

The Limits of Laissez-Faire: Free Competition, Freedom of Contract,  
and Other-Regard as a Competing Principle of Commercial Private Law

by

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Faculty of Law  
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# The Limits of Laissez-Faire: Free Competition, Freedom of Contract, and Other-Regard as a Competing Principle of Commercial Private Law

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## Abstract

A principle of laissez-faire has long dominated the doctrinal development of contract and tort as they apply to commerce. By contrast, opposition to laissez-faire developed in piecemeal fashion, which has precluded this opposition from amounting to a comprehensive critique of laissez-faire. This has proven problematic in light of research indicating that humans are prone to biases that inhibit their ability to maximize self-interest. In other words, laissez-faire fails to prevent humans from indulging in self-destructive tendencies.

As a solution, this thesis posits that parts of contract, tort and fiduciary law already implicitly recognize an underlying principle of other-regard. This principle functions at the same level as laissez-faire, offering a safeguard against human irrationality that protects self-interest in a way that would be impossible under pure laissez-faire. Ultimately, commercial private law might more effectively achieve its objectives by recognizing a system of competing principles rather than a hegemony of one.

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## The Limits of Laissez-Faire: Free Competition, Freedom of Contract, and Other-Regard as a Competing Principle of Commercial Private Law

“The acts of the defendants... were intentional, and were also calculated, no doubt, to do the plaintiffs damage in this trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. **They have done nothing more... than pursue to the bitter end a war of competition waged in the interest of their trade.** To say that a man is to trade freely, but to say that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible course of perfection.” (emphasis added)

- *Mogul Steamship Company v McGregor, Gow & Co* (1889), 23 QBD 598 (CA) at 614, per Bowen LJ

“Business and accepted morality are not mutually exclusive domains.”

- *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 668, per La Forest J

### 1. Introduction – The Hegemony of Laissez-Faire

#### 1.1. The Problem – Freedom of Contract and Free Competition’s Powerful Grip

If one were to ask what principle, if any, governs the common law of contract and its development at the doctrinal level, it seems reasonable to think that “freedom of contract” would be the paradigmatic reply. It has, after all, been emblematic of the classical thinking that has dominated contract law since the turn of the eighteenth century. But of the same token, one would be hard-pressed to identify any countervailing principle of similar influence. Only in exceptional circumstances might public policy override the primacy of freedom of contract<sup>1</sup>.

<sup>1</sup> See, for example, *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4. In dissent, Binnie J noted that courts maintain a “residual power” to decline contractual enforcement on public policy grounds, but such power would “rarely be exercised”: para 117. Interestingly, Binnie J observed that public policy is “fundamental to contract law”, but the balance of his judgment (including his reticence to invoke public policy except in exceptional circumstances) undoubtedly gives pride of place to freedom of contract as contract law’s dominant principle. Further, Binnie J characterized promotion of freedom of contract itself as a public policy choice: paras 119, 120. Though it is not made clear, Binnie J’s characterization of public policy – as well as the sources to which he cites – suggest that public policy is not fundamental to contract law so much as it is fundamental to common law, thus making it superordinate to contract law and therefore capable of suspending

So too has the common law been reluctant to impose rules in tort about fair economic competition, opting instead for “some elbow-room for the aggressive pursuit of self-interest”<sup>2</sup> in the commercial arena<sup>3</sup> and leaving the development of such limitations to Parliament<sup>4</sup>. Taking freedom of contract and free competition together, it seems fair to say that an attitude of laissez-faire has long dominated doctrinal thinking on the laws of contract and tort as they apply to commerce<sup>5</sup> (referred to for brevity as “commercial private law”). Indeed, this state of affairs is emphasized by the fact that legislatures in the 20<sup>th</sup> century were far more willing to restrict economic freedom<sup>6</sup> in order to protect consumers, employees, renters, and other classes of weaker parties<sup>7</sup> – occasionally in direct opposition to the judiciary (e.g. *Lochner v New*

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the normal operation of common law. See also, Brandon Kain and Douglas Yoshida, “The Doctrine of Public Policy in Canadian Contract Law”, in Todd L. Archibald and Randall Scott Echlin, eds, *Annual Review of Civil Litigation, 2007* (Toronto: Thomson Reuters, 2007) 1.

<sup>2</sup> Carolyn Sappideen and Prue Vines, eds., *Fleming’s The Law of Torts*, 10th ed (Pyrmont, New South Wales: Lawbook Co, 2011) at para 30.120. [“Sappideen & Vines”]

<sup>3</sup> This thesis does not address torts such as battery, false imprisonment, negligence in the case of personal injury, etc. since they are not per se related to commerce.

<sup>4</sup> See, for example, *OBG Ltd v Allan* (sub nom. *Douglas v. Hello! Ltd.*) (sub nom. *Mainstream Properties Ltd. v. Young*) [2007] UKHL 21, [2008] 1 AC 1, [2007] 2 WLR 920 [“OBG”] at para 56. In the past two centuries, the most significant restraints on free competition in commerce have arguably come by way of competition/antitrust legislation. On the other hand, the common law’s concern about monopolies dates back at least as far as Sir Edward Coke’s criticism of them in his *Institutes*: Edward Coke, *The second part of the institutes of the laws of England: containing the exposition of many ancient and other statutes*, vol 1 (London, W Clarke & Sons, 1809) at 47. Interestingly, Atiyah observes that Coke overstated the extent to which his position was based in earlier law, since the case on which Coke based his commentary – *The Case of Monopolies* (1572-1616) 11 Co Rep 84, 77 ER 1260 – did not purport to speak on all monopolies generally. Rather, the justices in that case were speaking only to monopolies that did not arise from a Crown grant: Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) [“Atiyah”] at 118.

<sup>5</sup> This point seems almost trite in light of the extensive academic literature and case law that has articulated the same claim far more comprehensively, but it nevertheless bears noting here. As Fridman noted in G.H.L. Fridman, “Freedom of Contract” (1967) 2:1 Ottawa LR 1 at 1, the following remark by Jessel MR in 1875 held equally true almost 100 years later: “if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract.” *Printing & Numerical Registering Co v Sampson*, (1875) 19 Eq 462 at 465.

<sup>6</sup> It is important not to overstate this point given that in the case of economic torts, legislatures were also willing to remove constraints on economic activity by exempting unions from the ambit of judicially-recognized torts such as intimidation in order to preserve unions’ ability to function freely. For example, consider the case of *Rookes v Barnard*, [1964] UKHL 1, [1964] AC 1129, [1964] 1 All ER 367 [“Rookes”]. In *Rookes*, the plaintiff Rookes was a unionized employee of the British Overseas Airway Corporation who resigned from his union after a disagreement. His union, which had a closed-shop agreement with his employer, threatened the employer with a strike action if Rookes was not fired. The employer duly suspended and then fired him. The House of Lords ultimately found the defendant union official liable for the tort of intimidation, but barely a year later the legislature passed the *Trade Disputes Act 1965*, 1964 c 48 in order to (mostly) exempt trade unions from the scope of *Rookes v Barnard* and thereby protect their ability to strike.

<sup>7</sup> See, generally, Atiyah, *supra* note 4 for a comprehensive historical survey of freedom of contract’s evolution from 1770 up to 1970. See chapter 21 for an account of how freedom of contract fell from prominence – at least

*York*<sup>8</sup>). For whatever reason, the overarching principle of laissez-faire has largely (though not entirely) escaped sustained judicial scrutiny, and instead remains frequently invoked as a guiding principle of judicial philosophy regarding private commercial law<sup>9</sup>.

While the conceptual dominance of laissez-faire has undoubtedly been key to fostering the salutary qualities of stability and predictability in commercial law, the common law's relatively uncritical embrace of its dominance has also had the problematic effect of foreclosing candid discussion of laissez-faire's shortcomings as a guiding principle for commercial private law. Assuming that contract and tort law – to the extent that they apply to commerce – are vehicles for maximizing the self-interest of commercial parties, then it must surely be reasonable to occasionally re-evaluate the guiding principles meant to advance this fundamental objective<sup>10</sup>. In theory, laissez-faire seems a good fit for advancing the objective of interest maximization. In theory, parties know what is in their best interest and are best left

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legislatively – between 1870 and 1970. By contrast, see F.H. Buckley, ed, *The Fall and Rise of Freedom of Contract* (Durham, North Carolina: Duke University Press, 1999) for the argument that freedom of contract has enjoyed an intellectual revival as a result of the rise of law and economics as a school of legal thought. However, note that both Atiyah and Buckley's respective texts speak largely to the legislative and academic treatment of freedom of contract – not its judicial treatment, which this thesis scrutinizes. The argument has also been made that a second rise of freedom of contract has taken place in the United States in the form of the US Supreme Court's strong endorsement of boilerplate clauses, such as arbitration agreements: see, for example, Hila Keren, "Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity" (2016) 2:1 CJCL 339. However, it bears noting that the US's view of arbitration agreements has been far more favourable than a number of other jurisdictions across the world.

<sup>8</sup> *Lochner v New York*, 198 US 45. Recall that in *Lochner*, a five-judge majority of the US Supreme Court struck down legislation placing limits on the maximum number of hours bakery workers could work per week, finding that the legislation violated the fourteenth amendment of the US Constitution. It bears noting that *Lochner* was not emblematic of a *unanimous* trend of striking down laws limiting economic liberty so much as a *dominant* trend since, as Holmes J noted in his dissent in *Lochner*, the court was willing in other cases to uphold such laws: *Ibid* at 75, citing *Otis v Parker* (upholding a prohibition on the sale of stock on margins or for future delivery), 187 US 606 and *Holden v Hardy*, 169 US 366 (upholding an eight-hour workday for miners).

<sup>9</sup> See, for example, *Tercon*, *supra* note 1 at para 117, citing *Re Millar Estate*, [1938] SCR 1 at 7 ["*Re Millar*"] with respect to freedom of contract. With respect to tort law and free competition, see *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12, [2014] 1 SCR 177 ["*Bram*"] at para 31, citing *OBG*, *supra* note 4 at paras 56 and 142, and *Sappideen & Vines*, *supra* note 2 at para 30.120.

<sup>10</sup> This is one of the core assumptions on which this thesis proceeds, and is surely a highly contentious one in the broader context of contract and tort theory. Of necessity, however, and in the interest of accommodating this thesis's central points of inquiry, I must sidestep that debate here. Suffice to say that, if commerce is intended to facilitate the maximization of self-interest for commercial parties, then it stands to reason that insofar as they apply to commerce, the laws of contract and tort are intended to preserve the integrity and viability of the market as the milieu for facilitating and encouraging commerce. On this view, contract and tort to some extent occupy a middle ground in the theoretical debate by balancing the enforcement of autonomy (which in the case of contract manifests in the enforcement of promises) with the protection of the market's efficient functioning (by preventing disreputable conduct that would, in the long run, disincentivize parties from trading for fear of being taken advantage of).

alone to pursue it; in aggregate, the unfettered pursuit of self-interest will produce the greatest good to society<sup>11</sup>. On this view, freedom of contract and free competition are eminently sensible since they discourage restraints on trade that would inhibit such pursuit. But if behavioural economics has taught us anything, it is that humans are fundamentally (and indeed at a primal level) incapable of recognizing what is actually in their best interest<sup>12</sup>. Humans are plagued by sundry cognitive biases that lead us away from rational decisions, and thus away from maximizing self-interest. Accordingly, the problem at play here is that the guiding principle of contract and economic tort arguably leads *away* from their fundamental objective. Bearing that fact in mind, it is worthwhile to assess what doctrinal alternatives are available to reorient contract and economic tort in a more effective direction. As the past century and a half have shown, however, doctrine has failed to yield viable alternatives to the laissez-faire model that still holds sway.

Doctrinal opposition to the laissez-faire principle both in contract and in tort have evolved in piecemeal fashion<sup>13</sup>, much more the exception than the rule and incapable of offering a serious, comprehensive critique of laissez-faire's status as the dominant mode of thought. Lord Denning's remarks in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*<sup>14</sup> were particularly revealing in this respect: there, the court was faced with the question of whether a limitation of liability clause on an invoice for cabbage seed should be interpreted to cover the

<sup>11</sup> See, for example, Raymond Wacks, *Understanding Jurisprudence*, 4th ed (Oxford: Oxford University Press, 2015) at 252-56.

<sup>12</sup> See, for example, Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); and Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

<sup>13</sup> Though this thesis does not attempt an exhaustive catalogue of these various exceptions, the examples discussed herein are nevertheless representative at one level of the disparate circumstances in which laissez-faire has been limited (of course, the main argument of this thesis is that at another level, these examples are implicitly indicative of a heretofore unacknowledged underlying principle). Bingham LJ remarked much the same thing in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, [1987] EWCA Civ 6, [1989] QB 433 at 439: "English law has, characteristically, committed itself to no such overriding principle [of fairness] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways". To some extent, this observation raises the question of at what point a sufficient number of exceptions have been recognized such that it might be appropriate to acknowledge an underlying principle that animates their recognition.

<sup>14</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA Civ 5, [1983] QB 284, per Lord Denning. ["*George Mitchell* EWCA"]



seeds sold, and whether the clause was ‘reasonable’ under section 11 of the *Unfair Contract Terms Act 1977*<sup>15</sup>. Writing on the favourable consequences of freedom of contract for powerful parties at the expense of the weaker, Denning MR quite candidly observed that judges of his generation were still compelled to publicly “worship” at the altar of freedom of contract, necessitating subterfuge in the form of strained and unnatural interpretations that could torture a just result out of the contract<sup>16</sup>. The House of Lords unanimously agreed<sup>17</sup>. Yet even in *George Mitchell*, the Court of Appeal and House of Lords’ respective judgments suggested that the justices viewed their departure from freedom of contract as enabled by the *Unfair Contract Terms Act 1977*<sup>18</sup>. By all indications, this departure could not be attributed to any principled change from within common law contract law itself; freedom of contract still held sway as a matter of doctrinal thinking.

In instances where the common law *has* pushed against freedom of contract, courts have been inclined to view such incursions as an exercise of a court’s “residual” power or an implementation of “overriding” public policy<sup>19</sup>. Duff CJ in *Re Millar Estate* expressed this relation quite aptly in noting that

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which *rules of law cannot have their normal operation* because the law itself recognizes some paramount consideration of public policy which *overrides* the interest and what otherwise would be *the rights and powers of the individual*.<sup>20</sup> (emphasis added)

In other words, Duff CJ suggested that the invocation of public policy *suspends* the operation of normal contract law in favour of a higher-order principle, rather than operating *alongside* contract law. Put differently, courts have treated any limitations on freedom of contract as

<sup>15</sup> *Unfair Contract Terms Act 1977*, 1977 c50.

<sup>16</sup> *George Mitchell EWCA*, *supra* note 14 at 297. For example, the court of first instance in *George Mitchell found that the seeds in question were not actually “seeds” because they were completely defective: George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, [1981] 1 Lloyd’s Rep 476.

<sup>17</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, [1983] 2 AC 803.

<sup>18</sup> See, for example, *Ibid* at 810.

<sup>19</sup> See, for example, *Tercon*, *supra* note 1 for this characterization of limitations on freedom of contract, and *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2012 NBCA 33 for this characterization of limitations on free competition in respect of economic torts. It bears noting, however, that the Supreme Court decision in *A.I.* rejected the notion of a residual judicial discretion with respect to the unlawful means tort, finding that the conferral of such a discretion would be unprincipled and threaten an undue imposition of commercial morality upon commerce.

<sup>20</sup> *Re Millar*, *supra* note 9 at 4.

superordinate and external to the guiding principles of contract, rather than as part of the same conceptual puzzle. So too is it true that the threshold for overriding freedom of contract on public policy grounds is a high bar: Binnie J affirmed in *Tercon* that “public policy “should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds”<sup>21</sup>. To the extent that the common law *has* recognized limitations on freedom of contract, those limitations have been piecemeal and haphazard, without a guiding principle to help explain where and when such interventions would be appropriate<sup>22</sup>. The problem, then, is an inability to reconcile the overarching principle of freedom of contract with the exceptions that do place restrictions upon the acceptable scope of contractual content and conduct, such as good faith and unconscionability<sup>23</sup>. Without a clear idea of how these exceptions fit together, it seems nigh impossible to articulate a principle for developing exceptions as the law evolves in future. In short, the way forward for contract law’s development is unclear.

Tort law insofar as it applies to the commercial domain has proven equally resistant to change, perhaps to no great surprise. To the extent that tort law is itself public policy writ large upon private parties, both judicial and legislative treatment of commercial activity have long upheld a stance in favour of free and vigorous competition in the marketplace. Apart from the notable exception of antitrust/competition law, courts have been keen to affirm that even economic harm to parties is largely acceptable as a precondition for the social good that competitive markets bring about<sup>24</sup>. This attitude is perhaps best encapsulated in the English Court of

<sup>21</sup> *Tercon*, *supra* note 1 citing *Re Millar Estate*, *supra* at 7. Binnie J’s remarks were more recently cited with approval in *Mega Reporting Inc v Yukon (Government of)*, 2018 YKCA 10; and *Niedermeyer v Charlton*, 2014 BCCA 165.

<sup>22</sup> There have been some attempts to theorize a general principle that explains exceptions to the strict enforcement of contracts. Stephen Waddams argues that these exceptions to the usual regime of strict enforcement (what we refer to as the ‘sanctity of contracts’) may be understood as instantiations of a principle that common law courts maintain a general power to intervene in contractual relations where enforcement would produce highly unreasonable results (such as disproportionate enrichment): Stephen Waddams, *Sanctity of Contracts in a Secular Age* (Cambridge: Cambridge University Press, 2019), forthcoming [“Waddams, *Sanctity of Contracts*”]

<sup>23</sup> Indeed, it is telling that even in *Bhasin v Hrynew*, 2014 SCC 71 [“*Bhasin*”]—an exemplar of judicial recognition of other-regard (in the form of good faith) as a fundamental component of contract law – the court felt compelled to affirm the importance of freedom of contract (notwithstanding that one might argue it merely amounted to lip-service): see, for example, para 70.

<sup>24</sup> See, for example, *Allen v Flood*, [1898] AC 1 at 179, per James LJ [“*Allen*”]. In *Allen*, Flood was a carpenter employed on a ship on a day-by-day basis (i.e. the contract began anew each day). Allen was a trade union representative for the employees on the ship. Allen indicated to the employers that if they did not discharge Flood, the other employees would strike. The employers subsequently declined to renew Flood’s daily contract and refused to employ him again. Flood sued Allen for maliciously inducing a breach of contract, and indeed it was

Appeal's ruling in *Mogul Steamship Company v McGregor, Gow & Co.*<sup>25</sup> where a group of shipping companies was alleged to have conspired to harm the plaintiff shipping company by offering traders significantly-reduced shipping rates and refusing to transport goods for any trader who dealt with any shipper apart from those of the allegedly conspiring group<sup>26</sup>. In finding for the defendants on appeal, Bowen LJ made the following observation about limiting economic competition – even where competitors intentionally harm one another:

“The acts of the defendants... were intentional, and were also calculated, no doubt, to do the plaintiffs damage in this trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. **They have done nothing more... than pursue to the bitter end a war of competition waged in the interest of their trade.** To say that a man is to trade freely, but to say that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible course of perfection.” (emphasis added)<sup>27</sup>

As the quote suggests, tort law has long been reluctant to limit even intentional harm in the course of commerce; as a result, courts have struggled to draw a bright-line, principled distinction between legitimate and illegitimate intentional harm<sup>28</sup> in this arena. Undoubtedly, this struggle can be attributed in large part to the unique historical circumstances and development of the various economic torts<sup>29</sup> (that is, those tort doctrines which create liability arising from economic relations and misconduct not covered by contract<sup>30</sup>). But in an equally significant sense, the reluctance to seriously interrogate the common law's dogmatic

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found as a matter of fact that Allen's actions were animated by malice. Nevertheless, the House of Lords ultimately found for Allen, noting that he had not violated any of Flood's legal rights since Flood had no right to be employed by the employer beyond the scope of his daily contract. Notably, Watson LJ observed that it was incorrect to find “that an act in itself lawful is converted into a legal wrong if it was done from a bad motive”: *Ibid* at 93.

<sup>25</sup> *Mogul Steamship Company v McGregor, Gow, & Co* (1889), 23 QBD 598 (CA), aff'd [1892] AC 25 (HL).

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* at 614.

<sup>28</sup> See, for example, Peter Burns and Joost Blom, *Economic Torts in Canada* (Markham, ON: LexisNexis, 2016) [“Burns and Blom”] at 4-5 (“Drawing the Line Between Legitimately and Wrongfully Causing Loss”).

<sup>29</sup> *Ibid* at 20-22.

<sup>30</sup> As notes below, I define “economic torts” according to the more expansive list proposed by Burns and Blom, which is as follows: inducing breach of contract, the unlawful means tort, intimidation, civil conspiracy, civil fraud, breach of confidence, breach of fiduciary duty, and negligence. Some commentators do not include breach of confidence or breach of fiduciary duty in this list. This uncertainty over the inclusion of equitable doctrines within the economic torts is perfectly understandable given that their non-tortious nature is at odds with how closely related they are with the economic torts in practice. However, it is suggested that this debate is to some extent misguided insofar as these equitable doctrines fit along the same spectrum of other-regard as the economic torts and good faith.

acceptance of free competition as the guiding principle of economic tort law has surely inhibited courts' ability to give serious, systematic consideration to how limiting free competition in favour of regard for others may itself be a desirable and useful guiding principle in developing and theorizing economic tort doctrine. Much like freedom of contract has enjoyed pride of place as contract law's fundamental, guiding principle from which deviations are exceptions to the rule, so too has free competition occupied a similar position with respect to the economic torts. Not coincidentally, the economic torts continue to suffer from conceptual confusion<sup>31</sup> both individually and collectively<sup>32</sup>, bereft of a coherence that could explain why we recognize these limits to free competition in the first place.

In sum, one would be hard pressed to find judicial suggestion of comprehensive limitations on laissez-faire; even where limitations are proposed (for example, public policy in relation to freedom of contract), they are conceptualized in opposition to contract and tort rather than as part and parcel of their very conceptual framework<sup>33</sup>. Doctrinal opposition to laissez-faire has only advanced in discrete circumstances by fits and starts, producing a patchwork of doctrinal exceptions from which no underlying principle is readily apparent. As a result, this has precluded opposition to laissez-faire from being theorized at same level of principle, thus leading contract and economic tort doctrine to have failed at producing a compelling doctrinal alternative. Accordingly, this thesis locates its critique in that vein. Taking as an assumption that humans are in fact hardwired to frequently act *against* their best interests – overvaluing lesser short-term gain over greater long-term gain, for example<sup>34</sup> – then this new understanding of the underlying circumstances of commerce suggest that a hands-off approach actually undermines the objectives of contract and tort in respect of commerce. Laissez-faire is thus an inadequate vehicle because of its inconsistency with humans' irrationality and real-world shortcomings. As such, it makes sense to assess whether there exists a viable doctrinal alternative that compensates for these shortcomings, as well as whether it competes with or

<sup>31</sup> See, for example, *Bram*, *supra* note 9 at para 28.

<sup>32</sup> See, for example, Burns and Blom, *supra* note 28 at 17-18 (“Does the System have a rational structure?”) and 32-33.

<sup>33</sup> See note 1, *supra*, regarding Binnie J's discussion of public policy in *Tercon*, *supra*.

<sup>34</sup> See, for example, Ted O'Donoghue and Matthew Rabin, “Doing it Now or Later”, (1999) 89:1 American Economic Review 103. With respect to this thesis' object of study, it seems reasonable to question whether commercial parties would even turn their mind *at all* to how their behaviour might be destructive in the long term, let alone whether the short-term gain outweighs the long-term loss.

complements laissez-faire in order to bridge the gap between the empirical reality of commerce and the underlying objectives of commercial private law.

## 1.2. The Solution – Other-Regard as a Principle of Commercial Private Law

The aim of this thesis is thus to demonstrate that we are able to understand opposition to laissez-faire *at the same level of principle* as laissez-faire itself, in view of the historical development of common law and equitable doctrines across contract, tort and fiduciary law as they apply to commerce (to reiterate, I will refer to these three areas as “commercial private law” collectively). Notwithstanding that exceptions to laissez-faire have appeared as discrete and largely unrelated developments, analysis of these developments reveals that underlying all of them is a common principle of subordinating the pursuit of self-interest in favour of regard for others. The extent to which the law demands subordination of pursuing self-interest varies from doctrine to doctrine – thus creating a spectrum of other-regard with tort at one end (representing minimal subordination) and fiduciary law at the other (representing maximal subordination). The principle of other-regard responds to the shortcomings of laissez-faire (i.e. its inability to limit self-harmful behaviour) by mandating behaviour that fosters trust between and amongst commercial parties, thus preserving the integrity of the commercial system and preserving the opportunity for self-interest maximization that might otherwise be compromised by behaviour that erodes faith in the commercial system as a vehicle for pursuing self-interest<sup>35</sup>.

The general economic torts (inducing breach of contract, the unlawful means tort, conspiracy, and intimidation) occupy one extreme of the spectrum, where the relevant doctrines restrict an actor’s pursuit of their self-interest not as a means of subordinating their interest to another person’s, but rather as a means of reinforcing the outer bounds of acceptable conduct and

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<sup>35</sup> I suggest here that absent a requirement of other-regard in commerce, general presumptions of trust amongst parties would dissolve and parties would be discouraged from entering the marketplace, thus diminishing the number of potential trade partners and compromising the efficiency of the marketplace. As the case law suggests, commercial actors are often willing to explore the grey areas of acceptable conduct under the law in order to secure an advantage at the expense of other parties (even contractual counterparties). What the case law rarely indicates is how such behaviour impacts on the reputation of the party taking advantage, and whether their ability to find trade partners was compromised in the long run as a result of their interest in short-term gain. If such behaviour is repeated across any particular industry or the marketplace at large, then it stands to reason that, in the knowledge that others generally could not be trusted, prospective parties would (rightfully) be more hesitant to trade.

ensuring fair competition (in the most conservative sense of the term – dis-incentivizing intentional rule-breaking). Fiduciary duties occupy the other extreme of the spectrum, where the duty of loyalty requires the fiduciary to subordinate their self-interest in the name of advancing the best interest(s) of the beneficiary – in other words, a total promotion of other-regarding behaviour. Between the general economic torts and fiduciary duties lies a conceptual gap bridged by good faith. The conceptual flexibility of “good faith” enables it to occupy a broad space across the center of the spectrum, as the inherently unstable concept of ‘reasonableness’ on which judicial analysis and academic commentary of good faith have historically relied allows for varying degrees of normative content to manifest in the different good faith doctrines on a case-by-case basis. This creates an array of duties that in some instances sit closer to economic torts’ minimal view of other-regarding behaviour, and in other instances sit closer to fiduciary duties’ maximal view. Given that good faith requires ‘fidelity to the bargain’<sup>36</sup> rather than loyalty to another, the end result is a concept that varies the restriction on self-interest according to the exact scope, purpose, and terms of the bargain – other-regarding behaviour is an effect rather than a cause. Taking these three areas of law together, it becomes clear that the thread of other-regard runs throughout all three as an overarching principle.

In turn, the co-existence of laissez-faire alongside other-regard suggests that commercial private law is better understood as a system of competing and complementary principles. Ideally, this proposed account of commercial private law will offer a compelling critique of the current doctrinal acceptance of laissez-faire as the conceptual core of commercial private law, and instead provide a more nuanced way of thinking about what principles should animate our understanding of commercial private law – as well as how those principles should guide doctrinal development in light of the empirical reality that supposedly “rational” actors are in fact far from the rational beings that laissez-faire takes them to be. If the law is meant to fulfil its objective in the commercial domain of facilitating self-interest maximization, then the doctrinal framework employed to reach that objective must take better account of the empirical

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<sup>36</sup> The term “fidelity to the bargain” was also employed by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 at para 139. Below, I employ the term in a more expansive sense than Leggatt J and should therefore not be taken to suggest a definition entirely aligned with his. See *infra*, note 126.

circumstances which frustrate that same objective. In short, the core of commercial private law must be re-imagined.

### 1.3. Content and Structure of this Thesis

In order to support the above claims, this thesis devotes the bulk of its analysis to demonstrating that existing commercial obligations found in doctrines of economic torts<sup>37</sup>, good faith, and fiduciary law are best understood together as evidence of a general principle – one of regard for others in the course of commerce – that opposes laissez-faire notwithstanding that these doctrines have previously been understood only as a discrete set of (at best) loosely-related concepts. The fact that each of these three areas has been undertheorized to varying extents, and is subject to serious conceptual confusion, necessitates a careful review of the existing case law in order to make theoretical sense of the data points used in service of the argument for a general principle of other-regard.

The economic torts exist in a state of conceptual confusion, the case law to date having rejected a unifying conceptual framework. Good faith has been similarly unsettled, a fact that has become particularly pertinent in the wake of the Supreme Court of Canada’s judgment in *Bhasin v Hrynew*<sup>38</sup>. There, the court took the significant step of recognizing an overarching principle of good faith that guides the development of common law good faith doctrines in Canada. However, there remains significant confusion in both the case law and the academic literature as to how good faith can be conceptualized and how it will evolve. Judges have often

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<sup>37</sup> I define “economic torts” here according to the more expansive list proposed by Burns and Blom, which is as follows: inducing breach of contract, the unlawful means tort, intimidation, civil conspiracy, civil fraud, breach of confidence, breach of fiduciary duty, and negligence. See Burns and Blom, *supra* note 28. Other commentators have adopted a narrower definition that does not include either breach of confidence or breach of fiduciary duty: see, for example, Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2010) [“Carty”].

<sup>38</sup> *Bhasin*, *supra* note 23. Briefly the facts of *Bhasin* were as follows: Bhasin was hired by Can-Am Financial Corp to sell RESPs in 1998, for three years with automatic renewal unless six months' notice was given. Hrynew, another enrollment director in competition with Bhasin, had proposed to merge their agencies, and pressured Can-Am to force the merger, but Bhasin refused. Can-Am appointed Hrynew to review compliance with the Alberta Securities Commission's new regulations, which gave Hrynew the power to review confidential business records. Bhasin objected, following which Can-Am told the Securities Commission that it would be restructuring its agencies such that Bhasin would work for Hrynew’s agency. Bhasin, however, was not informed of this, and during this time Can-Am misled him about the merger plan as well as how and why Hrynew was selected as the compliance officer. Bhasin refused to allow Hrynew to audit his records, as a result of which Can-Am gave notice of non-renewal. When the term expired, Bhasin lost his business and workforce, while Hrynew hired away Bhasin’s sales agents. Bhasin commence litigation against Can-Am and Hrynew in response.

taken an explanation for good faith to be so self-evident as to not warrant discussion (essentially, an implicit notion of ‘I know it when I see it’), while academic commentators (of which there are relatively few) are only in agreement insofar as they recognize variations of “reasonable expectations” as *one* underlying component of good faith<sup>39</sup>. Fiduciary case law has historically been confused and failed to provide a definitive account of *why* fiduciary duties attach to certain relationships and not to others, thus clouding the underlying principles and objectives. As some have observed, the courts’ application of fiduciary law in recent decades has often compromised fiduciary principles in favour of a results-oriented approach; rather than asking whether a fiduciary relationship exists, courts have frequently determined that the facts of the case warrant a certain remedy (a constructive trust, for example<sup>40</sup>) and consequently reasoned backwards to find a fiduciary obligation, the breach of which justifies the remedy<sup>41</sup>. In short, these three areas of law have only recently begun to escape from significant under-theorization and continue to elicit confusion about their place in the broader scheme of private law.

Accordingly, this thesis addresses these various theoretical hurdles in turn. Part 2 addresses the general economic torts, specifically arguing for three things: first, that the case law’s current definition of the unlawful means element of the unlawful means tort is theoretically inadequate, and a definition that accords with Kain and Alexander’s proposed “cheating” thesis should therefore be adopted<sup>42</sup> (in brief, the deliberate breach of an expressly prohibited

<sup>39</sup> This view is not without its opponents, though; see, for example, Stephen Smith, "The Reasonable Expectations of the Parties: An Unhelpful Concept" (2010) 48 Canadian Business LJ 366 ["Smith"]; and Geoff Hall, "A Study in Reasonable Expectations" (2007) 45 Can Bus LJ 150 at 162-64. This opposition is discussed in greater detail starting at page 35 below ("Evaluating Objections to the Utility of ‘Reasonable Expectations’”).

<sup>40</sup> See, for example, *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch 105 ["*Chase Manhattan*"]. Discussed in greater detail below, *Chase Manhattan* involved the plaintiff (Chase Manhattan Bank) mistakenly transferring two million dollars to the defendant, following which the defendant was put into receivership. Chase sought the return of the money based on the mistake but was unlikely to recover the money since it was merely an unsecured creditor. The only way to avoid this outcome was to segregate the money from the rest of the defendant’s assets, which the court did by imposing a constructive trust. But given that a constructive trust is an equitable remedy, it therefore required an equitable obligation in order to justify the trust’s use as a remedy. The court reasoned backwards and found a fiduciary relationship to exist, notwithstanding that the relationship between plaintiff and defendant exhibited none of the relevant signs.

<sup>41</sup> Leonard I Rotman, "Fiduciary Law’s ‘Holy Grail’: Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921 at 927 ["Rotman"].

<sup>42</sup> See, generally, Brandon Kain and Anthony Alexander, "The ‘Unlawful Means’ Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?", in Hon. Todd L. Archibald and Hon. Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2010* (Toronto: Thomson Carswell, 2010) 33 ["Kain and Alexander"].



legal obligation<sup>43</sup>); second, that inducing breach of contract is best understood according to a quasi-proprietary theory, in which case it is identifiable as a tort of primary liability and is therefore amenable to unification with the unlawful means tort; and third, that in view of the two foregoing arguments, all of the general economic torts can be mapped onto the commercial duties spectrum. Part 3 addresses good faith, also making three claims: first, that “reasonable expectations” have served as the analytical tool through which case law and academic commentary has developed good faith doctrines (and now the organizing principle); second, that “reasonable expectations” is composed of an unstable combination of factual reasonableness and normative reasonableness, each of which can predominate in a given case depending on the circumstances; and third, that the normative content of “reasonable expectations” in good faith articulates a concept of ‘fidelity to the bargain’ which requires parties to subordinate the pursuit of their self-interest to the full scope and purpose of the bargain (including that which is not memorialized in writing). The effect of this normative framework is a requirement of regard for other parties that is highly variable depending upon the circumstances of the case, thus positioning good faith at various locations on the spectrum. This thesis additionally devotes some space to addressing common criticisms of “reasonable expectations” as it relates to contract law more generally, in order to evaluate how good faith fits within contract law as a whole. Part 4 takes a different approach in discussing fiduciary relationships, instead taking as a given that the conceptual content of fiduciary law is relatively settled in demanding total subordination of a fiduciary’s self-interest in favour of pursuing the best interest(s) of the beneficiary, and therefore situates fiduciary law at the opposite end of the other-regard spectrum. This section is instead devoted to evaluating how the underlying normative objectives of fiduciary law have become clouded by virtue of doctrinal confusion and misapplication, with an ultimate view towards identifying how these

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<sup>43</sup> Among the most frequently-breached obligations is the tortious duty to avoid engaging in intimidation (i.e. threatening to engage in unlawful conduct if specified demands are not met). One example of this occurred in *International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers, Building Material, Construction and Fuel Truck Drivers, Local 213 v Therien*, [1960] SCJ No 6, 22 DLR 1. There, the defendant union threatened to strike in breach of both their collective agreement and the relevant labour relations legislation if the employer did not dismiss the plaintiff Therien. There is also some suggestion that contempt of court, as well as aiding and abetting contempt of court, may constitute unlawful means: *Acrown (Automation) Ltd v Rex Chainbelt Inc*, [1971] 3 All ER 1175. But *cf. Chapman v Honig*, [1963] 2 All ER 514, 2 QB 502, which held that contempt of court *does not* constitute unlawful means. Under Kain and Alexander’s cheating thesis, contempt of court would likely fall under the ambit of “unlawful means”.

normative objectives can help explain our understanding of fiduciary law's historical influence on contract and tort, as well as its potential function in developing private law in future<sup>44</sup>.

## 2. The General Economic Torts

At one end of the spectrum of commercial duties are the tortious doctrines identifiable as restricting an actor's pursuit of their self-interest not as a means of subordinating their interest to another person's or to an objective<sup>45</sup>, but rather as a means of reinforcing the outer bounds of acceptable conduct and ensuring fair competition (in the most conservative sense of the term – dis-incentivizing intentional rule-breaking). Towards the furthest point of this side of the spectrum, conduct is regulated by the economic torts sometimes labelled the “general economic torts”<sup>46</sup> (inducing breach of contract, the unlawful means tort, intimidation, and the conspiracy torts). But for reasons identified both in the case law and amongst academic commentators, these torts do not easily lend themselves to a unified theory<sup>47</sup>. Accordingly, the aims of this section are twofold: first, to argue that the rationale for the unlawful means element of the unlawful means tort<sup>48</sup> is best understood according to the “cheating” thesis proposed by Brandon Kain and Anthony Alexander<sup>49</sup> and previously rejected by the Supreme Court of Canada<sup>50</sup>; and second, that inducing breach of contract is best understood according to a quasi-proprietary theory, in which case it is identifiable as a tort of primary liability and is therefore amenable to unification with the unlawful means tort. Flowing from these two arguments, the general economic torts should therefore be understood as demarcating the end of the

<sup>44</sup> It bears noting that this thesis does not address a number of other doctrines that would seem a natural fit for such discussion. These include a number of economic torts (lawful means conspiracy, deceit, negligent misrepresentation, passing off, and injurious falsehood), as well as breach of confidence and a number of contractual doctrines concerned with limiting the pursuit of self-interest (e.g. undue influence, unconscionability).

<sup>45</sup> I use “objective” and “person” to suggest the categories further along the spectrum – namely, good faith (fidelity to the bargain or relationship) and fiduciary duties (loyalty to the beneficiary).

<sup>46</sup> See, e.g., Carty, *supra* note 37.

<sup>47</sup> *OBG*, *supra* note 4.

<sup>48</sup> A vivid example of the unlawful means tort comes by way of one of its earliest instantiations. In *Tarleton v. M'Gawley* (1793), Peake 270, 170 ER 153, The defendant master of a trading ship was found liable for having fired the ship's cannons at a canoe so as to prevent it from trading with the plaintiffs' trading ship. The defendant was liable for the plaintiffs' economic injury flowing from the defendant's wrongful conduct toward the canoe, conduct which had been committed with the intent of inflicting injury on the plaintiffs. See also *Bram*, *supra* at para 24.

<sup>49</sup> Kain and Alexander, *supra* note 42.

<sup>50</sup> *Bram*, *supra* note 9 at paras 40-42.

commercial duties spectrum that embraces the most minimal view of other-regarding behaviour – these doctrines evidence a basic concern for other parties’ equality before the law in the context of trade, and to some extent a concern for the integrity of market competition as a system in and of itself.

## 2.1. Defining the “Unlawful Means” Element of the Unlawful Means Tort

Given the central importance of the argument that the unlawful means tort should in fact be the genus tort for each of inducing breach of contract, conspiracy, and intimidation, it is crucial to articulate exactly how the “unlawful means” element as defined in the case law is inadequate, and how Kain and Alexander’s definition is a preferable option. Put briefly, the unlawful means tort requires: 1) interference with the plaintiff’s trade or business; 2) by deliberate resort to unlawful means<sup>51</sup>; 3) with an intent by the defendant to harm the legitimate economic interests of the plaintiff; and 4) subsequent economic injury or loss suffered by the plaintiff<sup>52</sup>. The most apparent ambiguity of course rests with requirement 2) – what exactly constitutes “unlawful means”? The Supreme Court in *AI Enterprises v Bram Enterprises*<sup>53</sup> brought clarity to what was previously an unsettled point of law (and indeed, an unsettled doctrine overall in Canadian law), so that is where analysis must begin. Cromwell J, writing for the court, evaluated two different explanations: the “intentional harm” rationale and the “liability-stretching” rationale. Cromwell J rejected two versions of the intentional harm rationale and accepted liability-stretching as his preferred rationale. He explained the liability-

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<sup>51</sup> I identify this second requirement somewhat broadly here in anticipation of the argument I make below with regards to the underlying rationale of “unlawful means”. By contrast, the House of Lords and Supreme Court of Canada in *OBG* and *Bram*, respectively, both held that “unlawful means” should be understood as conduct directed at a third party which interferes with the third party’s freedom to deal with the plaintiff, and which is actionable by the third party (or would be if it suffered a loss).

<sup>52</sup> Burns and Blom, *supra* note 1 at 98-99.

<sup>53</sup> *Bram*, *supra* note 28. The facts of *Bram*, *supra* note 9 are succinctly summarized by the Supreme Court at para 1 of the decision: “a group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them did not. He took a series of actions to thwart the sale. The result was that the ultimate sale price was nearly \$400,000 less than it otherwise might have been. When the majority sued to recover this loss, the main question was whether the dissenting family member and his company were liable for what the trial judge referred to as the tort of unlawful interference with economic relations.” Amongst other things, the dissenting family member: misused arbitration provisions to stall the sale; advanced baseless claims for a notice of a first right of refusal; filed a baseless certificate of pending litigation against the property; and denied prospective buyers entrance to the property. Ultimately, the court found that the unlawful means tort was not made out in this case because there was no identifiable wrong that could be actionable by a third-party prospective purchaser.

stretching rationale as restricting the tort to three-party situations in which the defendant commits an unlawful act against a third party in order to cause economic harm to the plaintiff. The cause of action would thus “stretch” from the third party to the plaintiff in order to establish the plaintiff’s cause of action, regardless of whether the third party actually suffered any harm<sup>54</sup>. Cromwell J preferred this rationale on the basis that it builds upon pre-existing causes of action and thereby establishes a clear ‘control mechanism’ for liability, providing certainty and remaining consistent with the judicial preference to avoid intruding into competitive economic activity<sup>55</sup>.

Notwithstanding these attractive features of Cromwell’s preferred rationale, however, liability stretching is a flawed basis on which to explain the tort. Firstly, the liability stretching rationale does not appear to identify a right of the plaintiff’s that is engaged, given that the third party’s cause of action against the defendant is ‘stretched’ from that third party to the plaintiff. In view of the basic axiom that liability flows from the infringement of a right<sup>56</sup>, it is therefore difficult to understand Cromwell’s reasoning on this point. He observes that “the question is whether there ought to be a *right to recovery*”<sup>57</sup> (emphasis added), but this sidesteps the central question of what right is violated so as to permit that recovery – a right to recovery does not exist in a vacuum. Second, as Neyers has observed, the potential explanation of merging the third party and plaintiff into a composite juridical person – thereby bridging the gap between the right and the harm – is equally problematic. This is for two reasons. First, there is no *gap*, strictly speaking, where the third party’s right is not harmed and the plaintiff has no right, so as a matter of corrective justice, there is nothing *to correct*; both outcomes are justified on their own<sup>58</sup>. Second, the ‘composite person’ does not adequately explain situations where the third party has suffered a loss, since there the right and the loss are already united in the third party<sup>59</sup>. However, Cromwell J seemed to discount this ‘gap-filling’ explanation, finding that it

<sup>54</sup> *Ibid* at para 23.

<sup>55</sup> *Ibid* at paras 37-49.

<sup>56</sup> Indeed, the case law has repeatedly affirmed that purposefully causing economic loss to another was not actionable so long as there was no violation of that other’s rights: J.W. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts LJ 162 at 170. ["Neyers, Corrective Justice"]

<sup>57</sup> *Bram*, *supra* note 9 at para 48.

<sup>58</sup> J.W. Neyers, "Rights-Based Justifications for the Tort of Unlawful Interference with Economic Interests" (2008) 28 Legal Stud 215 at 232 ["Neyers, Unlawful Interference"], citing Peter Benson 'Should White v Jones represent Canadian law: a return to first principles' in JW Neyers, S Pitel and E Chamberlain (eds) *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 141 at 170.

<sup>59</sup> Neyers, Unlawful Interference, *supra* note 58 at 232-33.

understands the “gap” too narrowly<sup>60</sup>. Ultimately his focus rested on compensating the plaintiff’s loss rather than identifying a specific right to which that loss is correlated, resulting in an explanation that is difficult to square with a rights-based understanding of tort law (a fact that is particularly odd given the extent to which Cromwell J sought to locate a principled rationale).

In light of this unsatisfying explanation, I therefore propose that a better way to understand the underlying rationale of the unlawful means tort is according to the “cheating” thesis advanced by Kain and Alexander – namely, that “unlawful means” is best understood as a wrong that is committed directly against, and suffered directly by, the plaintiff (regardless of whether it is achieved through the medium of a third party)<sup>61</sup>. In Kain and Alexander’s words, “[i]t injures the plaintiff through conduct that is legally forbidden to the plaintiff itself (or that would be were it the position of the defendant), and thereby violates the plaintiff’s right to compete equally under the law.”<sup>62</sup> However, Cromwell J rejected exactly this rationale in *Bram*<sup>63</sup>, so it behooves this analysis to use Cromwell J’s comments as a starting point. Firstly, Cromwell J observed that this rationale “would lead to an unwieldy concept of ‘unlawful means’ and thus to undue uncertainty in commercial affairs”<sup>64</sup>. However, the definition proposed by Kain and Alexander is very specific, and indeed contains several conditions that circumscribe its scope:

"Unlawful Means" consist of the deliberate and material breach of a binding legal obligation whatever its source, and whether by action or omission, which is not otherwise prohibited from giving rise to liability, in which the defendant lacks an honest belief as to the legality of its conduct, and for which the plaintiff could not obtain an adequate remedy against the defendant(s) under any independent head of liability that is alleged to make the conduct unlawful.<sup>65</sup>

It is difficult to identify where any significant uncertainty rests in this definition. Granted, intentionality is difficult to identify with precision both at a conceptual level and as a matter of evidence, but this difficulty is impossible to escape given that intention is integral to *all* of

<sup>60</sup> *Bram*, *supra* note 9 at para 47.

<sup>61</sup> Kain & Alexander, *supra* note 8 at 38.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Bram*, *supra* note 9 at para 42.

<sup>64</sup> *Bram*, *supra* note 9 at para 42.

<sup>65</sup> Kain & Alexander, *supra* note 42 at 183.

the general economic torts<sup>66</sup> (even in unlawful means conspiracy, where the requirement is loosened to include constructive intent<sup>67</sup>). The ‘material breach’ standard may also be somewhat unwieldy insofar as it provides some measure of discretion to a court, but as Kain and Alexander observe, there is already support in the case law for the view that a *de minimis* principle should be included within the unlawful means requirement, such that technical breaches of contract or statute should not meet the requisite threshold<sup>68</sup>. Perhaps the greatest ambiguity rests in what constitutes an “adequate remedy, but Kain and Alexander respond to this too by locating their definition of *inadequacy* in nominal damages, declaratory relief, and public law remedies (e.g. *certiorari*), insofar as these remedies do not truly redress tortious wrongs by restoring the plaintiff to their former state<sup>69</sup>.

Conversely, this definition provides certainty in tying the standard to conduct that is expressly prohibited – there is no ambiguity in this respect. The other conditions of the definition place easily identifiable restrictions on the scope, doing so in a fashion that is consistent with the case law and careful to avoid overlapping with other areas of law that already provide redress<sup>70</sup>. In short, the definition is tightly circumscribed and minimizes uncertainty. It is thus respectfully submitted that Cromwell J did not give the definition its proper due in *Bram*, and that the definition *does* withstand criticism on the grounds of uncertainty.

Second, Cromwell J indicated that Kain and Alexander’s rationale for unlawful means fails to account for the central role of intention in the tort, which would be irrelevant if the tort’s

<sup>66</sup> That is, the defendant must intend to commit the tort in question, although not necessarily intend to harm the plaintiff.

<sup>67</sup> *Canada Cement LaFarge v. B.C. Lightweight Aggregate Ltd*, [1983] 1 SCR 452, 145 DLR (3d) 385 at 398-99 [“*Canada Cement*”]. In *Canada Cement*, the appellant cement producers were found at trial to have entered into an unlawful agreement to suppress their competition (including the respondent), although it was found that the agreement was not directed at the respondents – rather it was an agreement to eliminate all competition in a general sense. The agreement was unlawful insofar as it violated legislation prohibiting conspiracies. The cement producers succeeded on appeal at the Supreme Court on the basis that unlawful means conspiracy requires, at a minimum, constructive intent derived from the fact that the conspirators should have known that injury to the plaintiff would ensue. As noted, that was not found on the facts at trial. While one might query whether the lowered standard of constructive intent might suggest a lesser concern for intent as a prerequisite of the tort, the facts of *Canada Cement* suggest otherwise. The case law leading up to *Canada Cement* was unclear on whether intent was a requirement at all, but the Supreme Court opted to include intent. See Burns and Blom, *supra* note 28 at 178-80.

<sup>68</sup> Kain & Alexander, *supra* note 42 at 178, fn 669 citing *Rookes*, *supra* note 6 at 1218-19, per Lord Devlin; and *Morgan v. Fry*, [1968] 2 QB 710 at 737-39 (CA), per Russell LJ.

<sup>69</sup> *Ibid*, Kain and Alexander, *supra* note 42 at 180.

<sup>70</sup> Kain & Alexander provide a comprehensive breakdown of their definition at 178-83.

primary purpose was to uphold the institution of market competition<sup>71</sup>. However, this too appears to rely on a narrow reading of Kain and Alexander’s argument. While it is true that their argument does not expressly account for how intention figures into rationalizing the tort, their overall discussion seems to strive for precisely that – intent is a cornerstone of the case law, and around that basis Kain and Alexander craft an explanatory framework. Given the underlying principle of free competition that informs the leading cases, and given the similarly recurring role of intention in these cases, it seems fair to conclude that intention functioned as a narrow control mechanism meant to impose a minimal normative framework. Competition would thus have to be fair, but the definition of “fair” leaves plenty of “elbow-room”, as Cromwell J would describe it<sup>72</sup>.

Accordingly, Kain and Alexander’s review of the case law suggests that it is more accurate to understand “the institution of market competition” as inherently carrying with it *its own* normative concern for fairness, as manifested through the requirement of intention. This logic therefore seems to suggest that fairness reinforces the integrity of competition as an institution, and that *intentional wrong* violates fairness and therefore undermines competition<sup>73</sup>. In this way, the “cheating” thesis does in fact account for the role of intention, albeit implicitly. Thus, upholding competition as an institution (i.e. a well-established, socially fundamental practice) is arguably the prime principle, but “competition” should not be understood as divorced from the normative concerns of fairness that reinforce the integrity *of that institution*. Intentional wrongs undermine that institution and thus threaten the efficiency of the market.

It is therefore suggested that Cromwell J’s criticisms of Kain & Alexander’s “cheating” thesis do not withstand scrutiny, and of the same token, his justification for the liability stretching rationale is problematic as well. Notwithstanding that the case law has confirmed that the liability stretching rationale is good law as a matter of precedent, the “cheating” thesis offers a better explanatory framework by which to explain the unlawful means element of the unlawful means tort. Importantly, this rationale brings the unlawful means element of the

<sup>71</sup> *Bram*, *supra* note 9 at para 42.

<sup>72</sup> *Ibid* at para 31, citing Sappideen Vines, *supra* note 2 at para 30.120.

<sup>73</sup> There is ample room to debate whether the connection of fairness to competition is in fact valid or logically persuasive, but at a minimum, it can be said that tying fairness to the integrity of the institution evinces some level of underlying concern for morality in competition. In other words, the law does not accept that commerce is a free-for-all.

unlawful means tort into harmony with that of unlawful means conspiracy<sup>74</sup> and intimidation<sup>75</sup>, and indeed suggests that intimidation could conceptually be understood as a species of the unlawful means tort<sup>7677</sup> (indeed, the same might be said of unlawful means conspiracy as well<sup>78</sup>).

As will be suggested below, reconceptualizing the tort of inducing breach of contract as based on primary liability thus brings that tort within the ambit of the unlawful means tort as well – with the crucial caveat that the intention requirement for inducing breach of contract differs from that of the unlawful means tort. Just as importantly for the broader purpose of this thesis, however, the “cheating” thesis identifies the scope of the normative commitment to other-regarding behaviour that exists at this end of the spectrum of commercial duties. While *laissez-faire* remains the dominant principle underlying the unlawful means tort (and, as suggested below, the general economic torts overall) and thus ensures free competition and the pursuit of self-interest, there is nonetheless a role for fairness as manifested in the intention requirement. As compared with commercial duties towards the other end of the spectrum (i.e. good faith duties and fiduciary duties), in which fairness assumes a more significant (if not predominant) normative role in subordinating the pursuit of self-interest in favour of other-regarding or relational behaviour, the unlawful means tort and its relatives demarcate other-regard near its most minimal and *laissez-faire* close to its most dominant. Only inducing breach

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<sup>74</sup> Lawful means conspiracy remains anomalous to the general economic torts, and therefore remains to be discussed another time.

<sup>75</sup> This particular point may be slightly contentious insofar as the case law has not specifically settled what constitutes “unlawful means” in the intimidation context. *Rookes*, *supra* note 6 and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 SCR 42, 88 DLR (3d) 609 only refer to tortious and criminal conduct as well as breaches of contract, leaving it unclear whether a breach of statute could constitute “unlawful means”.

<sup>76</sup> With respect to three-party intimidation, it was already noted by Lord Hoffman in *OBG* that the tort is essentially a variant of the unlawful means tort. With respect to two-party intimidation, the logic would still hold notwithstanding the distinction drawn in *Central Potash* that breach of contract should not be considered “unlawful means” in two-party intimidation (however, see *Golden Hill Ventures Ltd. v. Kemess Mines Inc.* (2002), 7 BCLR (4th) 1, where *Central Potash* was not followed on this point). Kain and Alexander’s definition already accounts for the possibility of an alternate remedy, as would be the case in a two-party situation.

<sup>77</sup> The idea that intimidation and unlawful means conspiracy are species of the genus that is the unlawful means tort is not a new one. See, for example, Hughes, “Liability for Loss Caused by Industrial Action” (1970) 86 LQ Rev 181 at 198; and Burns and Blom, *supra* note 28 at 97-98.

<sup>78</sup> Recall that the intent required in unlawful means conspiracy need only be constructive (i.e. the defendant directed their conduct towards the plaintiff and *should* have known that that injury would result). It is unclear whether this distinction is sufficiently important to bring it outside of the ambit of “intent” as defined under the unlawful means tort: *Canada Cement*, *supra* note 67 at 398-99.



of contract, as discussed below, evidences an even greater weighing of laissez-faire over other-regard.

## 2.2. The Quasi-Proprietary Theory of Inducing Breach of Contract<sup>79</sup>

In light of the foregoing discussion of the first three members of the general economic torts, it is thus worthwhile to analyze the final member of the class in order to evaluate where it fits within the theory proposed above. Rather than understanding inducing breach of contract as a tort of accessory liability (i.e. the inducer's liability being parasitic upon the contract-breaker's primary liability to the plaintiff), the tort is better understood as one of primary liability predicated upon understanding the plaintiff's contractual right as a sort of property. Through this explanatory theory, the tort of inducing breach of contract becomes amenable to categorization under the rubric of the unlawful means tort, thereby bringing it under the "cheating" rationale for unlawful means that is discussed in greater detail below.

For present purposes, it is useful to identify the elements of inducing breach of contract in order to understand the underlying theory. Put briefly, the tort requires: 1) that a valid and enforceable contract exist between the plaintiff and the contract-breaking third-party; 2) that the defendant be aware of the contract; 3) that the defendant intends and does procure the breach of contract; and 4) that as a result of the breach, the plaintiff suffers damages<sup>80</sup>. Conventionally understood, a finding of inducement must be supported by a breach of contract, meaning that the inducement is an accessory liability to the primary liability of breaching the contract<sup>81</sup>. It is on this basis that the House of Lords distinguished inducing breach of contract

<sup>79</sup> I am indebted to the thorough analysis presented by Brooke MacKenzie in "Shifting blame? Reassessing the tort of inducing breach of contract following A.I. Enterprises", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2016* (Toronto: Thomson Reuters, 2016) 245 ["MacKenzie"]. MacKenzie offers a thorough account of the quasi-proprietary theory, far more detailed and compelling than that which this section offers below. Although citations directly to her paper are minimal in the discussion below, it is important to note that this section relies on the structure of her arguments and the sources which she cites.

<sup>80</sup> *Drouillard v Cogeco Cable Inc.*, 2007 ONCA 322 at paras 26-38. In *Drouillard*, the plaintiff Drouillard was employed by Mastec, which was in turn a contractor for Cogeco. For reasons that were not entirely clear, Cogeco suggested that it would be in Mastec's best interest to terminate Drouillard's employment. Mastec consequently terminated Drouillard's employment. On appeal, the Court of Appeal found that Cogeco was liable for inducing breach of contract.

<sup>81</sup> The most recognizable instance of inducing breach of contract comes from *Lumley v Gye*, (1853) 118 ER 749, 2 El & Bl 216, the foundational case for the modern incarnation of inducing breach of contract. The plaintiff Lumley was a theatre manager who had contracted with Johanna Wagner – an opera singer – to sing exclusively at his theatre for a three-month engagement. Gye, a rival theatre manager, induced Wagner to break her contract

from the unlawful means tort in *OBG v Allan*<sup>82</sup>. Lord Hoffman explained that whereas inducing breach of contract is predicated upon accessory liability, the unlawful means tort is premised upon a primary liability insofar as it relies on an independently unlawful act committed by the defendant against the plaintiff<sup>83</sup>. Though the unlawful means tort requires a third party to be used as a means for the defendant to attack the plaintiff, the tort does not require any underlying finding of wrongdoing (i.e. primary liability) on which to build. It was on this basis that the House of Lords found that inducing breach of contract could not be subsumed under the conceptual framework of the unlawful means tort, with this line of reasoning later finding purchase with the Ontario Court of Appeal<sup>84</sup>.

However, the conceptual distinction between inducing breach of contract and the unlawful means tort only holds to the extent that inducing breach of contract can properly be said to stand as a tort of accessory liability. On the contrary, this explanation for the tort lacks persuasive force, while understanding the plaintiff's contract right as quasi-proprietary allows for the tort to be reconceptualized as one of primary liability. Notwithstanding that the 'accessory liability' theory is intuitively attractive for its symmetry with the "liability-stretching" explanation that Cromwell offered in *Bram* (and which aligns with Lord Hoffman in *OBG*), others have observed that it is a flawed model. As Mackenzie notes, the theory's reliance on an analogy to joint tortfeasance is faulty in that joint tortfeasance attributes the *act* of the wrongdoer to the accessory rather than the liability – in other words, the accessory's liability flows from having effectively committed the same act as the primary tortfeasor<sup>85</sup>. This makes no sense in the context of contract, since the alleged accessory cannot be held liable for breach of contract in respect of a contract to which it is not a party – contract rights are, under this theory, purely *in personam*, as between the two contracting parties<sup>86</sup>. The notion of

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with Lumley by offering to pay her more. Interestingly, Lumley ended up losing at trial on the basis that Gye was found to have an earnest belief that Wagner was entitled to end her contract due to Lumley defaulting on scheduled payments to Wagner: Stephen Waddams, "Johanna Wagner and the Rival Opera Houses" (2001) 117 LQR 431 at 456.

<sup>82</sup> *OBG*, *supra* note 4 at paras 3-5, and 8.

<sup>83</sup> *Ibid* at para 8.

<sup>84</sup> *Correia v. Canac Kitchens*, 2008 ONCA 506; *Alleslev-Krofchak v. Valcom Ltd*, 2010 ONCA 557, leave to appeal refused 2011 CarswellOnt 2149 (SCC).

<sup>85</sup> See Mackenzie, *supra* note 79 citing Neyers, *Corrective Justice*, *supra* note 56 at 170.

<sup>86</sup> *Ibid*, Neyers, *Corrective Justice*, *supra* note 56 at 170.

inducing breach of contract as a tort of accessory liability is, under this approach, therefore an inadequate basis on which to explain the tort's rationale.

Instead, a compelling explanation for inducing breach of contract as a tort of primary liability lies in a quasi-proprietary theory, whereby the contract right is treated as property insofar as it is a right held to the exclusion of everyone else in the world (that is, a right *in rem*)<sup>87</sup>. As Benson notes, a contractual right is treated as an asset when it is voluntarily assigned by the original right-holder to the assignee, and so in this respect is no different from a property right<sup>88</sup>. However, Benson is careful to note that this proprietary nature arises only by virtue of the assignee's intention to treat the contractual right as an asset. Further, since the contractual right functions this way in a voluntary assignment, so too must it function this way in an involuntary transaction – that is, where the defendant treats the contractual right as an asset to be acquired *without* the right-holder's consent<sup>89</sup>. Inducing breach of contract thus fits these parameters, given that the defendant intends to appropriate the plaintiff's right to performance and instead injure that right (i.e. breaching the contract). Thus, the quasi-proprietary theory of inducing breach of contract provides an explanation for the tort that is premised upon primary liability as between the inducer and the plaintiff. Notwithstanding the theory's persuasive force, however, it does not appear to have found any purchase in either the Canadian or English case law<sup>90</sup>.

Nevertheless, assuming for present purposes that such a rationalization of the inducing breach of contract tort is more theoretically sound than the explanation of accessory liability, it is therefore more desirable to treat the tort as one of primary liability – in which case the House of Lords' objection to characterizing it as a species of the unlawful means tort, on the grounds of the primary/accessory liability distinction, loses much of its persuasive force. On the other hand, it is crucial to note that the intention requirement for inducing breach of contract differs

<sup>87</sup> See Mackenzie, *supra* note 79 at 272-74.

<sup>88</sup> Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D.G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1997) 427 at 455-57. ["Benson"]

<sup>89</sup> MacKenzie, *supra* note 79 at 273, citing Benson, *supra* note 88 at 456-57.

<sup>90</sup> Mackenzie, *supra* note 79 at 274. Interestingly, Lord Hoffman in *OBG* actually explained the theory of accessory liability in inducing breach of contract as based on a treatment of contractual rights "as a species of property", but did not pursue this line of reasoning any further. Rather, he identified the proprietary nature of contracts in respect of this tort as the reason for providing special protection in the form of accessory liability: *OBG*, *supra* note 4 at para 32, citing Philip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999), 115 LQR 411 at 433.

from the unlawful means tort, conspiracy, and intimidation insofar as it does not require an intention to *harm the plaintiff*. Rather, all that is required is an intention to breach the contract – the defendant may very well intend for the breach to be beneficial to the plaintiff, and yet still be liable for the tort<sup>91</sup>.

Thus, treating inducing breach of contract as premised upon primary liability brings the tort within the scope of the unlawful means tort (insofar as inducing breach of contract is itself ‘unlawful means’), but does not render it entirely subsumed. Indeed, the difference in intention is noteworthy in this regard: carrying over Kain and Alexander’s “cheating” thesis discussed above, the normative enterprise underlying inducing breach of contract does not therefore seem to map as closely onto the concern for equality amongst commercial parties as do the other general economic torts. The normative enterprise underlying this version of ‘cheating’ instead appears to include an additional concern for defending the integrity of market competition in and of itself, rather than as predicated upon ensuring equality amongst trade parties. In other words, the normative content of inducing breach of contract is not tied to other-regard so much as it is tied to a regard for the system itself, and in this sense occupies the furthestmost point at this end of the commercial duty spectrum – closest to pure *laissez-faire*. To reiterate an earlier point, however, pure *laissez-faire* is itself undesirable as a matter of fulfilling contract and tort’s fundamental objective with respect to commerce: self-interest maximization. Without limits, *laissez-faire* would counterproductively diminish faith in the market as a viable medium for the pursuit of self-interest since prospective commercial parties would be wary of powerful actors taking advantage of them through harmful but legal behaviour. Accordingly, this suggests that inducing breach of contract is the doctrine that sits closest to the *laissez-faire* extreme of the commercial duties spectrum.

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<sup>91</sup> See, for example, *South Wales Miners’ Federation v Glamorgan Coal Co*, [1903] 2 KB 545 (CA), [1905] AC 239, where the miners’ union intended to strike in order to restrict production of coal and thereby raise its price. Not only did the miners not have an intention to harm the coal company, but had their strike been successful, it would have provided a benefit to the coal company.

### 2.3. Situating the General Economic Torts on the Spectrum of Commercial Duties

In view of the general economic torts' minimal normative commitment to restricting the pursuit of self-interest *in favour of other-regarding behaviour*, it is apposite to locate them at one extreme of the commercial duties spectrum. Within this grouping, inducing breach of contract occupies the closest position to the end of the spectrum, given that its normative content relates to restricting the pursuit of self-interest in favour of upholding the integrity of the system as a good in and of itself, rather than promoting behaviour that subordinates self-interest. Each of the unlawful means tort, conspiracy, and intimidation (insofar as they cohere as one conceptual whole) are located closer to the center of the spectrum – the unlawful means element, as explained above, situates these torts' normative concern with “cheating” in the harm that the unlawful conduct does to the other party's right to equality before the law in the context of economic competition. In other words, these torts enforce a minimal standard of other-regarding behaviour. But this says nothing of the other doctrines included amongst the economic torts, such as lawful means conspiracy, deceit, negligent misrepresentation, passing off, and injurious falsehood<sup>92</sup>. Instead, analysis must proceed to evaluating the duties occupying the middle of the spectrum and extending towards the other end – that other end being pure other-regard in the form of fiduciary duties. Duties in the middle of the spectrum are manifested in good faith doctrines which, as will be suggested below, act as a conceptual bridge between the two ends of the spectrum.

## 3. Good Faith

Given the significant conceptual gap between the minimal subordination of self-interest in the general economic torts and the complete subordination of self-interest in favour of another in cases of fiduciary duties, it is ostensibly difficult to locate any conceptual framework that could bridge the gap between these two opposite poles<sup>93</sup>. However, good faith may provide the

<sup>92</sup> To reiterate an earlier point, discussion of these other doctrines must wait for another time.

<sup>93</sup> Interestingly, the adoption of the *prima facie* tort doctrine in American law might make for a much tidier conceptual framework. Insofar as the intentional infliction of harm without justification equates to malice, and insofar as malice is identifiable as a form of bad faith (surely an uncontroversial claim), then the conceptual gap

solution to the issue of framework. While “good faith”<sup>94</sup> has often been criticized for being notoriously difficult to define with precision, it is exactly such conceptual flexibility (or what a pessimist might term its ‘meaninglessness’) that enables good faith to occupy a broad swath of space at the center of the commercial duties spectrum. The inherently unstable concept of ‘reasonableness’ on which judicial analysis has historically relied in articulating good faith duties allows for varying degrees of normative content to manifest in the different good faith doctrines, creating an array of duties that on a case by case basis sometimes sit closer to economic torts’ minimal view of other-regarding behaviour, and in other cases sit closer to fiduciary duties’ maximal view. The extent to which a good faith duty subordinates the pursuit of self-interest can differ substantially based on how the normative content of ‘reasonableness’ is balanced against the consideration of factual/empirical reasonableness in the circumstances<sup>95</sup>. As such, good faith duties often call for regard to the *legitimate* interests of one’s counterparty<sup>96</sup>, with the exact scope of those “legitimate interests” varying from case to case and thus varying the extent to which other-regarding behaviour must be observed.

This section proceeds in five parts. Subsection 3.1 addresses the Canadian common law and academic commentary in order to identify “reasonable expectations” as the analytical

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between bad faith in tort and good faith in contract seems much smaller than that which this thesis addresses. However, Anglo-Canadian law eschewed this approach long ago: *Allen*, *supra* note 24.

<sup>94</sup> As distinct from good faith doctrines, which exhibit varying degrees of fixity in their meaning.

<sup>95</sup> Though this is discussed in greater detail below, it warrants a brief explanation here. Some academic commentary has suggested that in a common law analysis of ‘reasonableness’, a court balances consideration of factual reasonableness (what is reasonable based on the circumstances of the specific contractual situation) with normative reasonableness (what is reasonable based on a standard of morality, efficiency, or any other ground that advances a specific view of the law). Such a combination is highly unstable and relies largely on the court’s discretion: Catherine Valcke, “Contractual Interpretation at Common Law and Civil Law—An Exercise in Comparative Legal Rhetoric” in Jason Neyers, ed, *Exploring Contract Law* (Oxford: Hart Publishing, 2008) 77 at 79. [“Valcke”]

<sup>96</sup> Though not pursued further in this thesis, there is an interesting distinction to be drawn between *legitimate* expectations and *reasonable* expectations (the latter of which is discussed here). As Schönberg notes with respect to administrative law, “An expectation is reasonable if a reasonable person acting with diligence would hold it in the relevant circumstances. An expectation is legitimate if the legal system acknowledges its reasonableness and attributes procedural, substantive or compensatory legal consequences to it”: Søren Schönberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2001) at 6. Catherine Mitchell draws a further distinction between legitimate expectation and legal entitlement, since conflating the two seems to result in circularity. On Mitchell’s view, legitimate expectation derives from some normative justification (e.g. of fairness), thus suggesting a three-step process in which reasonable expectations become legitimate expectations, and then legal entitlements. However, Mitchell also notes that reasonable and legitimate expectations are often used interchangeably in contract law, thus eliciting confusion: Catherine Mitchell, “Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law” (2003) 23:4 *Oxford Journal of Legal Studies* 639 at 643-44. [“Mitchell”]

mechanism by which courts and academic commentators have formulated and developed understandings of good faith, notwithstanding their failure to explain with precision what “reasonable expectations” actually means. Subsection 3.2 briefly attempts at identifying the content of “reasonable expectations” by explaining it as an amalgamation of factual and normative expectations. Subsection 3.3 identifies ‘fidelity to the bargain’ as the specific normative content of “reasonable expectations” that requires other-regard in the course of contracting, positing that other-regard is in fact incidental to the requirement of loyalty to the agreement itself. Subsection 3.4 evaluates criticisms raised regarding the use of “reasonable expectations” as an explanatory principle for contract law generally, concluding that good faith mostly withstands these criticisms because it differs in some significant respects from the rest of contract law. Subsection 3.5 concludes by reviewing where certain good faith doctrines fall along the commercial duties spectrum.

### 3.1. Locating the Analytical Mechanism(s) of Good Faith in Canadian Case Law and Academic Commentary<sup>97</sup>

Put briefly, “reasonable expectations” has been the central recurring theme in good faith case law<sup>98</sup>, serving as a flexible analytical tool due to the conceptual flexibility inherent in the term’s ambiguity<sup>99</sup>. As is suggested below, this flexibility has allowed courts to introduce varying degrees of normative commitment to other-regarding behaviour, dependent on how factual reasonableness interacts with its normative counterpart. Of the same token, however, this

<sup>97</sup> I note here that this section quotes from and expands on what I have written elsewhere about the academic and judicial commentary on good faith: Nicholas Reynolds, “The New Neighbour Principle: Reasonable Expectations, Relationality, and Good Faith in Pre-Contractual Negotiations” (2017) 60 Can Bus LJ 94 at 102-07. I have additionally relied on the cited article in another article currently under review by the Queen’s Law Journal. Given how germane the cited article is to this particular section of this thesis, I rely on it extensively without specific, pinpoint citations because to do so would be unnecessarily repetitive. Accordingly, a reader comparing the two documents will notice similarities in the text and accompanying footnotes.

<sup>98</sup> Although this section focuses on good faith in performance, it bears noting that good faith is present both in the enforcement and termination of contracts (e.g. the termination of an employment contract by the employer) as well as occasionally in the formation stage (e.g. the tendering process): see *infra* note 100.

<sup>99</sup> Others have also argued that reasonable expectations are a foundational concept of common law contract law more generally, but have failed to provide it with clear conceptual content in that context as well: see, for example, *Fidler v Sun Life Assurance Co. of Canada*, [2006] 2 SCR 3, 2006 SCC 30 at paras 29-34, citing *Hadley v Baxendale* (1854), 9 Ex 341, 156 ER 145 at 151. Similarly, others have also argued that reasonable expectations are a central tool across *multiple* areas of law, including privacy law, corporate law, and administrative law: see, generally, Edward Waitzer and Douglas Sarro, “Protecting Reasonable Expectations: Mapping the Trajectory of the Law” (2016) 57:3 Can Bus LJ 285.

flexibility is exactly that which has precluded “reasonable expectations” from receiving a specific definition. To offer one example, Cromwell J put it succinctly in explaining the court’s reasons for developing good faith law in *Bhasin v Hrynew*:

First, the current Canadian law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners... While these developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and bring the law closer to what reasonable commercial parties would expect it to be.<sup>100</sup>

While the first two of these three justifications are likely uncontentious (and indeed echo the concerns articulated in *Bram*<sup>101</sup>), Cromwell J’s recourse to reasonable expectations was in fact quite apposite in light of the prior case law – and notwithstanding that the meaning and scope of “reasonable expectations” in fact escapes scrutiny in *Bhasin*.

The common law good faith case law has, in its modern incarnation<sup>102</sup>, consistently relied on reasonable expectations as a central feature of good faith (as the analysis below suggests), notwithstanding their reluctance to expressly tie good faith and reasonable expectations together. Rather, reasonable expectations have functioned as an analytical placeholder for good faith. Courts have recognized an implied term (either implied in fact or law) of good faith performance as a requirement in six specific instances: the exercise a contractual discretionary power; compliance with a condition precedent; invocation of a rescission clause in an agreement of purchase and sale; exercise (or non-exercise) of a right of first refusal; the performance of franchise agreements; termination of an employment contracts by the

<sup>100</sup> *Bhasin*, *supra* note 23 at para 41.

<sup>101</sup> See *Bram*, *supra* note 9 at paras 28 and 74, where Cromwell J explained that the unlawful means tort was rife with “confusion, overlap and inconsistency”, and that an explanatory framework adopted in response to these problems offered a “coherent and rational” basis for developing the law going forward.

<sup>102</sup> Earlier common law seemed to suggest approval for good faith as a general principle of contracts: See, e.g., *Bhasin*, *supra* note 23 at para 35, citing *Aleyn v Belchier* (1758), 1 Eden 132, 28 ER 634; *Mills v Mills* (1938), 60 CLR 150 (HCA); *Mellish v. Motteux* (1792), Peake 156, 170 ER 113; and *Carter v. Boehm* (1766), 3 Burr. 1905, 97 ER 1162, 1 Blackstone W 593. However, this view did not find purchase in later case law, likely as a result of *laissez-faire*’s rise to prominence as the dominant principle of private law’s development in the late-18<sup>th</sup> and 19<sup>th</sup> centuries. The modern iteration of Canadian common law good faith seems to have taken its first major steps in two separate reports from the Ontario Law Reform Commission, both of which drew on American academic literature: Ontario Law Reform Commission, *Report on Sale of Goods*, vol 1 (Toronto: Ministry of the Attorney General, 1979), ch 7 and Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987), ch 9. This is not to suggest that there was no good faith case law prior to these reports, but rather that such case law was rare. Subsequent to the reports, good faith became a much more frequent topic in the case law.



employer<sup>103</sup>. In the first four of those circumstances<sup>104</sup>, courts have relied on “reasonableness” and “reasonable” to articulate a concept of good faith; but at the same time, courts similarly failed to define “reasonableness” and “reasonable expectations” with precision. *Greenberg v Meffert* – Ontario’s leading case on the duty to exercise a contractual discretion in good faith<sup>105</sup> – is characteristic of this conceptual ambiguity:

In any given transaction, the category into which such a provision [i.e. a contractual discretion] falls will depend upon the intention of the parties as disclosed by their contract. In the absence of explicit language or a clear indication from the tenor of the contract or the nature of the subject-matter, **the tendency of the cases is to require discretion... to be reasonable.**<sup>106</sup>

While interpretation of the contract might reveal the contractual discretion to be quite idiosyncratic, the default is reasonableness. The court, however, did not explain what it meant by “reasonable”, only offering that reasonableness entailed an objective standard (itself not a particularly helpful explanation – and indeed a somewhat circular one). and later in the same judgment indicated that “[a]part altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith”; it did not proffer a definition of good faith, instead suggesting that it was so fundamental that it “require[s] no elaboration”<sup>107</sup>. Thus,

<sup>103</sup> Geoff Hall, *Canadian Contractual Interpretation Law*, 3rd ed (LexisNexis: Toronto, 2016) [“Hall”] at 39-45. There may be a duty of good faith with respect to re-negotiation of an existing contract, but the case law is inconsistent: see, for example, *Empress Towers Ltd v Bank of Nova Scotia*, [1990] BCJ No 2054, 50 BCLR (2d) 126 (BCCA), leave to appeal refused [1990] SCCA No 472, [1991] 1 SC viii (SCC). The tendering process also includes a duty of good faith to treat all bids fairly and equally: see, for example, *Chinook Aggregates v. Abbotsford, (Municipal District)* (1989), 35 C.L.R. 241 (BCCA), *Kencor Holdings Ltd. v. Saskatchewan* [1991], 6 WWR 717 (Sask QB).

<sup>104</sup> The other two (performance of franchise agreements, and the termination of employment contracts by the employer) are implied by law in order to mitigate the effects of the power imbalance inherent to these relationships. See, for example, *Shelanu v Print Three Franchising Corp*, [2003] OJ No 1919, 64 OR (3d) 533 (Ont CA); and *Honda Canada Inc v Keays*, [2008] SCJ No 40, [2008] 2 SCR 362.

<sup>105</sup> This duty finds an analogue in administrative law. The Supreme Court in *Roncarelli v Duplessis*, [1959] SCR 121 at 140-41 found that an administrative tribunal with statutorily-conferred discretion may not exercise that discretion maliciously or arbitrarily. Rather, that discretion must be exercised in a manner consistent with the nature and purpose of the statute.

<sup>106</sup> *Greenberg v Meffert* [1985] OJ No 2539, 18 DLR (4th) 548 at 554 (Ont CA), leave to appeal refused [1985] 2 SCR ix. The plaintiff Greenberg was a real estate agent employed by the same company as the defendant Meffert. Greenberg obtained a listing for a piece of property but was terminated before finalizing the sale. Meffert became the selling agent for the property. The employer’s policy stated that the employer retained sole discretion to award any portion of a commission from a listing sold after an agent’s employment was terminated. While normally this would have meant that Greenberg would split the commission with Meffert, Meffert had in fact secretly paid the officer manager to award him the full commission. Perhaps unsurprisingly, the Court of Appeal ruled in Greenberg’s favour.

<sup>107</sup> *Ibid* at 556.

although the court superficially distinguished good faith from reasonableness<sup>108</sup>, it was in fact reasonableness that drove analysis<sup>109</sup> in the absence of any actual definition of “good faith”. *Gateway Realty Ltd. v Arton Holdings Ltd*<sup>110</sup> and *Lemesurier v Andrus*<sup>111</sup> also relied on “community standards of honesty, reasonableness, and fairness”<sup>112</sup> to ground a duty of good faith performance<sup>113</sup>, but did not explain what those terms meant and how they relate to good faith. This ambiguity has been present across other instantiations of good faith in Canadian common law<sup>114</sup>. Notwithstanding the lack of an express connection between reasonableness and good faith, the former has functioned as the analytical engine by which Canadian common law good faith has developed. The problem remains that courts have never precisely defined “reasonableness” and “reasonable expectations” – in many cases, not bothering to define the terms at all – but have nonetheless relied on both to develop the law on good faith.

Academic commentary has been equally consistent in its recourse to reasonable expectations as the basis for formulations of good faith, although the commentary has been equally unhelpful in actually defining reasonable expectations<sup>115</sup>. Robert Summers, whose definition of good faith was the basis for that outlined in the Restatement (Second) of Contracts, adopted an objective standard of reasonable expectations in stating that good faith is “prescribed as a

<sup>108</sup> See *infra*, note 121 for a discussion of Swan & Adamski’s distinction between good faith and reasonableness – a distinction which I dispute.

<sup>109</sup> See, generally, John D McCamus, “Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance” (2004) 29 *Advocates’ Quarterly* 72 [“McCamus”] at 83 for a similar argument that reasonableness in this context implies a duty to exercise discretion honestly and in light of the purposes for which it was conferred.

<sup>110</sup> *Gateway Realty Ltd. v Arton Holdings Ltd.* (1991), 106 NSR (2d) 180 *sub nom Gateway Realty Ltd. v Arton Holdings Ltd (No. 3)* (SC); upheld in the result (1992), 112 NSR (2d) 180 (CA).

<sup>111</sup> *Lemesurier v Andrus* (1986) 25 DLR (4th) 424, 54 OR (2d) 1, 12 OAC 299 (CA), leave to appeal to SCC refused 63 OR (2d) x.

<sup>112</sup> *Ibid* at 191-92.

<sup>113</sup> As McCamus observes, however, the result in *Gateway Realty* rested on Arton’s express undertaking to use “best efforts”, meaning the finding on good faith was *obiter*: McCamus, *supra* note 109 at 79. Indeed, Canadian common law good faith case law pre-*Bhasin* did not *require* reference to good faith in order to resolve the issues, making none of it binding: *Ibid* at 90.

<sup>114</sup> For greater detail regarding each instantiation of good faith, see: *Dynamic Transport Ltd. v O.K. Detailing Ltd.* (1978), 85 DLR (3d) 19 at 28, [1978] 2 SCR 1072, 6 Alta LR (2d) 156 (condition precedent); *LeMesurier, supra* at 430 quoting from *Mason v Freedman*, [1958] SCR 483 at 486, 14 DLR (2d) (rescission clause in purchase and sale of real property); and *GATX Corp v Hawker Siddeley Canada Inc.*, (1996) 27 BLR (2d) 251 at 276 (Ont Ct (Gen Div)), citing *Landymore v Hardy*, (1991) 110 NSR (2d) 2 at 16-17, 21 RPR (2d) 174 (SC) (right of first refusal);

<sup>115</sup> See also, Woo Pei Yee, “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” (2001) 1:2 *OUCLJ* 195.

standard for the observance of all men in their dealings with one another”<sup>116</sup>. This explanation was expressed even more vaguely in the Restatement’s comments:

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the **justified expectations** of the other party; it excludes a variety of types of conduct characterized as involving “bad faith” **because they violate community standards of decency, fairness or reasonableness**. (emphasis added)<sup>117</sup>.

The Restatement provides no definition of “community”, “decency”, “fairness”, or “reasonableness”. Summers’ position might mean that “reasonable expectations” are defined according to the “community” in the sense of general society (as opposed to the ‘business community’, for example), but there is no way to say with certainty. Allan Farnsworth expressed a similar explanation of good faith that relies on an “objective standard, based on decency, fairness, or reasonableness of the community”<sup>118</sup>, but he too failed to provide a precise definition for these terms.

Steven Burton articulated good faith in empirical terms (as opposed to the normative approach of Summers and Farnsworth), bad faith being “an attempt to recapture an opportunity that is foregone as a consequence of entering into the contract”<sup>119</sup>. While Burton’s definition tended closer to empirical reasonability than it did to normative reasonability (in other words, his normative account was more implicit and submerged than Summers’ or Farnsworth’s), it nonetheless suffered from the same failure to offer an exact definition of reasonability. Indeed, as Feinman observes, reasonable expectations are exactly that which link the Summers-Restatement definition and the Burton definition, notwithstanding their differing approaches

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<sup>116</sup> Robert S. Summers, “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54:2 Virginia Law Rev 195 at p. 203, citing *First National Bank v F.C. Trebein Co*, 59 Ohio Ct. 316, 324-25, 52 NE 837 (1898).

<sup>117</sup> Restatement (Second) of Contracts §205 (1981).

<sup>118</sup> Allan Farnsworth, “Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code” (1963) 30:4 U Chicago L Rev 666 at p. 672.

<sup>119</sup> Steven J Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith” (1980) 94:2 Harv L Rev 369 at p. 373 [“Burton”]. At 384, Burton gives the example of several commercial leasing cases where the lessee agreed to pay rent on the basis of a percentage of business revenue from the lessee’s business on the premises. In each of these cases, the lessee altered its business strategy in order to reduce the amount of sales at the leased premises and redirect those sales to other leased locations that offered more favourable rental rates. See, for example, *Mutual Life Ins Co v Tailored Woman, Inc*, (1955) 309 NY 248, 128 NE2d 402.

to formulating a definition<sup>120</sup>. Although a clear thread of reasonable expectations runs through Summers', Farnsworth's, and Burton's formulations, that thread never yields a precise definition for the term. Not only is there no consensus as to the relationship between normative and factual reasonability, but there is also no agreement as to the scope of its normative aspect. There is thus no precise guidance to be found in the academic literature or the case law, apart from the fact that reasonable expectations are central to understanding good faith<sup>121</sup>.

### 3.2. The Factual/Normative Tension Underlying 'Reasonableness'

The question that naturally follows from the difficulty in defining "reasonable expectations" is to ask *why* it is so difficult. After all, "reasonable expectations" intuitively seems apt to be described under the rubric of "I know it when I see it"<sup>122</sup>; but the simplicity of this answer is, of course, misleading and indeed of little logical value. However, it is exactly this intuitive simplicity that offers a clue, insofar as the components of "reasonable expectations" are familiar to any individual. Valcke suggests that courts are imprecise in applying a specific definition to reasonableness precisely because it functions as a conceptually unstable term that incorporates both factual/empirical reasonableness (i.e. what is reasonable based on the circumstances of the specific contractual situation) and normative reasonableness (i.e. what is reasonable based on a standard of morality/community standards/etc.<sup>123</sup>). In Valcke's words,

"the parties' reasonable intention" stands for the intention which it is (normatively) reasonable for the parties to have precisely because that is the intention which it is (factually) reasonable for each to attribute to the other. ... It is this interplay of normative

<sup>120</sup> Jay M. Feinman, "Good Faith and Reasonable Expectations" (2014) 67 Ark L Rev. 525 at p. 529.

<sup>121</sup> Interestingly, one academic commentator who does distinguish between good faith and reasonableness is Angela Swan, who suggests that the latter imports more restrictive requirements. On her view, reasonableness focuses on rationality or the absence of subjective whim (in other words, to defend rationally an action or decision), while good faith's requirements of honesty and fairness inherent in good faith are less demanding. Drawing a distinction between 'fairness' and 'reasonableness' might be futile insofar as the two are largely empty of fixed conceptual content, but nevertheless, Swan rightly points out that good faith and reasonableness largely overlap. However, good faith is perhaps better understood as a *subset* of reasonableness. Honesty and fairness are reasonable because they are implicitly rationally defensible – they are simply so self-evident that they do not require defence: Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham, ON: LexisNexis, 2012) at 921-38. It bears noting that the Alberta Court of Appeal recently drew the same distinction between good faith and reasonableness as Swan: *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 at paras 42-65.

<sup>122</sup> See, e.g. *Jacobellis v. Ohio*, 378 US 184 (1964); 84 S. Ct. 1676; 12 L. Ed. 2d 793, where Stewart J in concurrence categorized a film as pornographic on the straightforward basis that "I know it when I see it".

<sup>123</sup> One might also include efficiency as a normative standard.

and factual within the notion of objective intention that arguably causes this notion to be *inherently unstable*...<sup>124</sup> (emphasis added)

While Valcke writes in reference to contractual interpretation and the discernment of parties' reasonable intentions, her commentary is nonetheless highly germane to this analysis. It is because the concept of "reasonableness" is empty of fixed content, and its internal factual and normative components exist in an unstable relationship, that the definition can vary so significantly from case to case. Whereas at one instance the factual aspect may predominate and leave little room for normative content, it may be equally true that at another instance the factual content is of limited relevance and the normative content assumes central importance. Whereas in the former scenario the predominance of fact exerts a constraining effect on what norms can fit into the interpretation of "reasonableness", the latter scenario effectively lessens such constraint and opens up room for a variety of normative considerations at the court's interpretive discretion.

### 3.3. 'Fidelity to the Bargain' as Good Faith's Normative Framework

But why, then, do good faith duties advance only one normative view of reasonableness – namely, the promotion of other-regarding behaviour? At a basic level, it is because law cannot be separated from morality<sup>125</sup>, and essentially any school of moral thought stresses regard for others. But this answer is trite, and does not offer much in the way of edification. Rather, the answer may lie in identifying another perspective to good faith – namely, fidelity to the bargain<sup>126</sup>. Good faith's promotion of other-regarding behaviour – that is, the subordination of a party's self-interest in favour of protecting their counterparty's interest(s) – is not the core

<sup>124</sup> Valcke, *supra* note 95 at 79.

<sup>125</sup> Some commentators, such as Lon Fuller, would argue that there is an internal morality to law that imposes a minimal morality of fairness, but his argument was more closely aligned with a notion of procedural fairness than substantive fairness. See, e.g., Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

<sup>126</sup> "Fidelity to the bargain" was also recently referenced by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 at para 139, although Leggatt J placed less emphasis on its importance than I do here. Leggatt J explained "fidelity to the parties' bargain" as a justification for a mode of contractual interpretation and construction that "promotes the values and purposes expressed or implicit in the contract", but did not elaborate on *why* it is that filling these gaps is important, nor how to square fidelity to the bargain with good faith mandating appropriate regard for counterparties' legitimate interests. To that extent, our analyses differ, but Leggatt J did in fact provide some elaboration on these two points in an extrajudicial speech following *Yam Seng*: George Leggatt, "Contractual duties of good faith", Lecture to the Commercial Bar Association, 18 October 2016.

content of good faith so much as it is an effect of ensuring that parties remain committed to all aspects of the bargain, including those not memorialized in writing. In other words, good faith demands loyalty *to the agreement* – not loyalty to another – in order to maintain the “proper functioning of commerce”<sup>127</sup>. The essence of bargaining (i.e. contracting) is to facilitate reciprocal gains from trade<sup>128</sup>, so it can hardly be said that a party respects the spirit of the bargain by preventing their counterparty from realizing the gain(s) they expect or even causing that counterparty a loss. It is entirely reasonable, from both a factual and normative perspective, to assume this. To the extent that the counterparty’s interests align with or fit under the scope, purpose, and terms of the bargain, those interests are therefore protected; those interests and their relationship to the bargain are shaped, as noted, by the factual and normative dimensions of reasonableness. Accordingly, we might then characterize ‘fidelity to the bargain’ as another manifestation of reasonable expectations in good faith, except ‘fidelity to the bargain’ does not represent the specific reasonable expectations of the parties with respect to each other so much as what contract law as an institution expects of the parties with respect to the contract<sup>129</sup>.

This second level of reasonable expectations, so to speak, serves an equally important function in reinforcing both self-interest and the regard for others that are inherent in contract law, as well as identifying the tension between the two. On the one hand, fidelity to the bargain demands that parties adhere to the obligations that they have voluntarily undertaken in entering into the contract. The pursuit of self-interest is permissible, and is indeed the normal exercise

<sup>127</sup> *Bhasin, supra* note 23 at para 60.

<sup>128</sup> Leggatt J argued similarly in his lecture to the Commercial Bar Association: see note 126, *supra*. He expressed doubt about English law’s tendency to view commerce as a “Darwinian struggle in which everyone is trying to gain at the expense of those with whom they do business”, noting that this view does not seem to accord with commercial reality: paras 26-27. Leggatt J also suggests a role for good faith obligations as default rules out of which parties can contract if they are so inclined. Such an idea is attractive for its abstention from infringing on freedom of contract, and aligns with other thinking on “libertarian paternalism” that advocates influencing behaviour without restricting freedom of choice: see, for example, *Nudge, supra* note 12; and Steven J Burton, “History and Theory of Good Faith Performance in the United States”, in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford: Oxford University PPress, 2016) 210 at 219.

<sup>129</sup> Such general reasonable expectations might be defined broadly as the expectation that contractual rights and duties will be exercised and carried out in a manner consistent with the reason(s) for which they were given/imposed. Failure to do so diminishes faith in contract and threatens its credibility as a viable mechanism for trade (what is the point of contracting if one’s counterparty will simply seek ways to circumvent or undermine its obligations?).

of contractual rights<sup>130</sup>, so long as the sanctity of the contract and its terms are respected. Yet on the other hand (and indeed, of the same token), those parties must respect the constraints that the contract places upon contracting”<sup>131</sup>, even if the strict wording of the contract suggests that there is room to maneuver in such a way as to circumvent these constraints.

In other words, fidelity to the bargain indicates that the act of contracting *is itself* an act of voluntarily subordinating self-interest in favour of respecting the full scope and purpose of the agreement. To the extent that a counterparty’s interests align with the scope and purpose of the agreement, those interests are protected. Fidelity to the bargain therefore folds regard for other parties *into* regard for the contract itself, situating the exact requirement for other-regard within interpretation of the contract’s terms. It should therefore come as no surprise that good faith duties at common law are understood as implied terms – although *Bhasin* troubles this claim by virtue of the freestanding nature of the duty of honest performance (discussed below)<sup>132</sup> – and that the exact content of good faith duties can vary from contract to contract. In sum, fidelity to the bargain answers the question of why regard for others is the core content of good faith’s normative framework: because the act of contracting itself subordinates self-interest in favour of the contract, and honouring the contract in practice all but means fulfilling the coinciding interests of counterparties.

### 3.4. Evaluating Objections to the Utility of “Reasonable Expectations”

Notwithstanding the analysis above about how important reasonable expectations are to generating the conceptual content of good faith, the concept of “reasonable expectations” as it pertains to contract law more generally has been subject to serious and insightful criticism that it is unhelpful to understanding how contract law actually operates<sup>133</sup>. Accordingly, these

<sup>130</sup> Jack Beatson, “Public Law Influences in Contract Law”, in Jack Beatson & Daniel Friedmann, (eds.), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) 263 at 266.

<sup>131</sup> Burton, *supra* note 119 at 378.

<sup>132</sup> *Bhasin*, *supra* note 23 para 74. Cromwell J noted that the duty operates irrespective of the parties’ intentions, and is a duty out of which the parties cannot contract. Interestingly, there appears to be no precedent for the novel nature of this duty.

<sup>133</sup> Other authors critical of “reasonable expectations” who are not discussed here, such as Geoff Hall, are equally critical of the proposition that “reasonable expectations” is an underlying concept of contract law in general. In Hall’s view, the concept is better understood as explaining a limited number of areas within contract law and occupying a secondary (indeed sometimes tertiary) role in others: Geoff Hall, “A Study in Reasonable

criticisms demand some measure of reply in the present context in order to justify the use of “reasonable expectations” as a core component of good faith, and perhaps to more clearly explicate good faith’s role in the broader context of contract law. Stephen Smith presents what is likely the most comprehensive critique, arguing that “reasonable expectations of the parties” stands for a number of different ideas that, taken either individually or together, are too limited in conceptual scope and overly ambiguous<sup>134</sup>. Of course, “reasonable expectations of the parties” is distinct from “reasonable expectations” writ large, so reference to Smith’s critique is to some extent inapposite here; but all the same, his specific criticisms remain applicable to the present context. Specifically, Smith identifies three of the most plausible ways of understanding reasonable expectations, as well as the problems inherent with each way: the normative interpretation, the empirical interpretation, and the semantic interpretation<sup>135</sup> (note how closely these three interpretations overlap with the normative/empirical distinction that this thesis draws above).

Smith identifies the main flaw with the normative interpretation as its inability to seriously account for the expectations of the contracting parties, opting instead to give effect to the expectations of the abstract reasonable person<sup>136</sup>. This is a fair criticism of “reasonable expectations of the parties”, but perhaps less so with respect to “reasonable expectations” given that the latter term does not specifically emphasize the contracting parties. Indeed, Smith’s critique on this point actually lends support for how flexible the moral dimension of reasonable expectations can be across a number of different scenarios. Undoubtedly, there is some substratum of general morality that provides the bounds of acceptable interpretations; but this is not to suggest that this general morality always overrides the parties’ expectations. In other words, the balance between normative and empirical reasonability shifts based on the circumstances of the case. To borrow an example from Smith, the narrow morality of Mafia members contracting (i.e. moral beliefs understood through the lens of the Mafia community) will yield to the morality of the broader community, since Mafia morality is likely

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Expectations” (2007) 45:1 Can Bus LJ 150 at 154-58. Cf Barry J. Reiter, “A Study in Reasonable Expectations: A Rebuttal to Geoff R. Hall” (2008) 46 Can Bus LJ 95.

<sup>134</sup> Stephen Smith, “The Reasonable Expectations of the Parties: An Unhelpful Concept” (2010) 48 Canadian Business LJ 366 at 367. [“Smith”]

<sup>135</sup> *Ibid* at 369, 375, and 381.

<sup>136</sup> *Ibid* at 371.



unreasonable on general moral grounds (e.g. attitudes towards criminality)<sup>137</sup>. By contrast, other industry standards that fall within the bounds of conventional morality can be a useful instrument for arriving at an effective solution, so the empirical element of reasonable expectations assumes a greater role. Granted, it remains true that this characterization of normative reasonableness fails to provide any determinate answers *ex ante*, given that the balance between the normative and the empirical varies on a case-by-case basis. But as this thesis suggests, its indeterminacy is exactly that which makes “reasonable expectations” an appropriate tool for covering significant conceptual ground.

With respect to the empirical interpretation of “reasonable expectations” – that is, the parties’ rational expectations about their counterparties’ future behaviour – Smith similarly identifies several issues. First, empirical expectations are only protected to the extent that they do not arise from wrongful behaviour; in other words, a certain morality creates interpretive boundaries<sup>138</sup>. Second, the idea of protecting empirical expectations is only useful insofar as those expectations don’t flow *from* the law, since this latter circumstance is logically circular and therefore offers no insight into explaining or reforming the law<sup>139</sup>. Finally, Smith recognizes that expectations on their own cannot justify a legal obligation<sup>140</sup>; as he states, “something more is required”<sup>141</sup>.

On the whole, these criticisms are incisive with respect to contract law generally, and to some extent find purchase regarding good faith; after all, good faith certainly operates within the interpretive boundaries that Smith mentions (an unsurprising fact, given that this is true of all contract law). But as the analysis in earlier sections of this thesis suggests, these criticisms are less persuasive in respect of Smith’s latter two critiques. Regarding his second point, the case law indicates that several good faith doctrines were developed in response to empirical reasonable expectations that already existed. For example, the Supreme Court’s recognition of a duty of honest performance in *Bhasin* relied on what the Court believed was the pre-existing

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<sup>137</sup> *Ibid* at 375.

<sup>138</sup> *Ibid* at 376. Smith gives the example of a kidnapper demanding ransom from a parent for the return of their child. While the parent would rationally expect the kidnapper to refuse to release the child without payment of the ransom, no court would find the abductor has a right to continue to hold the child because of non-payment.

<sup>139</sup> *Ibid* at 376-77.

<sup>140</sup> Mitchell arrives at the same conclusion, noting that reasonable expectation is merely “a step in the argument for a legal right, not conclusive of it”: Mitchell, *supra* note 96 at 642.

<sup>141</sup> Smith, *supra* note 134 at 377.

expectation of commercial parties not to lie to one another in the course of contractual performance<sup>142</sup>. Smith's point remains valid that empirical expectations are liable to be disregarded should they be morally unacceptable, but it seems almost trite to say that good faith is, by its very nature, morally acceptable. The problem is that precise moral bounds of good faith are notoriously difficult to articulate; empirical expectations help remedy this to some extent by offering specific, tangible examples that fall within those vague boundaries. Regarding Smith's third point, this thesis already proposes the broad underlying justification for recognizing empirical expectations as legally valid; recall that contract law – as it applies to commerce – is meant as a vehicle for self-interest maximization, and the other-regard that good faith doctrines require is intended to protect the viability of contract law as such a vehicle. Thus, Smith's critiques on empirical interpretation affirm that good faith is in some sense distinct from the rest of contract law.

The semantic interpretation of “reasonable expectations” is of limited importance to discussing good faith since, on the one hand, the semantic interpretation addresses the textual interpretation of a contract's express terms, while on the other hand, arguably most of good faith comes by way of interpretation of implied terms. In other words, there is typically little or no semantic content to parse when it comes to a court's interpretation of good faith. That being said, it is not uncommon for contracts to contain express terms requiring parties to act in good faith without defining the term. On this point, none of Smith's criticisms of the semantic interpretation are especially germane to evaluating good faith, since contractual references to “good faith” fail to offer up even a plain meaning without further specification. This, of course, is because “good faith” as a term is essentially empty of fixed conceptual content. That being said, approaching good faith's “reasonable expectations” from the semantic perspective does offer some insight by virtue of the very *absence* of semantic content. Where a contractual term calls for good faith without defining the term, the only way to ascribe any meaning to the term is by reference to either some moral consideration (i.e. the normative interpretation) or the parties' expectations as derived from their conduct or industry standards (i.e. the empirical interpretation). From this perspective, good faith therefore *elides* the normative and empirical interpretations within its semantic content, reaffirming Valcke's point

<sup>142</sup> *Bhasin, supra* note 23 at para 41. Indeed, Cromwell J expressly described developing the law in response to commercial parties' expectations.

that the normative and empirical co-exist in an unstable, dynamic relationship. Just as importantly, it reaffirms the fact that good faith is distinct in some significant respects from the rest of contract law, and thus largely escapes the criticisms offered by Smith of “reasonable expectations” more broadly.

On the whole, then, this thesis’s conceptualization of good faith mostly withstands criticism of employing “reasonable expectations” as a conceptual tool for development precisely because good faith differs in some significant respects from the rest of contract law, and thus avoids those areas most susceptible to attack. “Reasonable expectations” escapes many objections precisely because it is not tied specifically to the parties’ expectations and instead remains conceptually flexible enough to assign different weight to the normative and empirical components on a case-by-case basis. Put differently, one might describe this flexibility as unacceptably ambiguous and therefore apt to generate commercial uncertainty. But to the extent that the normative dimension accords mostly with general morality and the law draws inspiration from the empirical dimension, this charge is perhaps overstated. Notwithstanding the ambiguity, these conceptual constraints suggest that good faith is apt to develop along common-sense lines rather than branch out into unexpected (and inexplicable) directions..

### 3.5. Situating Good Faith Duties on the Spectrum of Commercial Duties

Given the abstract nature of the foregoing discussion on good faith, it is perhaps difficult at this point to envision how good faith duties could at one instance resemble the minimalist approach to other-regard displayed by the economic torts, and at another instance fall closer to the maximal view of fiduciary duties. Yet a review of specific duties suggests exactly that: the duty of honest performance imposes a minimal standard of other-regard that closely follows Kain and Alexander’s central concern for ‘cheating’ as beyond the broad limits of free competition, whereas the standard of utmost good faith, and duty of disclosure, in insurance contracts skews more closely to fiduciary duties’ onerous restrictions upon the pursuit of self-interest. Between these two fit a host of other good faith duties.

The duty of honest performance as recognized in *Bhasin* requires only a minimal degree of deference to counterparties’ interests, although the freestanding nature of the doctrine locates

the underlying normative concern outside the ordinary realm of good faith duties and instead identifies as more public-oriented than private. In recognizing the duty of honest performance, Cromwell J stressed the minimal standard of conduct that such a duty would impose, and indeed that its requirements could be relaxed to some (indeterminate) degree by the context of the contract and its express terms<sup>143</sup>. Indeed, Cromwell J's observation that "It will surely be rare that parties would wish to agree that they may be dishonest with each other"<sup>144</sup> makes a compelling case from a practical perspective that the necessary degree of regard for others would be minimally intrusive. Framed as an entirely negative obligation<sup>145</sup>, the duty of honest performance sits closer to the minimalist stance of the general economic torts. More interesting, though, is the fact that this duty is not an implied term like all other good faith duties at common law – rather, it "operates irrespective of the intentions of the parties"<sup>146</sup>. This of course directly troubles the reasonableness analysis outlined above, both from the perspective of the parties' circumstances – where the factual component loses prominence – and from the perspective of fidelity to the bargain – where the prominence of respect for voluntary obligations fades. The duty of honest performance therefore minimizes good faith's commitment to the factual circumstances and to the private-ordering aspect of the contract. Instead, what remains is a more abstract commitment to the public dimension of other-regarding behaviour; not a subordination of self-interest to another party or to a contract specifically, but rather a broader understanding of what is acceptable between parties. In this regard, the duty recalls inducing breach of contract's more general regard for the integrity of market competition as an institution, rather than locating the subordination of self-interest in relation to another party specifically. In view of all the above, the duty of honest performance falls closest to the economic torts' end of the spectrum.

By contrast, the standard of utmost good faith and the related duty of disclosure fall closer (and indeed closest amongst good faith duties) to fiduciary duties' end of the spectrum. The

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<sup>143</sup> *Ibid* at paras 77-78. Cromwell J also clarified that the duty does not amount to a duty of disclosure or fiduciary loyalty: para 86.

<sup>144</sup> *Ibid* at para 81.

<sup>145</sup> Granted, framing obligations as positive versus negative is to some extent a distinction without a difference (e.g. a duty not to lie could just as easily be understood as a duty to be honest), but the specificity with which Cromwell J articulated the duty of honest performance expressly limited the extent to which the obligation could be construed as positive.

<sup>146</sup> *Ibid* at para 74. There is an interesting point to discuss regarding how this good faith duty appears less common law in nature and more civilian, but that discussion is outside of the scope of this thesis.

standard, most closely associated with insurance contracts, is grounded in the extreme vulnerability and informational deficiencies. As Lord Mansfield observed in *Carter v Boehm*,

Insurance is a contract of speculation... The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.<sup>147</sup>

Contrary to the duty of honest performance, the standard of utmost good faith and duty of disclosure flow from the specific nature of the contract. In order to fulfill the contractual objectives – or in other words, to observe fidelity to the bargain, the parties must therefore put each other in the position to do so by disclosing relevant information. Notwithstanding that the standard and accompanying duty are understood to apply in the context of contract *formation*<sup>148</sup>, it remains true that such a duty is normatively underpinned by a commitment *to the contract*, and to the type of contractual relationship. In this, the good faith duty adopts a requirement of other-regarding behaviour approaching that of fiduciary duties, yet remains distinct by eschewing the total subordination that fiduciary relationships' duty of loyalty demands. In sum, then, the duty of honest performance and the duty of disclosure identify the two poles of good faith duties that situate good faith as a bridging concept between economic torts and fiduciary duties.

#### 4. Fiduciary Relationships

Fiduciary law is, to some extent, a relatively settled area of law with respect to its conceptual content<sup>149</sup>; unlike good faith and the economic torts, fiduciary law is not plagued by confusion, notwithstanding scholarly debate over identifying the precise contours of fiduciary duties,

<sup>147</sup> *Carter v Boehm* (1766), 3 Burr 1905, 97 ER 1162, 1 Blackstone W 593 at 593-94.

<sup>148</sup> See, e.g., *Coronation Insurance v Taku Air* (1991) 3 SCR 622.

<sup>149</sup> This observation is not meant to suggest that fiduciary law as a whole is a settled area of law. On the contrary, it is the subject of lively debate and discussion in many respects. Fiduciary law, however, arguably benefits from stronger agreement as to its broad strokes – a trait largely lacking in good faith and the economic torts.

rights, and prerequisites<sup>150</sup> (e.g. by comparing the structural features of fiduciary relationships with contracts<sup>151</sup>). In effect, the debate over fiduciary law is more granular than the other areas of law discussed here. Bearing that in mind, the aim of this section is not to contribute further to that debate, as such a contribution would do little to elucidate this thesis's central analysis of the spectrum of commercial obligations that evince the principle of other-regard. After all, it is settled that fiduciary duties require a complete subordination of the fiduciary's self-interest in favour of regard for the beneficiary's (or beneficiaries'<sup>152</sup>) interest(s)<sup>153</sup>, within the context of that fiduciary relationship. It is therefore uncontentious, and requires little explication, to claim that fiduciary law sits at the end of the commercial duties spectrum aligned with other-regard, opposite the economic torts at the other end. Instead, the objective of this section is to analyze the "why" of fiduciary law – that is, which normative objectives animate the development of fiduciary law and recognition of new categories of fiduciaries – in order to suggest what fiduciary law can reveal about contract and tort in respect of the other-regard principle, as well as what fiduciary law can reveal about that other-regard principle in and of itself.

In brief, this section posits that a study of fiduciary law's normative underpinnings, along with a comparative analysis of fiduciary law with contract and tort, nuances our understanding of laissez-faire and other-regard in two ways: first, by suggesting that what has historically animated the growth of other-regard into both contract and tort in respect of commerce; and second, in suggesting where these areas might develop in future. In short, a study of the "why" of fiduciary law may help to flesh out an historical understanding of how and why commercial private law has moved away from laissez-faire to what this thesis proposes is now a mixed system of laissez-faire and other-regard. Accordingly, this section proceeds in three parts. Subsection 4.1 reviews the theory and case law on fiduciary relationships in order to explain

<sup>150</sup> See, for example, Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) LQR 608. ["Smith"]

<sup>151</sup> See, for example, Gregory Klass, "What if Fiduciary Obligations are like Contractual Ones?" in Paul Miller and Andrew Gold, eds, *Contract, Status, and Fiduciary Law* (Oxford: Oxford University Press, 2016) 93 at 93. See also, Lionel Smith, "Contract, Consent, and Fiduciary Relationships" in Paul Miller and Andrew Gold, eds, *Contract, Status, and Fiduciary Law* (Oxford: Oxford University Press, 2016) 117.

<sup>152</sup> E.g., in the case of a trustee with multiple beneficiaries, although that situation is perhaps better understood as a collection of bilateral fiduciary relationships *seriatim*.

<sup>153</sup> See, for example, Paul Finn, "The Fiduciary Principle" (1988) Victoria Law School Conference Lecture at 64 ["Finn, Victoria Lecture"].

the conceptual confusion that has unnecessarily troubled this area of law, and to identify the protection of trust and interdependence as fiduciary law's underlying normative objective. Subsection 4.2 traces the conceptual overlap between fiduciary law, contract, and tort in order to argue for fiduciary law's function as the normative engine of other-regard in private law, through which it sets and transforms the boundaries of morality within contract and tort. Subsection 4.3 concludes by attempting an answer to the question of how other-regard may evolve in future, using good faith doctrines as an example.

#### 4.1. The *Why* of Fiduciary Law – the Theory and Case Law

This section maps out the historical disagreement surrounding the structure and application of fiduciary relationships, then evaluates the claim that fiduciary law is meant to foster and protect trust and interdependence. In order to assess how fiduciary law helps to understand contract and tort, it is first necessary to understand how fiduciary law itself is conceptually oriented. The case law has historically been somewhat unclear and has failed to provide a definitive account of why fiduciary duties attach to certain relationships and not to others, although recent case law has made progress in dispelling some of this confusion. It is uncontroversial to claim that fiduciary law requires subordination of the fiduciary's self-interest in favour of the beneficiary<sup>154</sup>, but the straightforwardness of this relationship nevertheless belies uncertainties surrounding the underlying principles and objectives of fiduciary law. As some have observed, the courts' application of fiduciary law in recent decades has often compromised fiduciary principles in favour of a results-oriented approach; rather than asking whether a fiduciary relationship exists, courts have frequently determined that the facts of the case warrant a certain remedy (a constructive trust, for example) and consequently worked backwards to find a fiduciary obligation, the breach of which justifies the remedy<sup>155</sup>. Put briefly, reasoning backwards has clouded the underlying theory of fiduciary law and has obscured its objectives. That being said, some judicial analysis and academic commentary has offered a persuasive account of the fundamental reasons for why fiduciary relationships arise.

<sup>154</sup> See Smith, *supra* note 150.

<sup>155</sup> Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921 at 927. ["Rotman"]

#### 4.1.1. Disagreement Surrounding the Necessary Conditions for Fiduciary Relationships

The Canadian case law has to date not benefited from a clear and comprehensive articulation of fiduciary law's purpose or principles; rather, appellate pronouncement has presented a somewhat inconsistent and unclear account of what fiduciary law *is*, and what it *is for* at a conceptual level. As a result, and as the Supreme Court of Canada has noted, "there are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship"<sup>156</sup>. One of the first attempts at articulating the general structure of fiduciary relationships came by way of Wilson J (in dissent) in *Frame v Smith*<sup>157</sup>, where she held that such a relationship exhibits three characteristics:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>158</sup>

While a more general structure to the fiduciary concept had been proposed by Dickson J (as he then was) in *Guerin v. The Queen* – wherein he posited that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's

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<sup>156</sup> *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 ["*Lac Minerals*"] at 643-44, citing a number of sources: Paul Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 1; Sir Anthony Mason, "Themes and Prospects" in Paul Finn, ed, *Essays in Equity* (Sydney: Law Book Co, 1985) at 246; Dennis Klinck, "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on International Corona Resources Ltd. v. Lac Minerals Ltd." (1988) 33 McGill LJ 600 at 603; *Hospital Products, infra* at 243; R.P. Austin, "Commerce and Equity -- Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444 at 445-46; Ernest Weinrib, "The Fiduciary Obligation" (1975), 25 UTLJ 1 ["Weinrib"]; Finn, Victoria Lecture, *supra* note 153; J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 LQR 51; Tamar Frankel, "Fiduciary Law" (1983) 71 Calif L Rev 795; and J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can Bar Rev 1. Granted, this statement and the references it cites were made in and prior to 1989, but current scholarship on the topic suggests that such a claim remains accurate today.

<sup>157</sup> *Frame v. Smith*, [1987] 2 SCR 99. ["*Frame*"]

<sup>158</sup> *Ibid* at 135-136. See also *Hospital Products Ltd. v. United States Surgical Corp.* (1984), [1984] HCA 64, 55 ALR 417 at 488, where the High of Court of Australia held that

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other ...



discretion”<sup>159</sup> – Wilson J’s more thorough definition found greater purchase in later case law. Her definition was accepted by the majority in *Lac Minerals*<sup>160</sup>, and found further support in *Canson Enterprises v Boughton*<sup>161</sup>.

However, Wilson J was equally astute to observe that contemporary academic commentary (on which both Wilson and Dickson JJ relied in their respective judgments<sup>162</sup>) yielded little consensus on what underlying principle(s) could be discerned from the case law, and what conditions were necessary for a fiduciary relationship to arise<sup>163</sup>. Interestingly enough, La Forest J in *Lac Minerals* suggested that vulnerability is *not* in fact a necessary condition<sup>164</sup>. Rather, he located the existence of a fiduciary obligation in the parties’ reasonable expectations: that is, an obligation will arise where “one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other”<sup>165</sup>. More specifically to the case at hand, La Forest J indicated that the relationship of “trust and confidence”, as well as industry practice, both militated in favour of finding a fiduciary relationship<sup>166</sup>. With respect to vulnerability, that characteristic in itself did not seem to be the conceptual linchpin given its treatment in other circumstances; consider that in the case of negotiations, parties are protected by the unconscionability and undue influence doctrines, yet there is no suggestion that fiduciary obligations should apply<sup>167</sup>.

Greater clarity came from the Supreme Court in *Galambos*, where Cromwell J concluded that a fiduciary relationship arises where a fiduciary undertakes either explicitly or implicitly to act

<sup>159</sup> *Guerin v The Queen*, [1984] 2 SCR 335 at 384 [“*Guerin*”], citing Weinrib, *supra* note 156 at 7.

<sup>160</sup> *Lac Minerals*, *supra* note 156 at 598, per Sopinka J, and at 646, per La Forest J.

<sup>161</sup> *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 543-44.

<sup>162</sup> Both Wilson J and Dickson J cited to Weinrib, *supra* note 156 in their respective judgments. Wilson J additionally cited to Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts*, 3rd ed (Cambridge: Heffer, 1955); Gareth Jones, “Unjust Enrichment and the Fiduciary’s Duty of Loyalty” (1968), 84 *LQR* 472; George Keeton and L Sheridan, *Equity* (London: Pitman, 1969), at 336-52; and Shepherd, *supra*, at 94.

<sup>163</sup> *Frame*, *supra* note 157 at 134-35.

<sup>164</sup> *Lac Minerals*, *supra* note 156 at 663-64.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* at 656-62.

<sup>167</sup> *Hodgkinson v Simms*, [1994] 3 SCR 377 [“*Hodgkinson*”] at 406-07 citing Weinrib, *supra* note 156 at 6, per La Forest J.

in the beneficiary's interest<sup>168</sup>. Reviewing the case law and academic commentary, Cromwell J concluded that reasonable expectations, without a specific undertaking by one party to become a fiduciary, could not give rise to a fiduciary relationship<sup>169</sup>. La Forest J's explanation from *Lac Minerals* was therefore dismissed. Cromwell J also clarified the relevance of vulnerability, noting that the focus of fiduciary law is not on vulnerability understood broadly, but rather on vulnerability that arises *as a result* of the fiduciary relationship; thus, it was on this basis that fiduciary law was distinguished from other private law doctrines protecting pre-existing vulnerability<sup>170</sup>. Accordingly, it became clear that vulnerability was not a necessary condition for a fiduciary relationship; not a cause, but an effect. At least in Canada, then, the necessary conditions for a fiduciary relationship were clarified and settled, as were the characteristics of such relationships.

Unfortunately, this clarity has not necessarily been common to all common law jurisdictions, thus muddying a general understanding of fiduciary relationships and unnecessarily clouding analysis of the normative objectives of fiduciary law. Consider the not-infrequent approach of using fiduciary law in order to validate a specific remedy: to take a foreign example, *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd*<sup>171</sup> is perhaps the most prominent instance of a court ignoring a theoretically sound application of fiduciary law in favour of a results-based rationalization of its application. In *Chase*, the plaintiff (Chase Manhattan Bank) transferred two million dollars into the defendant's account, but later that day mistakenly transferred *another* two million dollars into the same account. The plaintiff attempted to stop payment, but the defendant never received the instruction and was shortly thereafter put into receivership<sup>172</sup>. Chase Manhattan sought the return of the second two million dollars based on the mistake, but because the defendant was in receivership, Chase Manhattan was likely to be

<sup>168</sup> *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247 ["*Galambos*"] at para 75-79, citing *Norberg v Wynrib*, [1992] 2 SCR 226 at 273, per McLachlin J (as she then was).

<sup>169</sup> *Galambos*, *supra* note 168 at para 75.

<sup>170</sup> *Ibid* at para 68.

<sup>171</sup> *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch 105 ["*Chase Manhattan*"]. For a more thorough discussion of this case, see <sup>171</sup> Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 BUL Rev 921 at 928-30. It must be noted that this case was subsequently subject to significant criticism both academically and judicially. See, for example, E.P. Ellinger, Eva Lomnicka, and Richard Hooley, *Ellinger's Modern Banking Law*, 5th ed (Oxford: Oxford UP, 2011) at 556; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12 at 714.

<sup>172</sup> *Chase Manhattan*, *supra* note 171 at 115-16.

an unsecured creditor and therefore unlikely to recover the money<sup>173</sup>. The only way to avoid this was to segregate the second two million dollars from the rest of the defendant's assets, which the court did by imposing a constructive trust. But given that the constructive trust is an equitable remedy, it therefore required an equitable obligation in order to justify the trust's use as a remedy. The court therefore reasoned backwards and found a fiduciary relationship to exist, notwithstanding that the relationship between plaintiff and defendant exhibited essentially *none* of the relevant signs<sup>174</sup>. While other case law has perhaps not been so pronounced in its confused application of fiduciary law, it remains true that *Chase* is emblematic of judicial inconsistency muddying what might otherwise be clear waters.

As such, it seems safe to say that notwithstanding the clarity achieved by Canadian courts, the judicial discussion more globally has inhibited fully explaining *why* the relevant circumstances warrant giving rise to a fiduciary relationship. Why attribute such protection to vulnerability flowing from the exercise of discretion? Why do so for relationships of trust and confidence? Finding the answer has been made more difficult by the uneven and at times haphazard fashion in which fiduciary law has been applied. In some sense, it might aptly be characterized as a vicious cycle: the lack of principle begets confused application of fiduciary obligations in the case law, which further obscures the principles might otherwise have been gleaned. The ultimate result is a conceptual thicket that fails to yield insight into how fiduciary law elucidates the relationship between other-regard and laissez-faire. But as the next section suggests, judicial and academic commentary does offer a persuasive account of why fiduciary relationships exist.

#### 4.1.2. *Protecting Trust and Fostering Interdependence as Fiduciary Law's Objective*

Some scholarship has taken a different approach in claiming that the explanatory framework for fiduciary law rests in large part on its normative objective; namely, protecting specific interdependent relationships because of the social good they foster. While Canadian case law has identified fiduciary law's focus as the protection of certain relationships<sup>175</sup>, there has been

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<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid* at 128.

<sup>175</sup> *Galambos, supra* note 168 at para 68, citing *Hodgkinson, supra* note 167 at 422.

limited explanation of *why* those relationships are protected<sup>176</sup>. As Leonard Rotman has argued, neither inequality nor vulnerability – nor indeed trust and confidence – can fully explain when or why a fiduciary obligation arises in respect of certain relationships, given that these are protected to varying extents outside of fiduciary law<sup>177</sup>. Inequality and vulnerability are present in other private law doctrines (e.g. unconscionability, undue influence, misrepresentation) yet do not give rise to fiduciary duties<sup>178</sup>. Rather, the explanation for fiduciary law is tied to its reason for existence. That is, the focus on protecting types of relationships via fiduciary obligations stems not from a specific objective of protecting weaker parties, but rather from the broader economic and social good that these relationships foster; according to Rotman,

“fiduciary interactions rank among the most valuable in society by enhancing productivity and knowledge, facilitating specialization, and creating fiscal and informational wealth. Consequently, fiduciary law puts in place, in appropriate situations, mechanisms to both foster and protect trusting relationships that create implicit dependency and peculiar vulnerability of one party to another”<sup>179</sup>.

In essence, the law views the relationships to which fiduciary obligations attach as sufficiently valuable from a social perspective that they warrant overriding the parties’ own inclination to pursue their self-interest to the fullest extent. Put differently, autonomy – one of the more important components of *laissez-faire* – is subordinated to the broader instrumental function that these types of relationships perform as social institutions. Much like the idea of ‘fidelity to the bargain’ discussed above with respect to good faith, there is very much a public flavour

<sup>176</sup> *Hodgkinson* is a notable example of this: La Forest J observed that the purpose of protecting certain relationships was to protect and reinforce “the integrity of social institutions and enterprises”, but he did not expand further on this comment: *Hodgkinson*, *supra* note 167 at 422. See also page 49, *infra*.

<sup>177</sup> Rotman, *supra* note 155 at 931-32.

<sup>178</sup> Consider *Lloyds Bank v Bundy*, [1974] 3 All ER 757, [1975] QB 326, [1974] 3 WLR 501 [*“Lloyds Bank”*], for example. While the case is best known as a case on unconscionability, it is equally true that Sachs LJ found the bank to have a fiduciary duty to Bundy due to the two parties having a “confidential relationship” – that is, a relationship similar to one of confidence, but importing an “extra quality” so as to heighten it beyond a common duty of care. Interestingly, Sachs LJ also discussed how a common duty of care may co-exist with a duty of fiduciary care without being coterminous, thus anticipating the point below about the overlap between fiduciary law and tort.

<sup>179</sup> Rotman, *supra* note 155 at 933. Rotman argues that this differs greatly from contract law, stating that “Contract law, meanwhile, has little direct regard for such a broad purpose, focusing instead on doing justice between individuals”; as will be suggested below, I posit that this contention is in fact incorrect to a certain extent.

to fiduciary law that incidentally requires subordination of self-interest of another in order to preserve a public good<sup>180</sup>.

La Forest J anticipated this same argument in *Lac Minerals*, locating fiduciary law's essence in its broader social utility. In noting that fiduciary obligations arose in the case at bar partly as a result of the parties' specific relationship and partly as a result of industry-wide practice, La Forest J noted that

**The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions...** In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties<sup>181</sup>. (emphasis added)

La Forest J returned to this analysis in *Hodgkinson v Simms*<sup>182</sup>, reiterating that “the marketplace cannot always set the rules” and that fiduciary law is to an extent premised upon protecting the integrity of social institutions<sup>183</sup>, presumably because they would otherwise function inefficiently (or not at all). La Forest J's judgments in these two decisions therefore stand as arguably the clearest judicial pronouncement in Canadian common law on the underlying objectives of fiduciary law – the answer to the “why” question. Perhaps as a result of this line of thinking not having received a great deal of consideration in subsequent case law, it therefore stands to reason that La Forest J's comments stand as the most *authoritative* statement as well.

On this view, fiduciary law is better understood as maintaining the integrity of the relationship as a whole, rather than protecting the vulnerable beneficiary; the latter is essentially an incident of the former. In other words, fiduciary law is necessary where there are compelling normative reasons to preserve certain *relationships*, not certain *persons*. Rotman's and La Forest's understanding of fiduciary law is therefore attractive for its elucidation of why we might

<sup>180</sup> I do not use “public good” here in the specific sense employed in economic analysis (i.e. denoting a good that anyone can use, and the use of which by one does not diminish the potential for use by others).

<sup>181</sup> *Lac Minerals*, *supra* note 156 at 673-674.

<sup>182</sup> *Hodgkinson*, *supra* note 167.

<sup>183</sup> *Ibid* at para 48.

impose greater duties on certain relationships, but as Rotman notes, this does little to offer any certainty in how and where to apply fiduciary duties in future. Perhaps the most obvious critique is that this overarching objective of fiduciary law is not exclusive; indeed, it has permeated tort law and contracts for many years, albeit to differing extents. As this thesis has suggested above, the common law recognizes that in all spheres of commercial activity, there must be some room for regulation of behaviour and relationships (even arm's-length relationships) so as to uphold the integrity of certain institutions that rely on interdependence in order to maximize utility and/or self-interest. The better question, therefore, is to ask why fiduciary law enforces a more rigorous standard of conduct than contract and tort. As the next section suggests, fiduciary law has historically occupied a more progressive role in the scheme of private law than have contract and tort, resulting in its normative underpinning bleeding into contract and tort in diluted form over time.

## 4.2. The Relationship Between Fiduciary Law, Contract and Tort

### 4.2.1. *Fiduciaries Law and Good Faith– Distinctions Wanting for Differences*

Even accepting that fiduciary law is meant to preserve trust and interdependence, this is a goal common to other areas of law such as contract, and tort to a lesser extent. Why is it, then, that fiduciary law involves such strenuous duties as compared to these other areas of law? With respect to contract law, the shortcomings of the *Frame* test are apparent in how difficult it is in some respects to distinguish a fiduciary duty from a duty of good faith to exercise a contractual discretion reasonably. Such a duty meets criteria 1 and 2 of the *Frame* test by virtue of one party having a discretion that may be exercised unilaterally to the detriment of the other. The only potential room for distinction lies in criterion 3 – and even that is largely attributable to the ambiguity of “*peculiarly vulnerable*” and “*at the mercy of the fiduciary*”<sup>184</sup>, given that the existence of a contractual discretionary power implicitly requires some ceding of power by the vulnerable party. Take, for example, the case of *Styles v Alberta Investment Management Corporation*<sup>185</sup>: the defendant employed the plaintiff, with the employment contract granting

<sup>184</sup> As noted above, in *Guerin*, *supra* note 159 at 384, Dickson J (as he then was) similarly identified that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion”, citing Weinrib, *supra* note 156 at 7.

<sup>185</sup> *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621; overturned on appeal, *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1.

the defendant the discretion to award “grants” that would vest in the plaintiff’s annual bonus after four years. The defendant terminated the plaintiff’s employment before the grant could vest for no apparent reason, thus depriving him of upwards of half a million dollars that he had come to expect at the time the grant was awarded. One might query whether this amounts to a vulnerability on the plaintiff’s part, given that he suffered no loss in reliance but rather one of expectation; however, it seems intuitive to say that the plaintiff’s reasonable expectations were at the mercy of the defendant’s discretion.

Accepting that this amounts to a power over another party<sup>186</sup>, it is nevertheless clear that it does *not* amount to a fiduciary duty, since the contractual duty does not require complete subordination of self-interest in favour of the other party; merely due regard for the other party’s *legitimate* interests, whatever that might mean<sup>187</sup>. In light of this example from contract law, the test from *Frame* therefore seems to offer an inadequate rationale for the heightened standard that a fiduciary duty attracts, since it cannot explain why the contractual relationship does not warrant the protection of fiduciary law given that the relevant preconditions are met. The conditions set out in *Frame* may be necessary, but they do not appear sufficient in view of the foregoing. Similarly, La Forest J’s position in *Lac Minerals* that fiduciary relationships arise out of the parties’ reasonable expectations seems equally inadequate insofar as it comes no closer to explaining why reasonable expectations generate fiduciary duties in one case and not another. Accepting that it is socially useful to foster interdependence in the employer-employee relationship – after all, work is central to many people’s very existence, and more cooperative employment relationships would intuitively seem to be more productive ones – surely then one could make a defensible argument that parties would reasonably expect that the ceding of autonomy should be safeguarded by the party to whom it is given. Reasonable expectations therefore come no closer to explaining the distinction between fiduciary law and certain elements of contract law<sup>188</sup>.

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<sup>186</sup> This is in some sense contentious, given that the Alberta Court of Appeal rejected the existence of a duty to exercise a discretionary contractual power reasonably; in Ontario, however, it appears settled law that such a duty exists: see, for example, *Greenberg*, *supra* note 106; and *Data & Scientific Inc v Oracle Corp*, 2015 ONSC 4178.

<sup>187</sup> See note 96, *supra* for discussion of the distinction between reasonable expectations and legitimate expectations.

<sup>188</sup> This criticism is not a new one, either. Robert Flanagan criticized the use of “reasonable expectations” with respect to fiduciary law for a number of reasons, including the fact that it contains no conceptual rigour either internally or externally (i.e. in courts’ use of the concept): see Robert Flanagan, “The Boundaries of Fiduciary

Given the lack of a conceptual explanation for why fiduciary duties and good faith duties differ notwithstanding the structural similarities between these relationships, perhaps the key to a satisfactory explanation rests in an historical account of the two. On the one hand, fiduciary law from the beginning of its existence at common law has unequivocally required that other-regard be the central feature of fiduciary relationships<sup>189</sup>. Even after the fusion of law and equity resulting from the *Judicature Act* of 1873<sup>190</sup>, fiduciary law's normative orientation was not compromised in favour of laissez-faire. Granted, it is true that equity more generally suffered a diminishment in its use following the *Judicature Acts*<sup>191</sup>, but the content of fiduciary law was not itself altered in this time and nor did it fall into disuse. On the other hand, contract law following the *Judicature Acts* up until the present day has slowly admitted more exceptions to laissez-faire and notions of strict enforcement (e.g. the recognition of economic duress<sup>192</sup>, the turn away from formalist interpretation to a contextual approach<sup>193</sup>) and slowly incorporated other-regard by way of good faith doctrines<sup>194</sup>. As a matter of logic, it is difficult to draw a causal relationship between fiduciary law's introduction into the common law and the conceptual shift in contract law doctrine. But to the extent that equity has exerted its influence on contract law post-*Judicature Acts*, the new conceptual content of contract doctrines suggests fiduciary law has been the vehicle for that influence. It would otherwise seem a strange coincidence that good faith and fiduciary law, for example, exhibit such striking similarities. The other-regard of fiduciary law has, over time, bled into contract.

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Duty" (2004) Can Bar Rev 35 at 74-76. Evidently, "reasonable expectations" has been a consistent target for criticism across multiple areas of law, as the earlier discussion with respect to good faith suggests.

<sup>189</sup> i.e. from its common law origin in the law of trusts/uses. However, others have argued that the early common law recognized certain duties that we would today recognize as fiduciary in their content: David Seipp, "Trust and Fiduciary Duty in Early Common Law" (2011) 91 BUL Rev 1011 at 1034.

<sup>190</sup> *Supreme Court of Judicature Act 1873*, 36 & 37 Vict c 66.

<sup>191</sup> This is not to diminish the fact that in a conflict between law and equity, equity would prevail: *Judicature Act 1873*, s. 25(11). That being said, others have observed that the new equitable powers of the courts came to be marginalized: Waddams, *Sanctity of Contracts*, *supra* note 22 at ch 2.

<sup>192</sup> *Occidental Worldwide Investment Corp. v Skibs A/S Avanti (The Sibeon and The Sibotre)*, [1976] 1 Lloyd's Rep 293 (QB); *Pao On v Lau Yiu Long*, [1979] 3 All ER 65, [1980] AC 614; *NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28

<sup>193</sup> *Investors Compensation Scheme Ltd. v West Bromwich Building Society*, [1998] 1 All ER 98; *Sattva Capital Corp v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633.

<sup>194</sup> While good faith does date back far beyond the advent of the common law – and indeed, enjoyed some prominence prior to the Industrial Revolution – only since the middle of the 20<sup>th</sup> century did it start to return to prominence (e.g. in the doctrines discussed earlier, as well as in the employment and franchising contexts).



#### 4.2.2. *Fiduciary Law and Tort – Similarities over Time*

Conceptual similarity has not been restricted to contract either, as tort has exhibited a similar (but admittedly much lesser) tendency to adopt fiduciary-like duties notwithstanding earlier reluctance to do so. The analogous nature of these duties simply emphasizes the lack of justification for unequal treatment as between fiduciary law, contract, and tort. With respect to tort law, what was once the domain of heightened fiduciary duties over time becomes the minimum standard covered by tort. Consider the example of negligent misstatement, as laid down in *Hedley Byrne*<sup>195</sup>. Considered as heralding a major alteration to tort law by establishing liability for negligent statements<sup>196</sup>, fiduciary law had already long since accepted that liability for such statements could arise in the context of a fiduciary relationship<sup>197</sup>. Some have argued that this difference is attributable to different attitudinal orientations to tort law and fiduciary law respectively. As Burrows puts it,

Once one realises that a fiduciary duty is a duty to look after another's interests, it becomes plain that what may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary. Hence undue influence or non-disclosure, while not in themselves wrongs, may be wrongs where committed by a fiduciary because they may then constitute a breach of the duty to look after another's interests. This explains why compensation was awarded for a fiduciary's – a solicitor's – negligent misrepresentation in *Nocton v Lord Ashburton* 50 years before the development of the tort of negligent misstatement, outside a fiduciary relationship, in *Hedley Byrne & Co. Ltd. v Heller and Partners Ltd.*<sup>198</sup>

But this does not explain why tort law ultimately *did* come around to finding liability in such circumstances. Indeed, it is perhaps no coincidence that the prerequisite of a “special relationship” strongly echoes the special nature of a fiduciary relationship.

Perhaps unsurprisingly, the result of this marked similarity between tort and fiduciary law has created some confusion in respect of pleadings where the two might overlap (for example, in instances where a client sues their solicitor – a statement of claim might plead all of breach of contract, negligent misrepresentation, and breach of fiduciary duty, arising from

<sup>195</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575.

<sup>196</sup> See, for example, G.H.L. Fridman, “Negligent Misrepresentation” (1976) 22:1 McGill LJ 1.

<sup>197</sup> See, for example, *Nocton v Lord Ashburton*, [1914] AC 932.

<sup>198</sup> Andrew Burrows, “We Do This at Common Law but That in Equity” (200) 22 OJLS 1 at 9.

the same facts). It is instructive here to quote (at some length) from *Girardet v. Crease & Co*<sup>199</sup>, which itself was cited with approval by Sopinka J in *Lac Minerals*:

The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure... and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty.<sup>200</sup>

Although fiduciary law and tort law are certainly not one and the same, the similarities that they share in respect of rights and duties in certain situations is striking in the same way as that seen above with respect to fiduciary law and good faith – perhaps even more so, given that the duty to avoid a negligent misstatement is essentially the same in both tort and fiduciary law. In the absence of a conceptual distinction, we are left with only the historical delay between tort and fiduciary law from which to discern the precise relationship between the two of them in the overall context of private law. Much like with respect to contract law, it is tempting to look to the *Judicature Act* as the historical impetus for fiduciary's law influence on tort law since, as noted earlier, tort law is in one sense public policy imposed on private relationships. As equity has grown in stature since its fusion with the common law, its influence has been felt in respect of tort the same way as in respect of contract – via fiduciary law. To the extent that the *Hedley Byrne* example is illustrative of the relationship in general, we might then conclude that fiduciary law acts as a progressive element advancing attitudes that over time are accepted as the baseline of acceptable conduct, as later expressed in tort law.

In view of the foregoing, it is thus difficult to categorically separate fiduciary law from either tort or contract in theory. Given this shared orientation, it is perhaps more useful to think

<sup>199</sup> *Girardet v Crease & Co*, (1987) 11 BCLR (2d) 361.

<sup>200</sup> *Ibid* at 362, per Southin J (as she then was).

of fiduciary law not simply as a manifestation of equity as conscience<sup>201</sup>, but rather as the vanguard of a conscience that progressively filters through into the other areas of private law, over time, where relationships are sufficiently analogous. This is not to say, of course, that one should expect to see a duty of loyalty in contract or tort any time soon. Rather, it suggests that it may be fruitful to look to fiduciary law in order to anticipate new frontiers of influence with relation to contract and tort. To the extent that private law at all admits morality into the governance of commerce and general social interaction – La Forest J anticipated this to some extent in *Lac Minerals* in his observation that “business and accepted morality are not mutually exclusive domains”<sup>202</sup> – fiduciary law may be an important instrument for determining the boundaries of that morality and for anticipating how they may change in future within contract and tort.

### 4.3. What Can Fiduciary Law Tell Us About Private Law’s Future?

Accepting the premise that fiduciary law has influenced the development of contract and tort in the past, the question arises as to what fiduciary law can tell us about how these areas of law are developing now, and how they might develop in future. In keeping with the earlier content of this thesis, this subsection therefore turns to common law good faith in order to evaluate recent developments and suggest how good faith might evolve in future. It is suggested first that the logic of *Bhasin* is explicable in fiduciary terms, and second, that that logic is equally applicable to other doctrines of good faith and thus might be applied there in future.

#### 4.3.1. *Terms Imposed by Law – The Current Influence on Good Faith*

The alteration of contract’s core content is perhaps most apparent with respect to the recently-recognized duty of honesty in contractual performance (one of the two holdings from *Bhasin v Hrynew*), which broke from prior common law good faith jurisprudence in order to establish that the duty of honesty would be one out which parties could not contract<sup>203</sup>. In this respect,

<sup>201</sup> I make indirect reference here to Selden’s aphorism that equity is “according to the conscience of the Chancellor”, although my usage is likely less cynical than Selden’s.

<sup>202</sup> *Lac Minerals*, *supra* note 156 at 668.

<sup>203</sup> Cromwell J did acknowledge that parties might be able shape the exact contours of the duty by providing express terms to that effect in the contract, but its core content could not be excluded: *Bhasin*, *supra* note 23 at

the duty of honest performance was fundamentally different from previously-recognized duties of good faith, which were either implied in fact or implied in law. Given how significant a change this was, it was therefore striking that the Court's reasoning for making this duty mandatory was quite thin. In essence, Cromwell J contrasted the creation of a mandatory rule (such as the duty of honesty) with the potential for interference with freedom of contract:

It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract... As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.<sup>204</sup>

This appears to be the only explicit reasoning provided for making the duty mandatory. Using freedom of contract as the analytical lens or standard by which the new duty was evaluated bespeaks a commitment by the Court to the classical, *laissez-faire* mode of thinking but therein lies the significance and ingenuity of Cromwell J's approach. By framing this mandatory regard for others (i.e. the duty of honesty) as compatible with freedom of contract – and indeed, making this its central point of conceptual appeal – Cromwell J maintained (at least rhetorically) a respect for *laissez-faire* by altering the core content of contracts *ex ante*, without crafting further exceptions to the principle of strict enforcement. In this way, *laissez-faire* at least ostensibly maintains pride of place in contract law; rather than tackle it head-on, the Court mitigated the very harshness that necessitated the many exceptions to strict enforcement.

What, then, can fiduciary law tell us about the significance of this decision? Given the emphasis that fiduciary law places on protecting the integrity of the *relationship* rather than solely protecting weaker parties from abuse, it is useful to understand the underlying logic of good faith in similar terms. First, there is evidently an equitable and quasi-fiduciary flavour to good faith, as Cromwell J explains it. Good faith requires appropriate regard for other parties'

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paras 77-78. It bears noting that this is, so far as I can tell, the first instance in the common law world that a good faith duty has been recognized as anything other than an implied term out of which the parties can contract.

<sup>204</sup> *Ibid* at para 76.

*legitimate* interests<sup>205</sup>. Indeed, the extent to which Cromwell J expressly disavowed any equivalence between the duty of honesty and the fiduciary duty of loyalty is exactly that which draws attention to how similar they are<sup>206</sup>. Just as important, though, is the fact that viewing good faith through the lens of fiduciary law helps to understand that this more equitable component of contract law is not simply a matter of protecting weaker parties. Rather, good faith is better understood as preserving the integrity of the contractual relationship because contracting itself is valuable as a social institution. The modern reality is that many contracts are rarely discrete, one-off events; rather, many contracts signify the inauguration, culmination, or continuation of a relationship<sup>207</sup>, and as such, the elements of trust and interdependence should be protected. On this view, *laissez-faire* is not simply a question of leaving parties to their own devices no matter how harsh the contract's terms may be. Instead, this view reiterates good faith as the conceptual bridge between *laissez-faire* and other-regard by refocusing contract as an institution for relationships rather than transactions. Indeed, good faith understood this way reorients contract entirely, rather than hiving itself off as anomalous within contract.

#### 4.3.2. *The Broader Implications of Bhasin's Logic*

Just as importantly, the logic employed in *Bhasin* yields insight into how the fiduciary influence on good faith may continue to exert itself as good faith develops in future. Put briefly, the logic of *Bhasin* may find itself used in respect of other good faith doctrines in order to justify their transformation into similarly mandatory rules. Currently, most good faith doctrines operate as implied terms either in fact or in law<sup>208</sup>, so the possibility remains that contracting parties could include express language to exclude these terms. As such, the equitable, fiduciary-inspired influence of good faith upon contract is in this sense limited. Rather than fostering trust and interdependence, contracts excluding good faith might instead

<sup>205</sup> *Ibid* at paras 65 and 69. See note 96, *supra* for a discussion of the distinction between “reasonable” and “legitimate” expectations. Although interests are not same as expectations, the logic in distinguishing “reasonable” from “legitimate” seems equally applicable here.

<sup>206</sup> *Ibid* at paras 60, 65 and 86. To quote Shakespeare, “the lady doth protest too much, methinks” (Act 3, Scene 2, line 217): William Shakespeare, *Hamlet*, ed by G. R. Hibbard (Oxford: Oxford UP, 2008) at 261.

<sup>207</sup> See, generally, Ian Macneil, “The Many Futures of Contracts” (1974) 47 Southern California Law Review 691.

<sup>208</sup> See above, note 103 and accompanying text.

trap parties in unfavourable, long-term contracts that foster animosity and ultimately discourage long-term contractual relationships (which presumably generate greater economic gains)<sup>209</sup>. Bearing that in mind, the question is therefore of some importance as to whether these implied terms might gain greater conceptual purchase in future.

Based on Cromwell J's logic, one could make a compelling case that those implied terms *do* warrant the same mandatory status as the duty of honesty. To borrow from Cromwell J's line of reasoning, if a party already expects behaviour to be covered by a legal duty, then it makes little sense to say that it will interfere with a freedom of contract that isn't really exercised in the first place. For example, if we apply this rationale to the duty to exercise contractual discretion in good faith, it seems quite simple to argue that because parties already expect this kind of behaviour, then that duty therefore minimally impairs freedom of contract and would therefore face no hurdle to becoming a mandatory rule. If the test for recognizing a freestanding duty is as simple as "minimal impairment of freedom of contract", then any and all good faith duties, by virtue of being good faith duties, would minimally impair freedom of contract since they entail behaviour that contracting parties already expect. Accordingly, this logic holds the potential to reorient our understanding of laissez-faire in a significant way by amplifying the effect of *Bhasin*. Given that the duty of honest performance on its own imports a fiduciary flavour and more progressive understanding of what contracting entails, a wholesale transformation of good faith law on those same grounds could offer significant inroads into a more modern understanding of contract law, and indeed private law more generally, as an intersection between laissez-faire and other regard.

## 5. Conclusion

It has become clear that laissez-faire cannot be the only vehicle by which the objectives of contract and tort in respect of commerce are met. While laissez-faire has gone a long way towards enabling the self-interest maximization for which commerce is intended, it alone

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<sup>209</sup> One might consider consumer contracts as such an example. Economic theory would generally suggest that competition between corporations would theoretically drive prices down as those businesses compete for customers, but this does not account for the cartelization that frequently takes place in a number of different arenas (for example, Canadian telecommunications contracts). See, generally, Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2012).

cannot provide an adequate bulwark against humans' counterproductive tendency to act against their own self-interest. Without any restraints, commercial parties are liable to compromise the viability of the market as a trustworthy – and therefore functional – institution. Accordingly, it should be clear that *some* measure of regulation is needed to balance against laissez-faire. Perhaps in an ideal world, this would not involve judicial or legislative fettering of commercial activity; as we have seen in certain industries, social norms and relations are sometimes powerful enough on their own to create extralegal incentives to refrain from condemnable-but-technically-legal behaviour<sup>210</sup>. In such circumstances, these social norms make clear to participants that the long-term harm to self-interest will outweigh short-term gain<sup>211</sup>. But extralegal enforcement such as this is hardly feasible at a broader social level, given the absence of effective means for enforcement; in the absence of enforcement, counterproductive behaviour can proceed without check or balance. At a general level, legal intervention is the only way to check such behaviour and preserve the best interests of both commercial actors and the market at large. Little surprise, then, that we have already seen pockets of exceptions to laissez-faire spring up across common law contract and tort. In a word, it is necessary.

It remains curious, and somewhat problematic, that the way we think doctrinally about commercial private law continues to revolve around a dominantly laissez-faire model. Framing our thinking of contract and tort around this philosophy is apt to perpetuate the same limitations that already exist. But as this thesis has shown, laissez-faire is not the only principle by which to guide thinking about commercial private law. Across tort, contract, and fiduciary law, there already exists a spectrum of economic torts, good faith doctrines, and fiduciary duties that evidence an underlying principle of other-regard.

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<sup>210</sup> See, for example, Lisa Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry" (1992) 21:1 Journal of Legal Studies 115 ["Bernstein, Diamonds"]. See also, Lisa Bernstein, "Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions" (2001) 99 Michigan Law Review 1724; Robert Ellickson, "A Hypothesis of Wealth Maximizing Norms: Evidence from the Whaling Industry" (1989) 5 J L Econ & Org 83; and William Twining, "Normative and Legal Pluralism: A Global Perspective" (2010) 20 Duke J Comp & Intl L 473

<sup>211</sup> Bernstein notes that in the diamond industry, establishing and maintaining a good reputation (e.g. being seen as trustworthy and honest) amongst traders in the diamond market is the key to being considered a viable trading partner within said market. It is clear that good behaviour was simply good business and the key to making a profit. Bernstein, *Diamonds*, *supra* note 210 at 152, 157.

Part 2 established that the general economic torts occupy the end of the spectrum, weighted most heavily towards laissez-faire, with inducing breach of contract occupying the furthestmost point at this extreme of the spectrum, and each of the unlawful means tort, intimidation, and unlawful means conspiracy grouped closer to the center<sup>212</sup>. Part 3 established three aspects of good faith: first, that “reasonable expectations” function as the analytical mechanism by which good faith doctrines (and now the organizing principle) have developed; second, that “reasonable expectations” is composed of an unstable combination of factual reasonableness and normative reasonableness, the balance between which varies depending on a case’s circumstances; and third, that the normative content of “reasonable expectations” in good faith can be explained by a ‘fidelity to the bargain’ that requires parties to subordinate their self-interest to the full scope and purpose of the bargain. The result is a requirement of other-regard that varies depending upon the circumstances of the case, thus positioning good faith doctrines at various locations on the spectrum of commercial obligations. Lastly, Part 4 – given that fiduciary duties are settled as occupying the other end of the commercial duties spectrum – evaluated how the underlying normative objectives of fiduciary law help explain its influence on contract and tort as well as how fiduciary law might function in evolving private law in future.

On the whole, it is thus suggested that recognition of the principle of other regard at the same level of laissez-faire helps us to think about contract and tort in a way more conducive to fulfilling the fundamental objective of commerce, and is therefore more desirable than the pure laissez-faire model. Commercial private law is thus better understood as a *system* of underlying principles, of which laissez-faire and other-regard are two parts of the same whole. Ideally, this understanding of private law may provide some guidance to doctrinal development; if the law is to fulfil its objective in commerce of facilitating self-interest maximization, then the doctrinal framework employed in that pursuit must take account of the empirical circumstances that were previously ignored (i.e. human cognitive frailties). To repeat an earlier point, the core of commercial private law must be re-imagined<sup>213</sup>.

<sup>212</sup> Recall that it was also argued that the unlawful means tort was the genus tort, and intimidation and unlawful means conspiracy were species of that genus.

<sup>213</sup> See *supra*, page 11.



Granted, this work is subject to certain limitations that suggest the account provided above is incomplete, and therefore warrants further study to lend further support, add more nuance, or indeed refute what has been argued here. This thesis has not addressed a number of economic torts, such as lawful means conspiracy, deceit, passing off, and injurious falsehood, to say nothing of the complex subject of negligence and pure economic loss<sup>214</sup>. It is tempting, at least superficially, to draw some parallels between negligence and good faith on the basis of reasonable expectations. Nor has this thesis delved into other aspects of contract law that limit the pursuit of self-interest, such as undue influence and unconscionability<sup>215</sup>. With respect to fiduciary law, breach of confidence offers another potentially fruitful avenue of inquiry. Together, these undiscussed aspects of the law relating to commerce suggests there remains ample work to be done in order to paint a full picture of how private law operates at the level of abstract principle. That is work for another day.

Nevertheless, this thesis has, ideally, offered a first step towards developing our understanding of a complex web of doctrines and entire areas of law that overlap and intersect in ways that are often difficult to parse. It is likely that each of contract, tort, and fiduciary law resist explanation according to any grand theory, either separately or together. But that does not necessarily render valueless the attempt at explaining facets of these areas according to abstract, overarching theory. The law governing commerce is critically important, given the inescapable fact that we are all commercial creatures to some extent. This is perhaps especially true in light of how commerce now exists at the click of a button. While the analysis of this

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<sup>214</sup> The topic of pure economic loss in Canadian law has received comprehensive treatment before, but not in the context of other-regard that this thesis addresses. See, for example, Russell Brown, *Pure Economic Loss in Canadian Law* (Toronto: LexisNexis, 2011).

<sup>215</sup> It has been suggested before that doctrines of contractual fairness as they apply to the formation stage are better understood according to a unifying/underlying principle. Denning LJ made such a claim in *Lloyds Bank, supra* note 178, but it did not find purchase in subsequent case law. Similarly, academic commentators have engaged in analysis to make the same or similar claims. See, for example, Matthew Marinett, “Protecting Individual Self-Interest in Aggregate as the Basis of Fairness in Contract” (2018) 55:3 Alberta Law Review 703, who in turn at fn 22 cites David Capper, “Undue Influence and Unconscionability: A Rationalisation” (1998) 114 Law Q Rev 479 (with respect to undue influence and unconscionability); Mindy Chen-Wishart, “Controlling the Power to Agree Damages” in Peter Birks, ed, *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996) 271 (with respect to liquidated damages and unconscionability); SM Waddams, “Unconscionability in Contracts,” (1976) 39:4 Mod L Rev 369 (with respect to duress, undue influence, unconscionability, penalty clauses, and others).

thesis is necessarily partial, it will hopefully be only the start of reconsidering commercial private law in a new light.

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