *Frustration, mistake, implication and good faith*

In cases of frustration or common mistake, realities become very different from the parties' actual expectations at the time of contracting. In *Taylor v Caldwell*,[66] Caldwell & Bishop agreed to let Taylor & Lewis have the use of a hall for concerts and fetes. Before the first concert, the hall was burned to the ground through no fault of either party. Subsequently, Taylor & Lewis sued to recover the expenses already paid for the planned concerts and fetes. Justice Blackburn held the court should excuse performance when the contract's foundation perishes through no fault of either party:

> [T]he parties must…have known that [the contract] could not be fulfilled unless … some particular specified thing continued to exist, so that when entering into the contract they must have contemplated *such continued existence as the foundation* of what was to be done. …[T]he parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.[67]

But, subsequent courts struggled with the exact meanings of the implied foundations in frustration cases. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, the Court chose the events that made contractual performance "indefinitely impossible"[68]; in *Canadian Industrial Alcohol Co v Dunbar Molasses Co*, the court applied "a tacit or implied presupposition."[69] Perhaps, harmonizing the courts' semantics is not only impossible but also unnecessary.[70] The key to conciliation lies within the Symmetry. Let me demonstrate.

In *Krell v Henry*,[71] Henry agreed to rent a flat from Krell to watch the coronation procession of Edward VII. Because of the King's illness, the procession did not take place on the days originally set. Since Henry refused to pay, Krell sued Henry to recover the balance. Justice Williams wrote:

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65. See *Wastech* SCC, *supra* note 57 at paras 71-75, 101-107 (the majority emphasized "the first source of justice between the parties" is the contract, warned against unjustified judicial intervention, and rejected an advantage that was unbargained for); *White and Carter (Councils) Ltd v McGregor* (1961), [1962] AC 413 at 445, [1961] UKHL 5 (BAILII).
66. (1863), [1861-73] All ER Rep 24, [1863] EWHC QB J1 (BAILII) [*Taylor* cited to All ER Rep].
67. *Ibid* at 27 [emphasis added].
68. [1942] 2 All ER 122 at 125, [1942] UKHL 4 (BAILII) [*Fibrosa*].
69. 258 NY 194 at 198 (NY Ct App 1932).
70. See *Davis*, *supra* note 54. Lord Radcliffe wrote, "the variety of description is not of any importance, so long as it is recognised that each is only a description and that all are intended to express the same general idea" (*ibid* at 727).
71. (1903), [1900-3] All ER Rep 20, [1903] 2 KB 740 (CA) [*Krell* cited to All ER Rep].

> [I]t cannot *reasonably be supposed* to have been in the *contemplation* of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred.[72]

In essence, since the procession's cancellation was not within the parties' reasonable expectations, "the loss lies where it falls."[73] Simply put, Krell's professed expectation was a post-event, one-sided wish. The court thus absolved Henry's obligation to pay the balance.[74] In comparison, consider *McRae v Commonwealth Disposals Commission*. In *McRae*, the Commonwealth Disposals Commission ("CDC") sold the McRae brothers an oil tanker wrecked in a specified location.[75] Because of a mistaken belief, the CDC provided incorrect information about the location of the tanker in the express contract and during the subsequent communications.[76] Consequently, the brothers wasted a lot of capital searching for a "ghost" tanker that was never there.

Even if the brothers did not buy a positive chance of profiting, they reasonably must not have expected certainty of suffering a loss.[77] Therefore, at the time of contracting, they must have reasonably expected to hold the CDC responsible for all their wasted expenditure, if the CDC sold them a certainty of suffering a loss; symmetrically, such an expectation is what a "reasonable person" in the CDC's shoes, would have expected to be responsible for. Thus, Justices Dixon and Fullagar wrote, "It would be wrong … to say that the course which the plaintiffs took was *unreasonable*, and it seems to us to be the very course which the Commission would *naturally expect* them to take."[78] Unsurprisingly, the Court refused to avoid the contract,[79] held the CDC responsible for a contractual breach and awarded the McRae brothers the "expenditure incurred and wasted in reliance on the Commission's promise."[80]

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72. *Ibid* at 23 [emphasis added].
73. *Fibrosa*, *supra* note 68 at 126-128, 142-143.
74. *Krell*, *supra* note 71 at 25.
75. *McRae*, *supra* note 30 at 396-398, 410.
76. *Ibid* at 396-399.
77. *Ibid* at 396.
78. *Ibid* at 413 [emphasis added].
79. *Ibid* at 410.
80. *Ibid* at 415.

In the foregoing cases, courts used reasonable expectations to include or exclude liabilities. The underlying principle seems to be: Under the objective theory, the *scope*[81] of contractual obligations includes only reasonable expectations that are mirror images of each other.[82] Thus, Justice Bailhache wrote, "the doctrine of frustration depending as it does upon implied contract, the question the court has to ask itself i[s]: Would two reasonable men making the contract in question have both agreed, if asked at the time of making it, that in the events which have happened the contract, or its further performance, was to be considered at an end…?"[83] Understood in this way, the necessity required for contractual implication is another way to express the Symmetry. Let me elaborate.

In *Hamlyn & Co v Wood & Co*,[84] Lord Esher quoted from *The Moorcock*[85] and expressed his own take on implication,

> [T]he Court has no right to imply…unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.[86]

At first glance, he distinguished necessity from reasonableness. On this interpretation, implications must be necessary to avoid a failure of consideration or make sense of the contract; reasonableness is simply inadequate. Such an understanding, however, only pushes the most crucial question back a single stage. That is, what is necessary to avoid a failure of consideration depends precisely on the definition—scope and extent—of the consideration. After all, it is conceptually easy to redefine the consideration so that necessary terms suddenly become unnecessary (the

81. *The Achilleas*, *supra* note 62 at para 15; *South Australia Asset Management Corp v York Montague Ltd*, [1996] 4 LRC 289 at 293, [1996] UKHL 10 (BAILII) [*South Australia*] (Lord Hoffmann stated, "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation"); *Munroe Equipment Sales Ltd v Canadian Forest Products Ltd* (1961), 29 DLR (2d) 730 at 740-742, 1961 CanLII 395 (MBCA) [*Munroe*] (Miller CJ used "type" to indicate the limits of reasonable contemplation); Toney Honoré & H L A Hart, *Causation in the Law* (Oxford: Oxford University Press, 1985), ch XI at 314-315. Class, type, and kind are synonyms of each other and denote limited scopes of contractual obligations.

82. See Swan, Adamski & Na, *supra* note 59 at § 6.237 (the authors proposed to understand *South Australia*, *supra* note 81, by reasonable expectation).

83. *Comptoir*, *supra* note 54 at 666.

84. [1891] 2 QB 488, 60 LJQB 734 [*Hamlyn* cited to QB].

85. (1889), 14 PD 64, 58 LJP 73 (CA) [*The Moorcock* cited to PD].

86. *Hamlyn*, *supra* note 84 at 491. See also *Dahl v Nelson, Donkin & Co* (1881), [1881-85] All ER Rep 572 at 582, 6 App Cas 38 (UKHL), Lord Watson.

same is true to make sense of contracts).[87] On my view, this understanding is wrong because the key is not the word, "necessary," but parties' presumed intentions. Let me explain.

In *Hamlyn*, Lord Esher considered Lord Justice Bowen's statement in *The Moorcock* "an expansion of the terms [Lord Esher has] used, and with which [Lord Esher] entirely agree[s]."[88] Specifically, Bowen LJ wrote,

> [I]n all these cases the law is raising an implication from the *presumed intention* of the parties with the object of giving to the transaction such efficacy as both parties must have intended it should have. If that is so, the *reasonable* implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from all the burdens, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for.[89]

In essence, implications "must have been intended at all events by both parties,"[90] based upon "the presumed intention *of the parties, and upon reason.*"[91] On my view, this is "the sense in" which Lord Esher urged us to understand the word, "necessary."[92] If I am right, the final, missing link between implication and the Symmetry is the connection between reasonable expectations and presumed intentions. On my view, under the objective theory, this connection is easily established, because saying one party has already manifested objective intentions to be responsible for some obligations is merely restating that the counterparties are reasonable to hold him or her responsible for the same obligations, and vice versa. Let me illustrate.

In *1688782 Ontario Inc v Maple Leaf Foods Inc,*[93] the majority made the same observation albeit in a negligent misrepresentation case,

> When a defendant undertakes to represent a state of affairs…it assumes the task of doing so *reasonably*, thereby *manifesting an intention to induce* the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that *intended*

87. See also JF Burrows, "Contractual Co-Operation and the Implied Term" (1968) 31:4 Mod L Rev 390 at 403, DOI: <10.1111/j.1468-2230.1968.tb01199.x>.
88. *Hamlyn*, *supra* note 84 at 491.
89. *The Moorcock*, *supra* note 85 at 68 [emphasis added].
90. *Ibid*.
91. *Ibid*.
92. *Hamlyn*, *supra* note 84 at 491.
93. 2020 SCC 35 [*Maple Leaf*].

> *effect* — that is, where the plaintiff *reasonably relies*, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement.[94]

This discussion about intention makes perfect sense if one bears in mind that the majority was discussing objective intentions. (At the risk of stating the obvious, negligence is not an intentional tort which requires subjective intentions.) That is, the majority observed that for the representee to reasonably rely, the representors must have manifested objective intentions to cause reliance. Simply put, objective intention and reasonable reliance are two sides of the same coin. So understood, *Maple Leaf* brings the connection between objective intention and reasonable expectations to the forefront.[95]

We are finally ready to examine the relationship between implication and the DHP. Briefly, both are merely different ways to formulate the same thing—the Symmetry. In *Market Street Assocs Ltd Partnership v Frey*,[96] Justice Posner explained:

> [W]hether we say that a contract shall be deemed to contain such implied conditions as are necessary to make sense of the contract, or that a contract obligates the parties to cooperate in its performance in "good faith" to the extent necessary to carry out the purposes of the contract, comes to much *the same thing*. They are different ways of formulating the overriding purpose of contract law, which is to give the parties *what they would have* stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero.[97]

"The two formulations would have different meanings only if 'good faith' were thought limited to 'honesty in fact.'"[98] That is, if the subjective elements are removed, the DHP comes to the same thing as implication. We thus seem to have come full circle so far: our seemingly random starting points, frustration and mistake, lead us to implication and then right back to good faith. On my view, however, our journey is not accidental. Although "an indefinite number of rules can be constructed consistent with a set of past actions,"[99] reasonable expectations always

94. *Ibid* at para 33 [emphasis added].
95. This connection also exists in contractual formation, compare *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal* (1982), [1983] 1 All ER 34 at 48-49, [1983] 1 AC 854 (UKHL), Lord Diplock with *Crystal*, *supra* note 52 at para 33.
96. 941 F (2d) 588 (7th Cir 1991).
97. *Ibid* at 596 [emphasis added].
98. *Ibid*.
99. Christopher Essert, "Property in Licences and the Law of Things" (2014) 59:3 McGill LJ 559 at

lurk behind courts' semantics in contract law. To understand why clearly, I turn to reasonableness as a transactional term in the next subsection.

3. *Reasonableness as a transactional term*

Critics commonly object that reasonable expectations are "inherently unstable,"[100] or too ambiguous.[101] Thus, two difficult questions to answer are: (1) Is the Symmetry simply a result of reasonableness's ambiguity? and (2) Is the concept of reasonableness too ambiguous to be meaningful?

To address these challenges, we must take a much closer look at the objective interactions between the parties. Since the DHP does not exist without contractual performance, we start from the position that contracts exist. That is, I deliberately avoid discussing consideration[102] at formation and the justifications for expectation damage[103] or performance interest.[104] Furthermore, I take the position that a contractual relationship is created and modified by objective interactions between the parties. To repeat Section II.1 (a), under the objective theory, the addressor manifests some invitations and invites the addressees to interact; the addressees then objectively assess the addressor's outward manifestations, make their own decisions, and interact with the addressor's manifestations. Direct interaction is unnecessary, because the addressees are only required to interact with the addressor's manifestations.[105] Regardless, implicit in this process is that the parties are *always* referring to and modifying the world shared between each other, not creating a contract out of nothing. Let me explain.

577, DOI: <10.7202/1025139ar>.

100. Catherine Valcke, "Contractual Interpretation at Common Law and Civil Law—An Exercise in Comparative Legal Rhetoric" in Jason Neyers, Richard Bronaugh & Stephen Pitel, eds, *Exploring Contract Law* (Oxford: Hart Publishing, 2009) 77 at 99-101. Valcke argued that the interplay of normative reasonableness and factual reasonableness causes the inherent unstableness of reasonable intentions.

101. E.g. Stephen A Smith, "The Reasonable Expectations of the Parties: An Unhelpful Concept" (2009) 48:3 Can Bus LJ 366, DOI: <10.2139/ssrn.1349995>; Sebastien Grammond, "Reasonable Expectations and the Interpretation of Contracts across Legal Traditions" (2009) 48:3 Can Bus LJ 345.

102. For discussions about consideration, see e.g. Peter Benson, "The Idea of Consideration" (2011) 61:2 UTLJ 241, DOI: <10.3138/utlj.61.2.241> [Benson, "Consideration"]; Williston, "Bilateral," *supra* note 5; Joseph Unger, "Intent to Create Legal Relations, Mutuality and Consideration" (1956) 19 Mod L Rev 96.

103. Some justify expectation damage on policy and reliance: e.g. LL Fuller & William R Perdue Jr, "Reliance Interest in Contract Damages: 1" (1936) 46:1 Yale LJ 52, DOI: <10.2307/791632>. But see Daniel Friedmann, "A Comment on Fuller and Perdue, the Reliance interest in Contract Damages" (2001) 1:1 Issues in Leg Scholarship [i], DOI: <10.2202/1539-8323.1002>; Benson, *Justice in Transactions*, *supra* note 8 at 5-10.

104. For discussions about performance interest, see e.g. Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 LQR 628.

105. E.g. *Carlill v Carbolic Smoke Ball Co*, [1892] EWCA Civ 1 (BAILII).

For simplicity, I assume parties know nothing about each other at the outset. Before the very first move, the addressor must take the shared world as given, because this world is *necessarily* the background within which the addressees will evaluate the addressor's first move. In other words, the original baseline is out of parties' control, precisely because they have not manifested anything yet. Notions of commercial efficiency, morality, customs, and good faith are therefore relevant only insofar as parts of the original baseline.[106] Parties can of course interact with each other's manifestations and consequently modify this baseline. However, the greater the difference between the addressor's desired modifications and the baseline, the more difficult it will be for the addressor to even get the message across.[107] Thus, Lord Denning wrote that the reason behind his well-known red hand rule is, "[T]he more unreasonable a clause is, the greater the notice which must be given of it."[108] Needless to say, the addressor often fails.[109] So understood, contractual implications are the *norms*, not the exceptions, because they represent the unmodified parts of the original baseline.[110]

We may simply call the fruits of these interactions contracts. Some contracts are complex because of numerous modifications; some are short because the parties simply take the world as given. Regardless, they are all just the modified worlds shared between the parties. So understood, reasonable expectations are symmetrical because reasonableness merely represents a shared world—transactionally shared meaning—between the parties.

In *Justice in Transactions*, Peter Benson went on to explain this shared meaning is categorically different from outside considerations and even rationality:

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106. Benson, *Justice in Transactions*, *supra* note 8 at 163; Adam Kramer, "Implication in Fact as an Instance of Contractual Interpretation" (2004) 63:2 Cambridge LJ 384 at 406-408, DOI: <10.1017/S000819730400662>.

107. *Benson*, *Justice in Transactions*, *supra* note 6 at 164.

108. *J Spurling Ltd v Bradshaw*, [1956] 2 All ER 121 at 125, [1956] EWCA Civ 3 (BAILII).

109. E.g. *Tilden*, *supra* note 58.

110. The unmodified parts of the original baseline—the assumptions or the things that go without saying—are the norms, not the exceptions. Even express terms are interpreted objectively in the world shared between the parties, based on these assumptions. To completely modify the shared world is theoretically possible but extremely unlikely in practice. Compare with Justice Binnie's view on judicial notice. See Justice Ian Binnie, "Judicial Notice: How Much is Too Much?" in Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 543. Normally, assumptions are invisible because they are unchallenged; when challenged, they become salient. See e.g. Lynn Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNBLJ 10 at 35, online: <journals.lib.unb.ca/index.php/unblj/article/view/29139/1882524319> [perma.cc/GX2Z-G9QP] (the assumption that men cannot be prostitutes).

> [T]he aim of the law is to enforce the transactionally shared meaning of the parties themselves, not that of anyone else. Similarly, the idea of reasonableness applies to what a party has actually said or done: it does not refer in the abstract to what one or both parties might have done or *a*greed to in the pursuit of certain goals or values *not already explicitly or implicitly rooted in their interaction*. It is important to emphasize that reasonableness does not express some substantive principle or value—moral, economic, or other—that orders the parties' mutual expectations and understandings in light of this goal or standard. Reasonableness has to do with an actual interaction between two particular parties and is therefore a term of relation—more exactly, one that is thoroughly and intrinsically transactional. In this way, it shows itself to be categorically different from the idea of the rational and is specific to the nature of the relation at issue.[111]

Ultimately, as a transactional term, reasonableness represents only the transactionally shared meaning between the parties, not "the standpoint of a hypothetical or actual third person, including a court, imposed *ab extra*."[112] Understood in this way, the apparatuses of the objective theory are merely devices for courts to deduce and enforce these shared meanings: the original baseline informs us of the initial assumptions of the parties; the iteration of deductions in Section II.1 (a) requires us to take both parties' perspectives *separately, successively, and continuously*; the Symmetry enables us to be very sensitive to one-sided wishes and outside considerations; the "reasonable person" forces us to always view parties in relation to the shared world.

Understood in this way, reasonableness is not foreign; rather, the perspective of reasonableness is a transactional way of thinking that we can adopt to truly understand the modified world shared between the parties. Having done so, we can, whatever our backgrounds, free ourselves from erroneous presumptions and unwarranted feelings. In contrast, the more we bring in outside considerations, such as morality, statistics, and economics,[113] against these transactionally shared meanings, the more ambiguous or unstable the concept of reasonableness will become. So understood, the excessive instability and ambiguity of reasonableness are not symptoms of an inherently flawed concept but results of our own misuses. To sum up, at least under the objective theory, the cumulative effect of the interactions between the parties' manifestations determines the transactional reasonableness at any given time. With clearer understandings of reasonableness, I turn back to the DHP in the next section.

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111. Benson, *Justice in Transactions*, *supra* note 8 at 115 [emphasis added].
112. *Ibid*.
113. *Ibid* at 155; *ibid* at 155-156, nn 96-97. See also Smith, *supra* note 101 at 369-380.

III. *The DHP under the framework of the symmetry*

1. *A general approach for the DHP*

a. *Knowledge and intent of representors*

Without subjective awareness of the alleged misrepresentation's falsehood[114] ("Subjective Awareness"); or objectively constructive[115] or imputed knowledge[116] of the alleged misrepresentation's falsehood ("Objective Knowledge"), lies and knowing misrepresentations would become innocent misrepresentations.[117] Unless the innocent misrepresentations amount to warranties, the plaintiffs' remedies are either rescission[118] or restitution damage.[119] In contrast, breach of the DHP does not require breach of warranty and supports expectation remedies, according to *Bhasin and Callow.*[120] Thus, the Court was perfectly logical in requiring some knowledge from representors. The more difficult question is: What are the possible developments of this requirement?

In both *Bhasin* and *Callow,* the defendants actually knew the plaintiffs' interpretations were false.[121] In addition, "active dishonesty,"[122] lying, and "knowingly misleading"[123] suggest representors' Subjective Awareness. Perhaps most importantly, in *Wastech*, the Court explicitly confirmed

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114. Courts have ruled fraudulent misrepresentation must be made knowingly, recklessly, or without belief in the truth since *Derry v Peek* (1889), 14 App Cas 337 at 374-376, [1889] UKHL 1 (BAILII) [*Derry*]. For discussions about subjective recklessness, see *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd*, 2019 BCCA 66 at paras 71-72; *R v Théroux*, [1993] 2 SCR 5 at 20-21, 1993 CanLII 134 [*Théroux*]; *Opron*, *supra* note 39 at paras 630, 636-643; Laura CH Hoyano, "Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud" (1996) 75:3 Can B Rev 474 at 479-484.

115. Sometimes courts used constructive knowledge: e.g. *Sullivan (Re)*, 2000 PESCTD 8 at paras 19, 27; *Roper* v *Taylor's Central Garages (Exeter) LTD*, [1951] 2 TLR 284 at 288-289, [1951] 1 WLUK 269 (KB).

116. Sometimes courts used imputed knowledge: e.g. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, [1949] 1 All ER 997 at 1002, [1949] 2 KB 528 (CA) [*Victoria*]; *Munroe*, *supra* note 81 at 737-739.

117. Innocent misrepresentations are here defined as misrepresentations that are neither fraudulent nor negligent. For negligent misrepresentation, the knowledge required is Subjective Awareness, or Objective Knowledge. See *Cognos*, *supra* note 38 at 101, 126; *Hanisch v McKean*, 2014 ONCA 698 at paras 46-49.

118. The general remedy is rescission. See *S-244 Holdings Ltd v Seymour Building Systems Ltd*, 1994 CanLII 963 at paras 14-15 (BCCA) [*Seymour*]; *Dusik v Newton*, 1985 CanLII 406 at para 102 (BCCA) [*Dusik*].

119. Some courts issue damage awards when rescission is impractical: e.g. *Seymour*, *supra* note 118 at paras 23-26; *Dusik*, *supra* note 118 at paras 102, 119. The rationale, however, is to prevent unjust enrichment by restitution damage awards, not to enforce expectation interests. See *ibid* at para 109; *Chutskoff Estate v Ruskin Estate*, 2004 SKCA 107 at para 22; *Seymour*, *supra* note 118 at paras 14, 26.

120. *Callow* SCC, *supra* note 7 at paras 105-109.

121. See *Ibid* at paras 99-101, 114; *supra* note 35;

122. *Callow* SCC, *supra* note 7 at paras 81-82.

123. *Ibid* at paras 83, 86, 88-89, 91-92; *Bhasin*, *supra* note 6 at para 73.

that "some subjective element is required to establish dishonesty in the relevant sense."[124] Therefore, in the future, the most obvious choice is to hold the line exactly at *Callow* and continue with a purely subjective approach. As "the general principle of law [is] that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact,"[125] the first possible development is to explicitly hold misrepresentations must be made "(i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."[126] (Hereinafter I refer to the three conditions as "Subjective Awareness.") Under a purely subjective approach, if the representors misrepresent, they could become liable under the DHP only after they obtain proper Subjective Awareness.[127] This approach would fully protect representors from surprises, in the knowledge requirement, regardless of the reasonable expectations of representees. Therefore, the one-sided approach is vulnerable to criticisms based on reasonableness between the parties.[128]

The opposite side of the spectrum is a purely objective approach. Under this approach, Objective Knowledge is sufficient. That is, dishonesty in fact is unnecessary. Supporters may argue this approach will align the DHP closer with the objective theory and better protect the representees' reasonable expectations. They may also argue that this approach would not be a lonely outlier[129] but just another instance of the objective theory's governance in contract law.[130] In comparison, opponents may argue elimination of all subjective elements opens the floodgate of litigations because a purely objective approach would deprive courts of a very convenient, fixed peg—Subjective Awareness—to hang reasonable expectations on. Furthermore, they may argue that since dishonesty is a serious allegation which carries a stigma in the public's eyes,[131] at least

124. *Wastech* SCC, *supra* note 57 at paras 55-56.
125. *OBG Ltd v Allan*, [2007] UKHL 21 at para 41 [*OBG*].
126. *Derry*, *supra* note 114 at 374.
127. See *Opron*, *supra* note 39 at 524-526 (Justice Feehan discussed the scenario when a representor makes statements with honest beliefs but subsequently discovers the statements' falsehood).
128. See also *Arndt v Smith*, 1997 CanLII 360 (SCC) at para 17.
129. For unilateral mistakes of rectification cases, the Court has already stated Objective Knowledge satisfies the knowledge requirement. See *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at para 31, which is later cited in both *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 53, and *Canada (AG) v Fairmont Hotels Inc*, 2016 SCC 56 at paras 15, 38.
130. See *Kelemen v El-Homeira*, 1999 ABCA 315 at para 19 [*Kelemen*] (the court stated that in contract actions, the general test to determine if a representation is relevant or material to the substance of the contract is objective); *Avli BRC Developments Inc v BMP Construction Management Ltd*, 2021 ABQB 412 at paras 123-124.
131. See e.g. *A Lawyer v Law Society of British Columbi*a, 2021 BCCA 284 at para 75; *Autocar*

some subjective element is necessary.[132] To be explicit, unless the Court is willing to equate dishonesty with "objective unreasonableness" and impose such a judicial "twistification" upon the public, I believe the better view is to reject a purely objective approach. Thus, Lord Bramwell warned, "[In] all the judgments there is…a confusion of *unreasonableness* of belief as evidence of dishonesty, and *unreasonableness* of belief as of itself a ground of action."[133] So understood, the Court's explicit confirmation in *Wastech* aligns with this better view: some dishonesty in fact is necessary under the DHP.

As a compromise, a mixed objective-subjective approach is the second possible development. The Court could insist representors' subjective awareness of falsehood must be *reasonably linked* with alleged misrepresentations. Specifically, in *Callow*, this approach would not require CMG to have subjective awareness of the falsehood of its implied misrepresentations—Callow's interpretations about the chance of early termination. Instead, CMG's subjective awareness of the falsehood of its misrepresentations about the renewal chance would be sufficient. The mixed approach shields representors from surprises at the expense of reasonable expectations of representee in some corner cases. Specifically, ceteris paribus, a legal gap logically exists when the alleged misrepresentation (1) falls within the reasonable expectations of the representors, but the representors have no Subjective Awareness; and (2) is not reasonably inferable from the misrepresentations whose falsehood the representors have subjective awareness of. Considering how extraordinarily narrow the gap is, I question whether a legal vacuum exists in practice. In addition, while working with murky contexts, courts and lawyers could at least keep the convenient peg of Subjective Awareness.

In all three approaches, at least for the requirement on the representors, the threshold is lower than some existing legal doctrines (e.g., fraudulent misrepresentation and estoppels), because the DHP "does not require a defendant to intend that the plaintiff rely[sic] on their representation or false statement."[134] As discussed above, the Court could rely on representors' subjective awareness of falsehood to require some subjective element

Connaisseur Inc v Marcil, [1996] FCJ No 1439 at para 8, 123 FTR 304 (TD).

132. See *Twinsectra Ltd v Yardley,* [2002] UKHL 12 at para 35 (Lord Hutton viewed dishonesty as a "grave finding" and wrote, "it would be less than just for the law to permit [such] a finding" on a purely objective standard).

133. *Derry*, *supra* note 114 at 352 [emphasis added].

134. *Callow* SCC, *supra* note 7 at para 50.

under the DHP. Thus, assessments of representors' subjective intentions[135] may be helpful[136] but are unnecessary. Let me elaborate.

In *Bram* and *OBG*, the two courts discussed six types of subjective intentions.[137] (I deliberately avoided the word, "deceive," because intent to deceive is incompatible with subjective recklessness.[138]) I have modified the six types of intentions specifically for the DHP. They are (1) an intention to cause reliance as an end in itself; (2) an intention to cause reliance as a necessary means of achieving an end that serves some ulterior motive; (3) an intention to cause reliance as a means of achieving an end that serves some ulterior motive; (4) knowledge that reliance will inevitably follow; (5) knowledge that reliance will probably follow; and (6) knowledge that reliance may follow coupled with reckless indifference as to whether it does or not. I note the representor's subjective awareness that some representations are false does not meet any of the listed definitions, precisely because this awareness is about falsehood, not about reliance.

We are, however, not done with a possible intent requirement under the DHP. The strongest argument for such a requirement may be: Under the framework of the Symmetry, some objective intentions are unavoidable. This observation is spot-on but does not render my view incompatible with the DHP, because (1) *Bhasin* and *Callow* only commented on subjective intention, and (2) as discussed in Section II.2, objective intention and reasonable expectations are two sides of the same coin. Nonetheless, objective intent may be a convenient peg to hang reasonable expectations on but is not a better thinking framework. Let me explain.

The apparent clarity of objective intentions is merely an illusion, because at least six types of objective intentions are possible, based on the six types of subjective intentions listed above. The strongest argument for objective intentions may be that the exact definition of objective intentions depends on the context of each case. But how is this argument different from saying the exact point of the Symmetry depends on the context of each case? At least, the Symmetry is merely a thinking framework and therefore by no means restricts courts' freedom to employ different semantics in each case. In contrast, objective intentions risk restricting

135. For discussions about intention, see Hoyano, *supra* note 114 at 487-498; *Derry*, *supra* note 114 at 374; *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at paras 95-97 [*Bram*]; Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Co, 1881) at 133-134 (the author explained the relationship between intent and knowledge); Melvin Aron Eisenberg, "Third-Party Beneficiaries" (1992) 92:6 Colum L Rev 1358 at 1378-1379, DOI: <10.2307/1122998>; Brian Coote, "Reflections on Intention in the Law of Contract" 2006:2 NZLR 183 at 184.

136. See discussions in Section III.2 (a).

137. *OBG*, *supra* note 125 at paras 42-43; *Bram*, *supra* note 135 at paras 95-97.

138. See *Opron*, *supra* note 39 at paras 659-663, 688; *Hoyano*, *supra* note 114 at 487-498.

courts to a specific expression. Perhaps, to think clearly, it is better to rely upon a framework, rather than clinging to courts' specific semantics. Thus, Justice Hand wrote, clinging to "[s]uch words as 'fraud,' 'good faith,' 'whim,' 'caprice,' 'arbitrary action,' and 'legal fraud'…obscure[s] the issue."[139]

b. *The inclusive and exclusive bases under the DHP*

Because subsequent events may convert truthful representations into misrepresentations, or honest representations into knowing misrepresentations later,[140] representors should always bear in mind reasonable expectations about the Matters, before contractual relationships terminate.[141] So understood, reasonable expectation is an inclusive basis under the DHP. In comparison, representors' proper subjective awareness is an additional requirement and the first basis of exclusion.

After contractual formation and interpretation, the subsequent, necessary supplement for the DHP is to examine the expectations about the alleged misrepresentations under the framework of the Symmetry. Among the expectations asserted by representees, any unreasonable, unmirrored expectation should be rejected upon discovery; if the asserted expectation only partially falls within the reasonable expectations, courts shall only reject the unreasonable, unmirrored portion.[142] So understood, reasonableness is the second basis of exclusion. Depending on the nuances of each case, courts could borrow from the rich case law of misrepresentation and use established, semantic expressions, such as

139. *Thompson-Starrett Co v La Belle Iron Works*, 17 F (2d) 536 at 541 (2nd Cir 1927).

140. See *Opron*, *supra* note 39 at paras 513-526 (Feehan J discussed various scenarios where the representors have a duty to disclose, because "an event occurs in the course of the parties' dealings in relation to the contract which creates a duty of disclosure"); *Xerex*, *supra* note 32 at paras 56-58; *Roy v 1216393 Ontario Inc*, 2014 BCCA 429 at paras 42-46. See also *Laidlaw v Organ*, 15 US 178 (1817). See generally Langille & Ripstein, *supra* note 49 at 70-75, 77-79 (the authors explained how meanings are determined by the systematic pattern of relations between speaker and interpreter, and why ambiguity and misunderstanding arise); *Mannai Investments v Eagle Star Life Insurance*, [1997] 1 EGLR 57 at 65-66, 68, [1997] UKHL 19 (BAILII) (Lord Hoffmann explained how meanings change as the contexts evolve) [*Mannai*].

141. See *Albo*, *supra* note 20 at para 50 (while rejecting the alleged dishonesty, the court pointed out the alleged dishonesty happened after the contract had been performed).

142. See e.g. *Victoria*, *supra* note 116 at 1004-1005 (the court rejected the claim of exceptional losses but still rewarded some ordinary "business loss," based on the imputed knowledge of the breaching party); *The Achilleas*, *supra* note 62 at paras 14-23 (Lord Hoffmann explained that some, but not all, of the losses, should be rejected because they are not "of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have accepted responsibility").

materiality,[143] reliance,[144] causation,[145] remoteness of damage, and duty of mitigation,[146] to protect representors' reasonable expectations. So far, I have spent a lot of ink setting up the stage for the true show. In the next subsection, I turn to several interesting issues.

2. *Case studies: equivocation, silence, the necessity of the DHP, and damage*

a. *The meaning in context: equivocation and silence under the DHP*

Critics may object that the framework of the Symmetry is inherently inexact. In their eyes, contextualization and reasonableness are both too inexact if not circular[147] for precise analyses and are consequently prone to contentions if not sophistries.[148] Although I addressed this challenge in Section II.3, a question from the opposite angle may be: Why cannot we reply on analytical definitions and meticulous categorizations? Briefly, the response is, "Human affairs do not lend themselves to categorisations of this sort."[149] Let me elaborate.

While courts are perfectly justified in using convenient expressions as pegs to hang reasonable expectations on, relying on these expressions as analytical definitions to produce exact results is worshiping the "idols of the

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143. See e.g. *Downs v Chappell* (1996), [1997] 1 WLR 426 at 433, [1996] EWCA Civ 1358 (BAILII); *LK Oil & Gas Ltd v Canalands Energy Corporation*, 1989 ABCA 153 (CanLII) at paras 24-25 [*LK Oil*]; *Wang v Shao*, 2019 BCCA 130 at paras 44-45, 48-49.

144. For reliance as factual findings, see *Barclays Bank PLC v Devonshire Trust (Trustee of)*, 2013 ONCA 494 at para 127; *LK Oil*, *supra* note 143 at para 37. Some courts shift the burden of disproving the reliance onto representors, once some conditions are met. See *Sidhu Estate v Bains*, 1996 CanLII 3332 at paras 36-40 (BCCA) [*Sidhu*]; *Manning v Dhalla*, 2018 BCSC 2148 at paras 39-42.

145. For discussions of causation in cases that involve the DHP, see *Bhasin*, *supra* note 6 at para 109; *Callow* SCC, *supra* note 7 at paras 143-149; *Water's Edge Resort Ltd v Canada (AG)*, 2015 BCCA 319 at paras 39-43 (the court discussed "but for" and "even if").

For discussions of inducement as causation, see *Sidhu*, *supra* note 144 at paras 35-36; *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 at para 19. For discussions that representees' knowledge of the falsehood severs the causation between the reliance and the misrepresentation, see *Opron*, *supra* note 39 at paras 552-553.

For other discussions about causation in the contract context, see *Berscheid v Federated Co-operatives Ltd*, 2018 MBCA 27 at para 22 (the court listed "effective cause" and "directly attributable"); *Smith v 663556 Ontario Ltd*, 2011 ONSC 4496 at paras 22-24; Honoré & Hart, *supra* note 81, ch XI; John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 1008-1012.

146. *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at paras 24-25; *Kelemen*, *supra* note 130 at para 31 (the court wrote, "It is elementary that the duty to mitigate arises only when the deceit or fraud is discovered").

147. For a brief discussion of the circularity of the reasonable person, see Edward J Waitzer & Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can Bus LJ 285 at 287, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3410&context=scholarly_works> [perma.cc/33HH-U2WL].

148. For criticisms against the reasonable person and reasonable foreseeability, see e.g. Fuller & Perdue, *supra* note 103 at 85-86.

149. *Royal Bank of Scotland v Etridge (No 2)*, [2001] UKHL 44 at para 86.

market."[150] If we read courts' expressions literally, "active dishonesty"[151] and "active deception"[152] falsely imply the boundaries between activity and passivity are the boundaries of the DHP; similarly, "positive misstatement"[153] and "positive misrepresentation"[154] incorrectly suggest inaction cannot be misrepresentations. If we read courts' expressions flexibly, silence certainly can amount to "active dishonesty" "active deception" "positive misstatement" or "positive misrepresentation."[155] But the expressions are twisted so much that the original clarity evaporates into thin air. We seem to have come full circle so far: Attempts to define exactly reveal our language itself is treacherous.[156] The task of writing down analytical definitions seems to be futile[157] not because we do not know what we want to convey, but because our tool is incapable.

In *Philosophical Investigations*, Ludwig Wittgenstein explained inexact but effective concepts:

> How would we explain to someone what a game is? I think that we'd describe games to him, and we might add to the description: "This and similar things are called 'games'." And do we know any more ourselves? Is it just that we can't tell others exactly what a game is?—But this is not ignorance. We don't know the boundaries because none have been drawn. To repeat, we can draw a boundary—or a special purpose.…
>
> "But if the concept 'game' is without boundaries in this way, you don't really know what you mean by a 'game'."——When I give the description "The ground was quite covered with plants", do you want to say that I don't know what I'm talking about until I can give a definition of a plant?[158]

Concepts such as "game" are incapable of analytical definitions. But these concepts are certainly not ineffective unless we insist all effective concepts must be capable of analytical definitions. As the exact meaning

150. Francis Bacon, *Novum Organum*, ed by Joseph Devey (New York: PF Collier & Son, 1902) at 31-33. For judicial criticisms against artificial categorization and generalization, see *Cavendish Square Holding BV v Talal El Makdessi*, [2015] UKSC 67 at paras 21-22, 31, 225 [*Cavendish*]; *Tuttle v Buck*, 107 Minn 145 at 148-149 (MN Sup Ct 1909).
151. *Callow* SCC, *supra* note 7 at para 82.
152. *Callow* ONSC, *supra* note 26 at para 66.
153. *Opron*, *supra* note 39 at paras 521, 527.
154. *Ibid* at para 730.
155. *Ibid* at paras 518-519; *Xerex*, *supra* note 32 at paras 56-57.
156. *Cavendish*, *supra* note 150 at para 31.
157. See William F Young Jr, "Equivocation in the Making of Agreements" (1964) 64:4 Colum L Rev 619 at 634, 646-647, DOI: <10.2307/1120463> (the author pointed out that categorization and reliance on criteria are questionable because expressions are of open texture).
158. Ludwig Wittgenstein, *Philosophical Investigations*, 4th ed, translated by GEM Anscombe, PMS Hacker & Joachim Schulte (Chichester, West Sussex: Wiley-Blackwell, 2009) at 37e-38e.

of a "game" depends on the context, we may call "game" an inexact but effective concept. Likewise, the framework of the Symmetry can be both effective and inexact. Under this thinking framework, we do not know where the boundaries of the DHP are, because none have been drawn. We can draw boundaries for particular purposes once we know the modified world shared between the parties. Thus, Lord Steyn wrote, "In law context is everything."[159] Consider the following examples.

On *Callow*'s facts but suppose CMG (1) is silent about the early termination and the renewal, (2) refuses Callow's "freebie" work, and (3) answers, "Your chance is egregious."[160] It is unreasonable for Callow to interpret "egregious" as remarkably good and plans his business accordingly. I note under my thinking framework, assessing CMG's subjective awareness, in this case, is unnecessary and might be harmful: unnecessary because Callow is plainly unreasonable; harmful because courts might forget CMG's subjective awareness is insufficient to make up for Callow's objective unreasonableness. That is, even if CMG has subjective awareness of Callow's egregious interpretation (pun intended), it is not under the DHP to correct him and may watch "the loss lies where it falls."[161] course, courts' specific semantics (e.g. not objectively intended) may vary from case to case.

Alternatively, assume (1) and (2) above, but suppose CMG equivocates, "We may or may not renew your contract," when he asks about his renewal chance. On these facts, we have a perfect equivocation. (CMG's perfect equivocation may be understood as true silence because it reasonably conveys no information.) Consequently, Callow's case fails on a balance of probabilities. I note again that assessing CMG's subjective awareness is unnecessary and might be harmful for the same reasons just discussed. Again, courts' specific semantics (e.g. immateriality) may vary from case to case.

Alternatively, assume (1) and (2) above, but suppose CMG equivocates, "I cannot assure you of your chance of renewal strongly enough." This equivocation can plausibly support two opposite interpretations: Callow's chance is not good enough for CMG to assure him sufficiently highly, and Callow's chance is so high that there is no limit to how strongly CMG can

159. *R (Daly) v Secretary of State for the Home Department*, [2001] UKHL 26 at para 28. See also Brian A Langille & Guy Davidov, "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21:1 Comp Lab L & Pol'y J 7 at 14.

160. This sentence is inspired by Lord Hoffmann's discussion about expressions that use wrong words in *Mannai*, *supra* note 140 at 65. The concept is that when representors used wrong words, the expressions can still be interpreted reasonably and objectively (e.g. "meaningful minority," and "offensively delicious").

161. *Fibrosa*, *supra* note 68 at 126-128, 142-143.

assure him. Maybe, when detached from any context, the equivocation equally supported both interpretations. But, to a reasonable person in the shoes of Callow or CMG, are the two interpretations *equally* supported? (CMG's satisfaction[162] with his service certainly is not determinative; but, in the face of the express contractual term to terminate without cause, how relevant is it?) Perhaps, our hesitations are not accidental because equivocations are not created equal. Depending on the context, some equivocations are perfect; others are imperfect and consequently may not equally support two plausible but opposite interpretations. That is, at least in some cases, courts may be forced to deal with exceedingly difficult interpretations within very murky contexts. In such cases, assessing CMG's subjective state of mind may be not only necessary but also helpful: necessary, because proper subjective awareness is required in a purely subjective or a mixed objective-subjective knowledge requirement; helpful, because CMG's subjective state of mind might reveal the contextualized reasonableness. Let me elaborate.

Generally, subjective states of mind are irrelevant to objective reasonableness (the modified world shared between the parties). But exceptions exist. In *Chartbrook*, Lord Hoffmann explained that although evidence about subjective states of mind often carries little weight in an objective test, it may be significant in some cases, because "[a] party may have had a clear [subjective] understanding of what was agreed without necessarily being able to remember the precise [objective] conversation or action which gave rise to that belief."[163] In essence, parties' subjective states of mind are at least partially based on the modified world shared between themselves, and consequently may indirectly provide some information (e.g. conversions or tones that the parties cannot even recall) about the contextualized reasonableness. Thus, in corner cases, subjective states of mind may break a tie. On my view, *Callow* itself is just such a case. Let me demonstrate.

In *Callow*, the majority wrote, "Unlike in [*Callow*], the defendant there did not engage in a series of acts that it knew would cause the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misapprehension"[164] We seem to have a self-contradiction here: The majority wrote, the DHP "does not require a defendant to intend that the plaintiff rely on their representation or false statement,"[165]

162. *Callow* SCC, *supra* note 7 at paras 19, 31.
163. *Chartbrook*, *supra* note 55 at para 65.
164. *Callow* SCC, *supra* note 7 at para 101.
165. *Ibid* at para 50.

but found a subjective intention anyway. (The intention seems to be subjective knowledge that reliance will inevitably follow.) Instead, on my view, there is no self-contradiction. To be explicit, the majority resorted to an *unnecessary but helpful* element, because, in the face of the express contractual term to terminate without cause, the alleged misrepresentations were all weak: One was implied misrepresentations through acquiescence (CMG's acceptance of the "freebie" work); the rest were misrepresentations through unsuccessful equivocations (e.g., the interpretation of "it" in "[CMG]'ll be up for it").[166] Although the combined effect of all misrepresentations was certainly stronger, in the face of the express term, were Callow's inference and reliance what a reasonable person, in CMG's shoes, would have expected to be responsible for? In such a corner case, perhaps we should not be shocked that the majority consciously or unconsciously resorted to CMG's subjective state of mind to break the tie.

Without repeating my analysis, I note that similar considerations apply to Callow's subjective state of mind.[167] So understood, Cote J's dissension is perfectly understandable: In comparison with the majority, she gave hardly any (if not zero) weight to the subjective states of mind of Callow[168] and CMG,[169] but more weight to the express contractual term to terminate without cause.[170] After the weights were assigned, it was perhaps inevitable that she interpreted CMG's representations differently[171] and reached a different conclusion: Callow's inference is "mistaken,"[172] not reasonable. If different semantics are needed for illustration, I respond: It may be understood that on Cote J's view, there was—not the exact terms she used—a lack of objective intention to cause reliance, or materiality[173] in *Callow*. In summary, although she and the majority both objectively interpreted CMG's representations within the context, the subtle difference in their methodologies pushed them to completely different conclusions.

Here may be the perfect place to briefly comment on a subjective approach which only considers parties' subjective states of mind. Because the DHP does not require subjective intentions, the strongest case for the duty is: Setting aside causation, breach of the DHP only requires three elements: (a) Proper subjective awareness from representors, (b) Damage,

166. See Section I.2 (a).
167. *Callow* ONSC, *supra* note 26 at paras 36, 41-42; *Callow* SCC, *supra* note 7 at paras 95-97.
168. *Callow* SCC, *supra* note 7 at paras 224-225.
169. *Ibid* at para 223.
170. *Ibid* at paras 216, 220-221.
171. *Ibid* at paras 224, 232.
172. *Ibid* at paras 223, 234.
173. *Ibid* at paras 216, 227, 236.

and (c) Honesty in fact from representees. Under this approach, CMG could be held liable even when Callow's interpretation is objectively egregious.[174] If courts resort to a lack of legal causation to address such cases, I respond: What is this legal causation if not causation attributed based on the objective reasonableness in the world shared between the parties?[175] We seem to have come back to the same thing again: Reasonableness, as a transactional term, necessarily exists regardless of anyone's private wishes.

As for silence, depending on the context, silence has already constituted acceptance,[176] misrepresentation,[177] non-consent,[178] or repudiation.[179] Likewise, under the DHP, there is no reason to treat silence fundamentally differently from equivocations. Consider the following examples.

On *Callow*'s facts but assume (1) above, but suppose CMG accepts Callow's "freebie" work, knowing he performed the work to incentivize CMG to renew. The strongest case for Callow is: By its acquiescence, CMG makes a weak, implied misrepresentation, not a true silence. The majority might still rule against CMG under the DHP for the reasons discussed above (e.g. the discussion about subjective states of mind). In contrast, Cote J will rule against Callow with a firmer determination. Alternatively, suppose (1) and (2) above only. On these facts, we have a true silence. Consequently, Callow's case fails. Again, courts' specific semantics (e.g. mere silence and lack of causation), may vary from case to case.

As elaborated, the meanings, and by extension, the consequences, of one party's manifestations are never abstract and isolated, because the world necessarily exists between the parties, regardless of anyone's private wishes. On the contrary, the manifestations always take their meanings within the shared world and may have very different meanings, and by extension, consequences as this world changes, even if parties stay static. On this view, the inexactness of the Symmetry merely reflects the infinite

174. E.g. the example about "Your chance is egregious" earlier in this section.
175. *Supra* note 145.
176. E.g. *Saint John Tug Boat Co Ltd v Irving Refining Ltd*, [1964] SCR 614 at 621-624, 1964 CanLII 88; *Kings County Construction Ltd v O'Neill*, 2019 PECA 13 at paras 6, 13; *Ammons v Wilson & Co*, 176 Miss 645 at 654-655 (MS Sup Ct 1936).
177. For silence as fraudulent misrepresentation, see *Alevizos v Nirula*, 2003 MBCA 148 at paras 20-32; *Outaouais Synergest Inc v Lang Michener LLP*, 2013 ONCA 526 at para 77; *Meridian Credit Union Ltd v Baig*, 2016 ONCA 150 at paras 26-27, 29-30; *Sidhu*, *supra* note 144 at paras 26-33. For silence as misrepresentation, see *Opron*, *supra* note 39 at paras 513-526; *Xerex*, *supra* note 32 at paras 54-58.
178. E.g. *Felthouse v Bindley*, [1862] EWHC CP J35 (BAILII); *Albo*, *supra* note 20 at paras 10-11, 24, 27-29.
179. See *Dawson v Helicopter Exploration Co*, [1955] SCR 868 at 882, 1955 CanLII 45; *Marcotte v Marcotte*, 2018 BCCA 362 at para 44.

complexity of our world. Thus, Justice McLachlin wrote, "any concept capable of embracing the diverse circumstances…must, of necessity, be general. Particularity is found in the situations."[180] So understood, the inexact framework of the Symmetry can be effective, precisely because of its flexibility and adaptability, in the face of infinity.[181] To push my thinking framework to its limits in order to test its flexibility and adaptability, I turn to an extreme scenario: Attempting to contract out the DHP.

b. *The necessity of the DHP*

Critics may argue honesty in performance is not necessarily part of reasonable expectations, and thus should not operate "irrespective of the intentions of the parties."[182] In *Bhasin*, Cromwell J admitted that parties might agree to permit dishonesty in performing their obligations in rare cases.[183] We seem to face an absurdity: Since parties can contract with each other to determine the level of dishonesty in performance, why cannot they waive the DHP completely by setting this level to zero? On my view, if performance is involved, the DHP necessarily exists. Let me elaborate.

On *Callow's facts* but suppose CMG (1) arms itself with an entire-contract clause and a non-reliance clause, (2) starts all communication with a non-reliance disclaimer, "None of my following representations shall be relied upon by Callow," and (3) knowingly and continuously misrepresents about the Matters to Callow. For simplicity, we consider two extreme but possible consequences of CMG's intricate scheme: (1) CMG's scheme itself is of no legal significance because "fraud vitiates every contract and every clause in it,"[184] or (2) None of CMG's misrepresentations is of any legal significance. Under the objective theory, CMG cannot eliminate the first possibility precisely because its communications are interpreted objectively and continuously from Callow's perspective. For instance, as just discussed in the previous subsection, the meanings of equivocation and silence are not always under CMG's complete control. Therefore, from Callow's perspective, when the *cumulative* effect of the interactions between CMG and him is such that the effectiveness of the intricate scheme is weakened significantly, Callow may suddenly become reasonable to rely on CMG's representations. Among many possibilities,[185] courts may

180. *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 35, 1997 CanLII 346.
181. See also *Allcard v Skinner* (1887), [1886-90] All ER Rep 90 at 99, 36 Ch D 145 (Lindley LJ discussed the implications of the infinite varieties of fraud).
182. *Bhasin*, *supra* note 6 at para 74.
183. *Ibid* at paras 76, 81.
184. *S Pearson & Son, Ltd v Dublin Corporation* (1907), [1904-07] All ER Rep 255 at 260, [1907] UKHL 960 (BAILII).
185. Depending on nuances of each case, other doctrines, such as civil fraud, may be involved.

declare CMG's scheme is just part of its dishonesty and hold it responsible for breach of the DHP. Understood in these terms, the duty "can be mandatory, not in the sense of imposing nonwaivable requirements of substantive contractual fairness, but in the way that the objective test is itself nonwaivable."[186]

Here may be the perfect place to address the confusion that the Symmetry is overly inclusive. Briefly, the confusion goes as follows. Since certain modifications upon the shared world are harder to make, the threshold to register these modifications must be proportionally higher. In contrast, by relying solely on reasonable expectations, my view seems to have a fixed or low threshold. Therefore, the Symmetry seems overly inclusive. Instead, I respond: This view misunderstands the dynamics of *symmetry in iterations*. If an addressor's attempted modification is harder to register, it proportionally makes the reasonable person, in the addressee's shoes, less likely to expect to be responsible. Simply put, the threshold adjusts itself automatically, precisely because of the Symmetry. To repeat Section II.1 (b), plausibility is not symmetrical reasonableness. More importantly, as explained when discussing CMG's intricate scheme, unsuccessful attempts of modifications are not removed from our considerations. Over time, the cumulative effects of unsuccessful attempts may become sufficient to meet the threshold for registration. In short, plausibility may add up over time and suddenly become symmetrical reasonableness. Thus, in *Potter v New Brunswick Legal Aid Services Commission*, the majority wrote, "This [cumulative] approach is necessarily retrospective, as it requires consideration of the *cumulative effect* of past acts by the [defendant] and the determination of whether those acts evinced an [objective] intention no longer to be bound by the contract."[187] So understood, long-term relational contracts bring *iterations* to the forefront. Hence, absolute impossibilities of registration do not exist under the framework of the Symmetry. I hasten to add, just because something is possible theoretically does not mean it is probable in practice. To illustrate, it certainly takes some fantastic combination of facts to beat CMG's intricate scheme, precisely because the threshold is exceedingly high. Most likely, no such cases will ever come before courts. Thus, Cromwell J wrote, "Any interference by the duty of honest performance with freedom of contract is more theoretical than real."[188]

186. Benson, *Justice in Transactions*, *supra* note 8 at 163.
187. 2015 SCC 10 at para 33.
188. *Bhasin*, *supra* note 6 at para 81.

To summarize, the cumulative effect of the interactions and the threshold to register modifications are both dynamic: The former depends on the continuous interactions between parties' manifestations in the world shared between themselves; the latter depends on how difficult it is to objectively modify this world. More importantly, the effects of interactions and the shared world are also interdependent: The cumulative effect of interactions may or may not successfully modify the shared world at any moment; any successful modifications immediately change this world for evaluations of other interactions. In short, because everything is connected to everything else, everything may or may not change with everything else at any moment. Nonetheless, the world shared between the parties is not in chaos; Like an ecosystem, the certainty lies with equilibrium—the Symmetry.

c. *Putting the horse before the cart: the natural injury under the DHP*

The majority stated that breach of the DHP supports "the ordinary measure of contractual expectation damages"[189] and rejected that "a breach of the duty of honest performance should in general be compensated by way of reliance damages."[190] In contrast, Justice Brown's concurring decision says the DHP protects reliance interest.[191] In the middle of the debate, it is perhaps wise to revisit the two sources of liabilities—promise-for-consideration and reliance-based relations[192]—in contract law.

In "The Idea of Consideration," Benson explained the function of consideration,

> By framing my promise in terms of what you must do in return, I necessarily intend a bilateral relation which is not produced by me alone but which, to the contrary, is our joint and inseparable work. Because the promises are entirely and exclusively constituents of this relation between them, there *cannot be any residual* power in either party to exercise control over, or to make any further decision with respect to, her promise or what she has promised the other. For, as already noted, such further decision or control would have to be *unilaterally* exercised by a party and this is precisely what is *incompatible* with the fact of the

189. *Callow* SCC, *supra* note 7 at para at 113.
190. *Ibid* at para 109.
191. *Ibid* at paras 139-146.
192. Some believe reliance has no place in contract law: e.g. Anna SP Wong, "Duty of Honest Performance: A Tort Dressed in Contract Clothing" (2022) 100:1 Can Bar Rev 95 at 120, online: <cbr.cba.org/index.php/cbr/article/view/4736/4519> [perma.cc/QE35-QNUY]. On my view, reliance-based doctrines (e.g. estoppels) are not foreign to contract law. To believe otherwise is to commit a fault against Waddams' warning. See SM Waddams, "Johanna Wagner and the Rival Opera Houses" (2001) 117 Law Q Rev 431, online: <tspace.library.utoronto.ca/> [perma.cc/6DMB-M3YR] (It is a demerit "to insulate the concepts from each other" at 458).

relation.[193]

On Benson's view, in promise-for-consideration relations, "the initial power to decide, which originally resides with each party, is superseded by a relation in which, *pro tanto*, neither can decide anything on her own."[194] In other words, in such relations, each party intentionally places the content of the consideration or promise under the counterparty's exclusive control and retains no residual, unilateral power over the same content. On this view, actual reliance is irrelevant to expectation damage. In contrast, "[r]eliance-based liability arises from the fact that the breach of promise leaves the promisee worse off as compared with the pre-reliance position in which he would have pursued the opportunity or not made the expenditure."[195] In a nutshell, actual, detrimental reliance relative to the pre-reliance position is necessary for reliance-based relationships. So understood, the distinction between promise-for-consideration and reliance-based relations is categorical, not superfluous: "[I]n contrast to consideration, reliance does not involve a kind of interaction which makes the expectancy the *direct and intrinsically* required remedial standard."[196]

Understood in these terms, the majority's view is self-contradictory. If the DHP involves promise-for-consideration relations (e.g. modification with fresh consideration), "the least onerous means of performance" cannot be "to correct the misrepresentation."[197] Instead, pacta sunt servanda.[198] After all, CMG cannot unilaterally get out of a promise-for-consideration relation without incurring liabilities for expectation damage. If, however, CMG can unilaterally make all subsequent reliance of Callow unreasonable by correcting its misrepresentations before actual reliance, the analyses under the DHP must be reliance-based and consequently impose reliance damage as a matter of course.

We are, however, not done with the majority's view. To get rid of reliance-based analyses, actual reliance needs to be made irrelevant under the DHP. Once—if—we do so, the DHP becomes an abnormity in Anglo-Canadian contract law. Let me illustrate.

If we remove the reliance element and set aside causation, the strongest case for the DHP is: Since some objective intention is merely another way to express reasonable expectations, *Bhasin* and *Callow* established that

193. Benson, "Consideration," *supra* note 102 at 262 [emphasis added].
194. *Ibid* at 262-263.
195. *Ibid* at 276.
196. *Ibid* at 248 [emphasis added].
197. *Callow* SCC, *supra* note 7 at para 114.
198. Latin, meaning agreements must be kept. See *Clark v Macourt*, [2013] HCA 56 at para 135, Justice Keane.

contractual terms may be modified without any representors' subjective intention or fresh consideration, but with some objective intention, and proper subjective awareness from representors ("Modification View"). Since its scope of application is huge, the DHP can hardly be called an exception to the general rule that fresh consideration is necessary for modification. Instead, on the Modification View, the DHP becomes a general doctrine of contractual modification. (For simplicity, I avoid discussions about estoppels, consideration, and other exceptions for contractual modification.[199])

In contrast, under a reliance-based approach ("Reliance View"), the inquiry focuses on reliance: Callow's actual reliance is necessary and must be reasonable and detrimental. On the Modification View, CMG's contract is modified immediately and irreversibly after CMG's misrepresentations, because actual reliance is irrelevant. On the Reliance View, the DHP merely treats contracts as pre-reliance entitlements. On the Modification View, the duty directly modifies contracts. On the Reliance View, the DHP does not conceptually collide with long-established contractual doctrines head-on. On the Modification View, the duty does. On the Reliance View, the damage follows naturally from the injury—the actual, reasonable, and detrimental reliance. On the Modification View, the injury is *mysterious* because liabilities under the DHP can hardly be distinguished from enforceable, gratuitous modifications.

To make sense of the majority's view, we need to put the cart before the horse. That is, its view makes some sense if we agree with the majority that "[r]eliance damages in contract mean putting the injured party in the position it would have been in had it not entered into the contract at all."[200] But an absurdity arises if we take this brief comment as a general statement of the law: On this view, existing contracts cannot be pre-reliance entitlements, because they do not exist under the majority's formulation. The majority's s view also makes some sense if we agree with its view on justifications of expectation remedies. Specifically, the majority wrote "there is good reason to retain" expectation damage for "a positive deterrent effect."[201] That is, expectation damages deter non-performance. However, if we take this "good reason" as the general justification of expectation remedies, another absurdity arises. On this

199. For such discussions, see e.g. Mindy Chen-Wishart, "Consideration and Serious Intention" 2009:2 Sing JLS 434, DOI: <10.2139/ssrn.1673169>; Samuel Williston, "Successive Promises of the Same Performance" (1894) 8:1 Harv L Rev 27, DOI: <10.2307/1322383>; Brian Coote, "Consideration and Variations: A Different Solution" (2004) 120 Law Q Rev 19.
200. *Callow* SCC, *supra* note 7 at para 108.
201. *Ibid* at para 109.

view, expectation remedies are generally not compensatory but imposed as a matter of policy.[202] Needless to say, neither absurdity is "a modest, incremental step"[203] in Anglo-Canadian contract law.

In short, a reliance-based approach is not only much more straightforward conceptually but also consistent with the Court's own repeated warnings that the DHP is "a modest, incremental step."[204] To avoid undesirable "gymnastic contortions"[205] in legal contemplation, the better view is Brown J's concurring judgment.

Conclusion: an old bottle for the new wine

This article argues that the Bottom-up Approach can provide a solid foundation and a different thinking framework for understanding and developing the DHP, independently of the Top-down Approach. An old bottle for the new wine. So understood, at the very minimum, the Top-down Approach is not the only way to make sense of and develop the DHP.

Certainly, the two approaches differ from each other. Under the Bottom-up Approach, the certainty lies within the parties' standpoints. Under the Top-down Approach, the certainty lies within universal intelligence. Under the Bottom-up Approach, the DHP is a natural part of bilateral relationships. Under Top-down Approach, the duty is a foreign imposition upon the parties. Under the Bottom-up Approach, the boundaries of the DHP are drawn by the context of each case. Under the Top-down Approach, the boundaries are drawn by universal proclamations of courts. Under the Bottom-up Approach, particular semantics of courts are not determinative. Under the Top-down Approach, they may be.

The most important question, of course, is: Which approach fits better within the Anglo-Canadian Contract law and provides a sounder footing for the DHP to stand the test of time? Since the basic orientation of the common law is inductive from the bottom up,[206] I believe the answer is obvious. But ultimately, I can only leave the final judgement to each and every of my readers and time itself.

202. This is the position of Fuller & Perdue, *supra* note 103. Leading cases contrary to this position is too numerous to cite. For scholarly criticisms, see *supra* note 103.
203. *Bhasin*, *supra* note 6 at paras 72, 82, 89.
204. *Ibid.*
205. *George Mitchell (Chesterhall) Ltd v Finney Lock Seedy Ltd* (1982), [1983] 1 All ER 108 at 115, [1982] EWCA Civ 5 (BAILII).
206. McInnes, *supra* note 4 at 402.