Two Models Of Pre-Contractual Disclosure in Canadian Construction Law

I. INTRODUCTION

Canadian construction law imposes pre-contractual disclosure obligations on "owners" who hire contractors through the process of tendering.[1] This is so in both common law provinces and in Quebec civil law. Quebec courts treat the owner's duty to inform as flowing from the requirement of good faith under the *Civil Code of Quebec*.[2] Courts in common law jurisdictions treat the owner's duty to inform as flowing from the duty of care that owners owe to contractors in negligent misrepresentation.[3]

The common law approach to the duty to inform may begin to align with that of Quebec. In *Bhasin v Hrynew*,[4] the Supreme Court of Canada held that there is a common law "organizing principle" of good faith that subsumes narrower good faith doctrines. It is possible that a common law duty of good faith disclosure could be derived from the organizing principle.

This paper is organized as follows. In Part II, I analyze *Bhasin* and highlight its implications for how the law of good faith will develop. In Part III, I discuss the civil law model of the duty to inform as set out in *Bank of Montreal v Bail*.[5] In Part IV, I examine a number of

---

[1] The tendering process involves the issuance of a call for tenders (also known as "bids") by property owners. Prospective contractors then submit their tenders, which contain proposals for, among other things, the price at which the contractor would complete the project. The law of tendering in Canada is unique in structure, and I encourage readers to see *R v Ron Engineering and Construction (Eastern)*, [1981] 1 SCR 111.

[2] arts 6, 7, 1375 CCQ. See, for example, *Bank of Montreal v Bail*, [1992] 2 SCR 554 [*Bail*]; *GMC Construction Inc v Terrebonne (Ville)* (1994), 24 CLR (2d) 89 (QCSC); *Groupe Guy Pépin Inc & Ses Divisions v Nova PB Inc*, (15 November 1999), Longueuil 505-05-004464-985, JE 2000-378 (SC); *Lac St-Charles (Ville) v Construction Choinière Inc*, [2000] JQ No 2042 (CA); *Confédération des Caisses Populaires et d'Économie Desjardins du Québec v Services Informatiques Decisionone*, [2003] JQ No 18731 (CA) [*Desjardins*]. All of the decisions cited in this note, except *Bail*, are delivered only in the French language. An English language discussion of these judgements can be found in Oliver F Kott & Pierre Cimon, "The New Boundaries of the Obligation to Inform Under Quebec Civil Law" (26 February 2004) online: <http://www.nortonrosefulbright.com/centre-du-savoir/publications>.

[3] See, for example, *Cardinal Construction Ltd v Brockville (Municipality)*, [1984] OJ No 238 (HC) [*Cardinal Construction*]; *Brown & Huston Ltd v York (Borough)* (1985), 17 CLR 192 (Ont CA); *JJM Construction Ltd v Sandspit Harbour Society*, [1998] BCJ No 1313 (SC); *Cherubini Steel Inc v Merit Management Inc* (2000), 4 CLR (3d) 201 (Nfld TD); *Inscan Contractors (Ontario) Inc v Halton District School Board* (2005), 43 CLR (3d) 100 (Ont SCJ). But see *Opron Construction Co v Alberta*, [1994] AJ No 224 (QB) [*Opron*].

[4] *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*].

[5] *Bail*, *supra* note 2.

important common law cases regarding good faith disclosure. In doing so, I assess objections that some courts have raised against the adoption of the good faith model. I also consider the judgement of the Court of Appeal for Ontario in *978011 Ontario Ltd v Cornell Engineering Co*,[6] which established a common law test for pre-contractual disclosure that essentially encapsulates the civil law framework. I conclude that common law courts ought to recognize a good faith duty of pre-contractual disclosure. As I will show, the good faith model is more doctrinally coherent than the misrepresentation model, and is capable of providing for disclosure rights that are more robust.

II. BHASIN

In *Bhasin*, the plaintiff, Harish Bhasin, ran a business that had a commercial agreement with a company called Canadian American Financial Corporation ("Can-am"). The agreement was subject to automatic renewal after a three-year period, unless either party gave written notice. Can-am issued a notice of non-renewal after Bhasin repeatedly refused to allow an auditor appointed by Can-am to access Bhasin's confidential business records (the auditor turned out to be a competitor of Bhasin's). Bhasin sued for breach of contract. Importantly, the contract contained an "entire agreement" clause, which provided that no express or implied terms applied that were not in the agreement itself.

At trial, the Court of Queen's Bench of Alberta found that the renewal provision was subject to an implied term of good faith, and that dishonest conduct on the part of Can-am gave rise to a breach of this implied term. The Alberta Court of Appeal set aside the trial decision on the basis that 1) a term cannot be implied into a contract if that term would contradict the express

[6] *978011 Ontario Ltd v Cornell Engineering Co*, [2001] OJ 1446 (CA) [*Cornell Engineering*].

provisions of the agreement (for example, the entire agreement clause);[7] and 2) there is no overarching duty of good faith in contract law.

The Supreme Court of Canada overturned the decision of the Alberta Court of Appeal and established the organizing principle of good faith. The Court derived a "duty of honest performance" from the organizing principle. Can-am was liable for violating this duty. In what follows, I discuss the aspects of *Bhasin* that are most relevant to the future development of the good faith doctrine.

The Court held that the duty of honest performance is not an implied term, but rather, a "general doctrine of contract law that… operates irrespective of the intentions of the parties".[8] Accordingly, parties cannot exclude the duty of honest performance through the insertion of an entire agreement clause, though they may "relax" the duty. It is unclear what it means to relax a duty.[9] The court in *Bhasin* declined to resolve whether specific manifestations of the organizing principle must always be general doctrines as opposed to implied terms.[10]

Cromwell J. wrote the judgment and noted that the duty of honest performance does not itself impose a duty disclosure.[11] However, the court did not foreclose the possibility of further expanding the law of good faith. Cromwell J. stated that "[t]his court ought to develop the common law to keep in step with the 'dynamic and evolving fabric of our society' where it can do so in an incremental fashion and where the ramifications of development are not incapable of assessment".[12] The recognition of the duty of honest performance was held to be a modest step

[7] Any implied term would contradict the stipulation that the agreement is limited to what is contained in the written contract.
[8] *Bhasin*, *supra* note 4 at para 74.
[9] *Ibid* at paras 75, 77. For further discussion see Finkelstein et al, "Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015) 53:2 Alta L Rev 349 [Finkelstein et al, "Good Faith in the Energy Sector"].
[10] *Bhasin*, *supra* note 4 at para 74.
[11] *Ibid* at para 73.
[12] *Ibid* at para 40.

supported by case law. The Court was concerned with legal certainty, and made it clear that it was not reversing a settled rule.[13]

Cromwell J. described the organizing principle as follows: "The organizing principle is simply that parties generally must perform their *contractual* duties honestly and reasonably and not capriciously or arbitrarily" [emphasis mine].[14] Despite the wording used by Cromwell J., it is plausible that if the court had intended to exclude *pre-contractual* conduct from the ambit of the organizing principle, it would have done so explicitly. However, *Bhasin* is silent on pre-contractual good faith. This is important because good faith disclosure would apply to the time period before a contract is executed.

Cromwell J. cautioned against *ad hoc* judicial moralism and palm tree justice.[15] Courts should be careful not to interfere with private ordering between commercial parties on the basis of abstract conceptions of fairness. Legal predictability demands precision. Freedom of contract must also be respected, though Cromwell J. implied that this freedom has reasonable limits.[16] The duty of honest performance was held to be only a minor transgression upon freedom of contract, since parties reasonably expect that contractual terms will be performed honestly.

In reaching its decision, the Court referred to a number of Quebec cases that address good faith.[17] Cromwell J. also noted that the *Civil Code of Quebec* provides for a broad duty of good faith that extends to the pre-contractual setting. He stipulated that this expansively framed obligation of good faith has not impeded contractual activity or contractual stability.[18] He expressed concern that, for years, the common law has been out of step with Quebec on the issue

[13] *Ibid*.
[14] *Ibid* at para 63.
[15] *Ibid* at para 70.
[16] Finkelstein et al, "Good Faith in the Energy Sector", *supra* note 9 at 350.
[17] *Bhasin*, *supra* note 4 at para 85.
[18] *Ibid*.

of good faith.[19] Uniformity is desirable, given that Quebec is a major trading partner of common law Canada. As Finkelstein et al explain, having consistent legal regimes across jurisdictions is helpful in terms of minimizing problems resulting from cross-border litigation, conflict-of-laws issues, and extended negotiations over governing law clauses.[20]

III. BAIL

Bail is the seminal civil law judgment on the owner's duty of good faith disclosure. In *Bail*, Hydro-Quebec issued a call for tenders. The tender documents included a geotechnical report dated 1974. The successful bidder, Bail, subcontracted part of the work. Shortly after construction began, it became apparent that soil conditions were much less favourable than the geotechnical report suggested. Hydro-Quebec promptly sent experts to prepare another report. This report, dated 1977, was not disclosed Bail or the subcontractor. The subcontractor incurred significant losses as a result. The subcontractor went bankrupt and a claim was brought against Hydro-Quebec.[21]

There was no privity of contract between the subcontractor and Hydro-Quebec. The subcontractor's claim was therefore grounded in "delict" (tort). The court relied on article 1375 of the *Civil Code of Quebec*: "The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished". The court interpreted article 1375 to mean that a party to a contract owes a duty of good faith not only to the other contracting party, but also to third parties. The duty extends to both pre-contractual conduct and performance.[22] For the court, Gonthier J. wrote: "I believe that it is possible to outline a general

[19] *Ibid* at para 41.
[20] Finkelstein et al, "Good Faith in the Energy Sector", *supra* note 9.
[21] *Bail*, *supra* note 2 at 5.
[22] *Singh v Kohli*, 2015 QCCA 1135 at para 67.

theory of the obligation to inform, based on the duty of good faith in the realm of contracts".[23] In light of Gonthier J's statement, it seems clear that a pre-contractual duty to inform could also arise at common law under the organizing principle of good faith, but only as between the contractor and the owner (and not the subcontractor). As the common law organizing principle of good faith is a contractual doctrine, it will only be operative where a contractual relationship materializes (though after the contract materializes, pre-contractual conduct could be scrutinized, much like in a claim for innocent (as opposed to tortious) misrepresentation).

It might be objected that *Bail* is a case about disclosure in the course of contractual performance (rather than pre-contractual disclosure). On closer inspection, this is not necessarily so. Gonthier J. characterized construction contracts as contracts of continuing formation. Construction contracts are frequently subject to change orders such that the contract is put in a state of flux and a pre-contractual element is maintained. The line between formation and execution becomes blurred. Gonthier J. wrote:

> The obligation to inform therefore retains, throughout the term of a contract for a major project with multiple amendments, the characteristics of the pre-contractual obligation to inform. Thus a relatively high degree of disclosure is required, because the validity of the consent of the debtor of the obligation to inform must more or less constantly be assured while the initial project evolves as change orders are issued[24]

Fully informed consent is maintained throughout a constantly changing construction contracts by means of good faith disclosure. Gonthier J. set out the following three-step test for the duty to inform:

1. Knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform;
2. The information is of decisive importance; and

---

[23] *Bail*, *supra* note 2 at 29.
[24] *Ibid* at 39 - 40. Gonthier J. referred to the duty to inform as having a pre-contractual aspect at other points in his judgement as well. See *Ibid* at 7, 32.

3. It is impossible for the party to whom the duty is owed to inform itself, (or if the creditor is legitimately relying on the debtor of the obligation)[25]

This is a general test not limited to any particular category of contract. Gonthier J. stated that the duty to inform reflects the civil law's increasing attentiveness to situations wherein one party is vulnerable due to an asymmetry of information. As I will show, the owner-contractor relationship exhibits this asymmetry of information.

Gonthier J. listed three characteristics of construction contracts that are especially relevant to the duty to inform. The first is the "continuing formation of the contract", which I have discussed already. The other two are the "allocation of risk" and the "relative expertise of the parties". As to the allocation of risk, the contractor usually assumes the risk in construction contracts. This includes the risk that soil conditions may not be favourable. The duty to inform is nevertheless a corollary of the allocation of risk. This is because the owner distorts the contractor's assessment of risk when it withholds decisive information that the contractor cannot otherwise acquire. The relative expertise of the parties is important because the owner's duty to inform increases with its expertise relative to the contractor. The more decisive information an owner holds, or is presumed to hold, the more it has to disclose. The result in *Bail* was that the Bank's claim was allowed.

IV. DISCLOSURE AT COMMON LAW

The Supreme Court of Canada has not ruled on whether the owner's duty of disclosure at common law flows from good faith or from the doctrine of negligent misrepresentation by omission. There is conflicting jurisprudence at the trial and appeal court level, though, as noted above, the trend is to apply the negligent misrepresentation analysis. That may very well change now that *Bhasin* has confirmed the existence of an overarching common law duty of good faith.

[25] *Ibid* at 30.

The foundational case on the owner's common law disclosure duties is *Cardinal Construction Ltd v Brockville (Municipality)*,[26] a 1984 judgment of the Ontario High Court. *Cardinal Construction* concerned mislabelled disclosure documents rather than bare non-disclosure, however. The municipality of Brockville hired a consultant to help prepare tender documents. The consultant drew up specifications, including an installation labelled "Underground Bell Cable". Both the consultant and the successful bidder, Cardinal Construction, understood this to mean an ordinary, flexible cable. The cable turned out to be a concrete encased duct structure. Construction was rendered more time-consuming and costly than the contract provided for. Brockville had discovered the error before tenders were submitted, but did not take any action. The Court found that Brockville owed a duty of care to Cardinal Construction in negligent misrepresentation. Brockville had breached that duty through the agency of the consultant. In addition, Brockville breached its *positive* duty to convey the error to Cardinal Construction.

North Pacific Roadbuilders Ltd v Aecom Canada Ltd[27] is a recent case in which the Saskatchewan Court of Queen's Bench applied *Cardinal Construction* in the context of a consultant's failure to disclose. The consultant omitted information with respect to a particular piece of terrain and thereby implied that "there was no terrain information available to [the consultant] that could assist bidders to prepare their bids".[28] Thus, the consultant had made an implied misrepresentation *via* omission. The Court relied on *Queen v Cognos Inc*[29] for the proposition that negligent misrepresentation can be made out on the basis of an implied

[26] *Cardinal Construction*, *supra* note 3.
[27] *North Pacific Roadbuilders Ltd v Aecom Canada Ltd*, 2013 SKQB 148 [*North Pacific Roadbuilders*].
[28] *Ibid* at para 120. The defendant also made express misrepresentations.
[29] *Queen v Cognos Inc*, [1993] 1 SCR 87 [*Cognos*] (before entering into an employment contract with the plaintiff employee, the defendant employer misrepresented the nature of the job opportunity).

misrepresentation.[30] *Spinks v Canada*, [31] a decision of the Federal Court of Appeal, was also cited and the following passage was quoted:

> 14… *[F]ailure to divulge material information may be just as misleading as a positive misstatement*… This is especially the case where, as here, the information in question is of a specialized nature, which is easily available to the advisor but not easily obtainable by the party being advised…
>
> 29. Consequently, the duty may be breached not only by positive misstatements but also by omissions[32] [emphasis mine]

Where the owner or consultant has expertise with respect to certain information, and it is difficult for the contractor to obtain that information, it is especially likely that a court will find liability for failure to disclose. In *Cognos*, Iacobucci J. made a similar point when he stated that negligent misrepresentation may be found where there has been a "failure to divulge highly pertinent information".[33]

In *Opron Construction Co v Alberta*,[34] the Alberta Court of Queens Bench did not confine its disclosure analysis to misrepresentation by omission. The contractor, Opron Construction, successfully bid for the right to complete the second stage of a hydro project for the Province of Alberta. The tender documents did not convey the relevant experiences of the stage one contractor, nor did the documents disclose information regarding unfavourable subsurface conditions at the site. Opron Construction alleged negligent misrepresentation and breach of an implied term of good faith disclosure.

---

[30] *Ibid* at 130 - 131; *North Pacific Roadbuilders*, *supra* note 27 at para 113.
[31] *Spinks v Canada*, [1996] 2 FC 563 (CA).
[32] *North Pacific Roadbuilders*, *supra* note 27 at para 114.
[33] *Cognos*, *supra* note 29 at 123 - 124.
[34] *Opron*, *supra* note 3.

Citing *Cognos*, the Court found that non-disclosure in the course of pre-contractual negotiations constitutes an actionable form of negligent misrepresentation.[35] Feehan J., for the court, also discussed the relevance of *Bail* to common law construction disputes:

> [The] factors from *Hydro-Québec* [*Bail*] are not alien to the common law's obligation of disclosure imposed on an owner in the pre-tender process… [C]ommon law courts also focus on… the lack of opportunity or time for the tenderers to acquire that information themselves, and whether the information was indispensable for tenderers to form a judgment[36]

In this passage, Feehan J. refers to the second and third steps of the *Bail* test. I.e.: Whether the relevant information is decisive, and whether it is possible for the owner to acquire the information on its own. Similar considerations therefore animate the disclosure obligations of both the common law and the civil law. The Province of Alberta was held liable in negligent misrepresentation.

With respect to Opron Construction's good faith claim, Feehan J. found that, in the circumstances, the law implied a term of pre-contractual disclosure:

> It is reasonable, where the owner or its agents impart critical information in the tender documents which form part of the contract, that there is an implied covenant that such information has been furnished in good faith, in the honest and reasonable belief that it is complete and accurate, with all material information provided[37]

The content of the implied term of good faith pre-contractual disclosure as articulated by Feehan J. differs slightly from the duty to inform established in *Bail*. This is because the implied term of good faith requires that, once the owner provides *some* decisive information, the owner must ensure that *all* information is complete and accurate. On the other hand, *Bail* stands for the proposition that the owner cannot withhold *any* decisive information from a contractor in situations where the contractor cannot be expected to inform itself. The distinction seems

[35] *Ibid* at para 533.
[36] *Ibid* at paras 547 - 548.
[37] *Ibid* at para 621.

inconsequential, however, as owners will always provide *some* important information about the project to bidders in the tender documents. So, the implied term of good faith recognized in *Opron* will be operative in almost all construction disputes.

Feehan J. justified the implied term of good faith on the basis of business efficacy and the reasonable expectations of the parties:

> The Supreme Court of Canada recognized, in *Hydro-Québec* [*Bail*], supra and *Edgeworth*, supra that business efficacy and economic efficiency in the bidding of this type of construction project dictate that bidders be given critical information on the basis of which they can prepare their tenders in the short time usually afforded to them… I find that the law does reflect the reasonable expectations of the parties to the tendering process. Thus, I find that Alberta Environment owed an obligation of good faith and fair dealing to the plaintiff[38]

In the tendering context, contractors are simply unable to conduct full scale due diligence with respect to soil conditions and other factors between the time at which bids are submitted and the time at which construction begins. Contractors therefore hold a reasonable expectation of disclosure. I discuss this point in greater detail below.

Recall that the duty of honest performance in *Bhasin* was also supported by considerations of business efficacy and reasonable expectations. Courts will look to these indicia in deciding whether to recognize new good faith doctrines under the organizing principle. In *International Corona Resources Ltd v Lac Minerals*,[39] LaForest J wrote that "[t]he institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectation of the parties".[40] Pre-contractual disclosure is arguably a species of good faith bargaining.

As noted above, *Bhasin* did not establish whether specific manifestations of the organizing principle must always be general doctrines as opposed to implied terms. Thus, the law

[38] *Ibid* at para 590, 622.
[39] *International Corona Resources Ltd v Lac Minerals*, [1989] 2 SCR 574 at 672.
[40] *Ibid.*

of good faith does not necessarily prohibit the introduction of novel duties framed as implied terms. If a duty of good faith disclosure were implied into construction contracts, then the concern about the organizing principle involving only "contractual duties" (rather than *pre*-contractual duties) would be alleviated.

A different view would be that, even if we accept the argument that the organizing principle, as it stands, only applies to the performance of contracts, this does not mean that the organizing principle is incapable of changing in such a way so as to allow for pre-contractual good faith duties. After all, Cromwell J. held in *Bhasin* that the law should develop in an incremental fashion where appropriate. If justice demands that the organizing principle envelope pre-contractual conduct, then the principle should evolve accordingly. The upshot would be that the organizing principle is able to encapsulate a freestanding duty of pre-contractual good faith disclosure.

The main issue with framing good faith disclosure obligations as implied terms is that implied terms can easily be excluded through entire agreement clauses. The Alberta Court of Appeal made this clear in *Bhasin*. A duty of good faith disclosure would only have teeth as a freestanding duty. It might be objected that courts should be hesitant to add to the list of un-excludable, freestanding duties, since doing so chips away at freedom of contract. However, the Supreme Court of Canada in *Bhasin* demonstrated a willingness to reign in freedom of contract in order to give effect to the reasonable expectations of the parties. With regard to construction contracts, the jurisprudence is clear that contractors hold a reasonable expectation of pre-contractual disclosure.

Further complications arise when we consider how a pre-contractual duty could flow from an organizing principle of contract law. When a party seeks redress for pre-contractual

misconduct, they are not suing on the contract itself. Although this issue deserves further treatment than I am prepared to give it, a forceful response would be that claims for pre-contractual misrepresentation or breach of collateral warranty implicate contract law doctrine. By analogy, so could a pre-contractual good faith principle.

In *Weiss v Schad*,[41] the Ontario Superior Court of Justice considered whether a clamant could rely on *Opron* in order to assert an implied term of good faith pre-contractual disclosure in a share purchase agreement. The court distinguished *Opron.* Garton J. held that construction contracts require disclosure and utmost good faith, whereas share purchase agreements do not fall into this "special and restricted class".[42] Garton J. explained that, generally, there is no pre-contractual duty of good faith. He cited the decision of the House of Lords in *Walford v Miles,*[43] which categorically rejected the notion that good faith duties could apply at the pre-contractual stage.[44]

Weiss v Schad is illustrative of how good faith obligations can apply to particular categories of contract but not others. While the organizing principle of good faith applies to all contracts, the specific doctrines it subsumes are, theoretically, capable of applying more narrowly. After all, the doctrine of good faith developed through recognition in one "pigeon hole" category after another.[45] The disclosure case law already discriminates between different categories of contract *via* selective application of the principle of implied representation by omission.[46] Garton J. was correct to point out that construction agreements are a unique class of

[41] *Weiss v Schad*, [1999] OJ No 4356 (SCJ), aff'd [2002] OJ No 1599 (CA).
[42] *Ibid* at para 120.
[43] *Walford v Miles*, [1992] 2 AC 128 [HL].
[44] *Weiss v Schad*, *supra* note 42 at para 116.
[45] *Bhasin*, *supra* note 4 at para 23.
[46] See SM Waddams, "Precontractual Duties of Disclosure" in Peter Cane and Jane Stapleton, eds, *Essays For Patrick Atiyah* (Oxford: Clarendon Press, 1991) 237 at 239.

contract. The jurisprudence has developed in such a way so as to position owners and contractors in a relationship of good faith as regards the exchange of information.

One year after *Weiss v Schad*, the Supreme Court of Canada handed down its judgement in *Martel Building Ltd v Canada*.[47] The Court held that there is no duty of care with respect to pure economic loss inflicted as a result of a failure to bargain in good faith. *Martel* does not have a direct bearing on the law of good faith in contract. That said, it is important to engage with the reasoning in *Martel* in any discussion about whether there should be liability for bad faith conduct prior to the execution of contracts.

For the court, Iacobucci and Major JJ. emphasized that litigation must not become after-the-fact insurance for a party's failure to undertake proper due diligence in the bargaining process. In *Opron*, Feehan J. explained why there is no rigid due diligence expectation in the tendering process. In doing so, he quoted from the Supreme Court of Canada's judgement in *Edgeworth Construction Ltd v ND Lea & Associates Ltd*:[48]

> …[E]ach tendering contractor would be obliged to hire its own engineers and repeat a process already undertaken by the owner… From an economic point of view, it makes more sense for one engineering firm to do the engineering work, which the contractors in turn are entitled to rely on, absent disclaimers or limitations on the part of the firm. In fact, the short tender period suggests that in reality this is the way the process works; contractors who wish to bid have no choice but to rely on the design and documents prepared by the engineering firm[49]

The Court was concerned with both doing practical justice and the larger economic ramifications of a rigid due diligence requirement. As explained above, time constraints leave the contractor with "no choice" but to rely on the information contained in the tender documents. Even in the rare circumstance in which a contractor *does* have the time to completely assess site conditions,

---

[47] *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*].
[48] *Edgeworth Construction Ltd v ND Lea & Associates Ltd*, [1993] 3 SCR 206 [*Edgeworth*].
[49] *Opron*, *supra* note 3 at para 551; *Edgeworth*, *supra* note 49 at 220 - 221.

the contractor would be duplicating the work of the owner. This is undesireable from an economic efficiency perspective, and, in the public procurement context, the taxpayer would bear the additional cost. The upshot is that the due diligence argument against good faith disclosure has no force with respect to construction contracts.

Iacobucci and Major JJ. echoed the view of the House of Lords in *Walford v Miles* that negotiation is inherently adversarial and therefore does not admit of good faith. While it is true that the aim of a negotiating party is often to leverage the best financial bargain it can, the common law already attributes liability to an owner for non-disclosure in negligent misrepresentation. As Gonthier J. noted in *Bail*, "[t]he obligation to inform and the duty not to give false information may be seen as two sides of the same coin".[50]

Given that contractors have recourse in negligent misrepresentation, it might be said that there is no reason to recognize a good faith duty to inform. Indeed, Iacobucci and Major JJ. held that existing doctrines provide sufficient redress against pre-contractual misconduct.[51] Two counter-arguments are that 1) a positive duty to disclose is more doctrinally consistent with the concept of good faith than it is with negligent misrepresentation; and 2) a freestanding duty of good faith disclosure would not be redundant because, unlike an action in negligent misrepresentation, the good faith duty could not be excluded.

The doctrine of misrepresentation essentially imposes a *negative* duty on the representor to refrain from making false statements.[52] By contrast, the duty to inform is a *positive* obligation to disclose that exists where there is an imbalance of information. Courts have stretched the concept of misrepresentation such that it encompasses inferences that the representee draws from

---

[50] *Bail*, *supra* note 2 at 31.
[51] Iacobucci and Major JJ. were also concerned about discouraging needless litigation. Given that omissions by an owner are presently actionable in negligent misrepresentation, an implied duty of disclosure is unlikely to spawn an intolerable multiplicity of suits.
[52] See Black's Law Dictionary, 9th ed, *sub verbo* "actionable misrepresentation" online: <thelawdictionary.org>.

omissions of the representor (implied misrepresentations). However, the reality is that an inference drawn by the representee is not an affirmative, misleading statement of the representor.[53] The argument that a positive obligation of disclosure flows from the organizing principle of good faith is more coherent and intuitively plausible. For instance, in listing the different types of "asymmetric information imperfections", Professor Waddams et al have classified misrepresentation and non-disclosure separately.[54]

Turning to the second point, a carefully worded clause could exclude liability in tort for negligent misrepresentation.[55] However, freestanding duties of good faith, such as the duty of honest performance in *Bhasin*, do not suffer from the same weakness. Therefore, misrepresentation does not cover all the ground that a good faith duty to inform might. The latter, as a freestanding duty, would correspond to a more expansive right.

It might also be argued that there is no point in expanding the law of good faith because parties already have recourse to the doctrine of unconscionability. Unconscionability[56] is not an adequate substitute for good faith disclosure, however. Unconscionability is normally invoked where there is a serious inequality in bargaining power. Sophisticated commercial parties will therefore seldom have recourse to unconscionability. Good faith fills the void and demands

---

[53] A different view is that an incomplete statement is misleading and therefore a misrepresentation. This is equivalent to suggesting that a representee will be misled by the failure of a representor to provide full information. The ultimate concern is with the consequences of non-disclosure, and not with false information *per se*. Cf *Xerex Exploration Ltd v Petro-Canada*, 2005 ABCA 224 [*Xerex*].

[54] SM Waddams et al, eds, *Cases and Materials on Contracts* (Toronto: Edmond Montgomery Publications Ltd, 2014) at 747 - 748 [Waddams et al, "Contracts"]. See also American Law Institute, *Restatement of the Law Second: Contracts* (St. Paul: American Law Institute Publishers, 1981) at s. 161(b) (the duty to disclose hinges on a 'failure to act in good faith and in accordance with reasonable standards of fair dealing'). But see SM Waddams, "Precontractual Duties of Disclosure" (1991) 19 Can Bus LJ 349 at 350 (where Professor Waddams writes that 'the desirable solution lies in the development of existing techniques, such as those of implied warranty, and the notion that silence with other conduct may amount to an assertion, rather than in the adoption of any general obligation to disclose material facts').

[55] See *Tercon Contractors Ltd v British Columbia*, 2010 SCC 4 for the test that courts use to assess exclusion clauses.

[56] Unconscionability is an equitable concept that provides relief against agreements that are against good conscience. See *Gindis v Brisbourne*, 2000 BCCA 73, leave to appeal to SCC refused, [2001] 1 SCR xi.

forthright conduct between sophisticated parties. As well, good faith is a more onerous standard than unconscionability. Unconscionability captures conduct that is "excessively self-interested or exploitative", but allows a party to otherwise act self-interestedly toward another "as of course".[57] On the other hand, a party under an obligation of good faith must have regard to the legitimate interests of the other party, though the interests of the other party do not need to be treated as paramount. Contracts where the law requires disclosure on behalf of a party possessing superior information traditionally fall under the category of good faith.[58] A related concept is that of fiduciary duty. A fiduciary must act selflessly and must treat the interests of the other party as paramount.[59] Given how high this standard is, it is doubtful that owners owe fiduciary duties to a contractor.[60]

In the 2005 case of *Xerex Exploration Ltd v Petro-Canada*[61] (a case outside of the tendering context) the Alberta Court of Appeal stated its disagreement with *Opron* and rejected the argument that contracts may contain an implied term of good faith disclosure. The Court made the following comments:

> Xerex also suggests that a duty to disclose can be found in the "secondary obligation arising from the primary obligation of good faith between contracting parties"… *Opron* is cited as authority for this principle, although, as Justice Feehan acknowledged, the principle comes from the decision of the Supreme Court of Canada in *Québec (Commission hydroélectrique) c. Banque de Montréal* [*Bail*]…We are reluctant to apply this doctrine because it is not clear to us that this particular duty of good faith in contract negotiations applies outside of Quebec. In the *Québec (Commission hydroélectrique)* case [*Bail*] relied upon in *Opron*, the Supreme Court was considering the *Quebec Civil Code* which contains specific duties of disclosure that may not form part of the common law[62]

---

[57] PD Finn, "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1 at 4 [Finn, "The Fiduciary Principle"]. Cited with approval in *Cornell Engineering*, *supra* note 6 at 11 - 12.
[58] Finn, "The Fiduciary Principle", *supra* note 58 at 11 - 12. See also *Cornell Engineering*, *supra* note 6 at 11.
[59] Finn, "The Fiduciary Principle", *supra* note 58 at 4.
[60] I leave a detailed analysis of why an owner likely does not a fiduciary duty to a contractor for another paper. See also *Galambos v Perez*, 2009 SCC 48 (clarifies the test for *ad hoc* fiduciary duties). There are additional doctrines with which good faith might be said to overlap. I will not address every such doctrine in this paper.
[61] *Xerex*, *supra* note 54.
[62] *Ibid* at para 75 - 76.

The court in *Xerex* took the view that good faith disclosure is a civil law obligation that has not been imported into common law jurisdictions. However, that position is untenable because the criteria for the duty to inform as set out in *Bail* can be found within the broader test established by the Court of Appeal for Ontario in *Cornell Engineering*. Good faith disclosure is therefore present in the common law.

In *Cornell Engineering*, a young entrepreneur named McDonald entered into a share purchase agreement with his mentor, Stevens. The contract contained a provision that was at odds with an oral agreement reached by the parties before the written agreement was signed. Stevens did not read the written agreement. Stevens wanted to prevent McDonald from enforcing the relevant provision.

At trial, Cullity J. held that there was a relationship of complete trust between Stevens and MacDonald. Accordingly, it was reasonable for Stevens to rely on MacDonald not to insert any terms into the written agreement that had not already been discussed. MacDonald did not owe Stevens a fiduciary duty, though he had a "sufficient obligation to act in good faith".[63]

The Court of Appeal reversed the trial decision. Weiler JA., citing *Martel*, found that, as a general rule, parties negotiating a contract are entitled to act entirely in their own self-interest; however, "the law requires more than self-interested dealing" when the following test is made out:[64]

1. One party relies on the other for information necessary to make an informed choice; and
2. The party in possession of the information has an opportunity, by withholding (or concealing) information, to bring about the choice made by the other party[65]

[63] *Cornell Engineering*, *supra* note 6 at 10.
[64] *Ibid* at 11.
[65] *Ibid* at 11 - 12.

With regard to the first criterion, Weiler JA. listed five indicia of reliance, the most important of which, for the purposes of this paper, is the relative positions of the parties in their access to information. Weiler JA. applied the indicia of reliance and concluded that Stevens was not justified in relying on MacDonald to explain every difference between the oral agreement and the written contract.

The criteria set out by Weiler JA. resemble the duty to inform in *Bail*. Where a contracting party cannot acquire decisive information necessary to make an informed choice, that party may rely on the other contracting party to disclose. Applying the first branch of the *Cornell Engineering* test to the tendering context, bidders reasonably rely on owners to disclose site conditions because they are not in a position to conduct their own investigations; there is an asymmetry of information. Applying the second branch of the test, withholding unfavourable information would bring about the choice of the contractor to submit a bid calculated at a certain price. (I.e.: The contractor would submit a lower bid than they would otherwise submit with full information).

Imposing a freestanding duty of good faith disclosure would enlarge the owner's duty to inform, as the doctrine of misrepresentation by omission can be restricted by a well-worded exclusion clause. Recognizing a duty of good faith disclosure would be an incremental step in the law at most, and is therefore in keeping with the cautious approach to developing the law articulated in *Bhasin*. The jurisprudential trend is to impose disclosure obligations where there is an asymmetry of information. Owners are already liable for material omissions. It follows that legal certainty is not a concern. No settled rule is being disrupted. Good faith disclosure is a more certain concept than the duty of honest performance. Under the duty of honest performance, a party can perform their contractual obligations to the letter but still be held liable if the court for

some reason disapproves of their behaviour, as in *Bhasin*. The duty to inform is a more determinate standard and can be grounded in either the *Bail* or *Cornell* test. The encroachment on freedom of contract is minimal. As Professor Waddams et al write, "it is difficult to conceive of a choice as autonomous without basic information about its implications".[66] Adversarial bargaining would remain the general rule, with good faith disclosure in construction contracts being the exception. The ramifications of expanding the doctrine of good faith are capable of assessment, because we can look to Quebec as an example. As mentioned above, commercial activity and contractual stability have not been negatively affected by a more robust conception of good faith in the civil law.

V. CONCLUSION

In conclusion, a sound legal argument can be made that owners have a common law, pre-contractual obligation of good faith disclosure. Given the analytical framework established in *Bhasin*, any specific doctrine of good faith must be drawn from the organizing principle. The Supreme Court of Canada has already derived the civil law duty to inform from the "primary" obligation of good faith under the *Quebec Civil Code*. Cases such as *Opron*, *Weiss v Schad*, and *Cornell Engineering* give us reason to think the Court may be open to a similar approach in a common law dispute.

[66] Waddams et al, "Contracts", *supra* note 55 at 747.