Canadian Encyclopedic Digest

Contracts

XI — Express Terms; Performance of Contract

2 — Performance

(i) — Duty of Good Faith in Performing Contracts

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XI.2.(i).(i)

See Canadian Abridgment: CON.IX.4.d.i Contracts — Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

§752 The legal characterization of the relationship between contracting parties largely determines their obligations to each other. The graduated obligations arising between commercial contracting parties have been ordered in a three-tiered theoretical framework which is often cited in recent Canadian judgments: "the unconscionability standard"; "the good faith standard"; and the "fiduciary standard". Although all three standards are concerned with the extent to which one contracting party is obliged to acknowledge and to respect the interests of the other, each standard, in setting its own limits, proceeds from a different premise. Thus, "unconscionability" accepts that one party is entitled as of course to act self-interestedly in his or her actions toward the other; however, in deference to the other party's interests, it proscribes excessively self-interested or exploitative conduct. "Good faith", while permitting a party to act self-interestedly, also positively requires that such party, in his or her decisions and actions, have regard to the legitimate interests of the other party. The "fiduciary" standard enjoins one party to act in the interests of the other — that is, to act selflessly and with undivided loyalty. The demarcation where one standard of behaviour ends and another begins is not always clear. The duty of good faith is not a fiduciary duty, and it does not extend to create new, unbargained rights.

§753 Canadian courts have traditionally proceeded quite cautiously in recognizing duties of good faith in the performance and enforcement of contracts. References in judicial decisions to good faith obligations have usually been made where the result of the case has been determined by the application of other, more established, legal principles, such as that regarding implied terms. Thus, unlike the situation in Quebec and the United States, where a duty of good faith in the performance of commercial contracts was broadly recognized, Canadian courts took more time in developing a comprehensive and principled approach to good faith obligations in commercial contracts. In particular, they have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from its provisions, although the law in this regard is currently unsettled. Lastly, the Supreme Court of Canada recently held that it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just with regard to contracts. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

§754 Canadian courts have recently expanded the range of "special" relationships giving rise to a duty of good faith beyond those traditionally giving rise to fiduciary obligations, such as trusts, partnerships, joint ventures, and agency, and the relationship of utmost good faith created by an insurance contract, as well as such situations as tendering contracts, mortgagees in possession, grantees exercising rights of first refusal, and termination of long-standing contractual arrangements. For example, the courts have regarded employment contracts as having unique characteristics setting them apart from ordinary commercial contracts, giving rise to an obligation to act in good faith in the termination of an employee. And franchise arrangements have been characterized as contracts of adhesion, giving rise to good faith obligations. However, parties to ordinary commercial contracts, which are usually not characterized by vulnerability and trust, are generally not subject to a general and overriding good faith obligation. Where a duty of good faith exists, not every breach of contract will be a breach of the duty of good faith. Canada's law of conflicts as administered by the courts is based on precedents rooted in English jurisprudence. Lastly, the Supreme Court of Canada recently held that it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just with regard to contracts. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.
Canadian courts have generally accepted that once a contract has been entered into, the parties must perform their respective obligations in good faith, even if there is no express contractual provision to this effect in the contract itself. This duty of good faith performance either arises by operation of law, within the parameters of what the court considers to be fair dealing between the parties or, alternatively, is an implied term of the contract, particularly where required to give the agreement business efficacy.

Cases in which a duty of good faith has been implied have been viewed as falling into three broad categories: (i) those imposing a duty to co-operate in achieving the objectives of the agreement; (ii) those imposing limits on the exercise of discretionary powers provided for in the contract; and (iii) those precluding parties from evading contractual duties, such as by engaging in conduct not strictly prohibited by the letter of their agreement, but that effectively defeats the other party's contractual rights. A duty of good faith may also arise from one party's representations or undertakings to the other party. Whether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to a duty of good faith conducted itself fairly throughout the process. Lastly, whether or not there is good faith is dependent on the facts, circumstances and contractual terms.

Footnotes


4. P.D. Finn, "The Fiduciary Principle", in T.G. Youdan, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989); see also **Canadian Imperial Bank of Commerce v. Ohlson** (1997), 1997 CarswellAlta 1050 (Alta. C.A.) (unconscionability, like undue influence and duress, aiming to temper ideal of freedom to contract with need to prevent abuse and protect the weak; doctrine permitting application of judicial discretion to excuse obligant from performing contract); **Deforest v. Deforest** (1982), 1982 CarswellSask 175 (Sask. C.A.) ("constructive fraud in equity including two related but distinct notions: agreement subject to rescission if obtained by "undue influence" or constituting "unconscionable bargain").

5. **Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.** (2016), 2016 CarswellBC 94 (B.C. S.C.); affirmed (2016), 2016 CarswellBC 2763 (B.C. C.A.) (giving appropriate regard to contractual interests of party merely meaning to refrain from undermining interests in bad faith and not requiring counterparty to serve these interests or disregard its own interests; no breach of implied duty of good faith in exercising contractual discretion to allocate waste volumes without also compensating for financial consequences of allocation; compensation sought not legitimate contractual interest derived from parties’ agreement, and would rather be exercise in re-writing contract based on what now seems fair); P.D. Finn, "The Fiduciary Principle", in T.G. Youdan, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989).


(Ont. C.A.) (Canadian courts not recognizing independent stand-alone duty of good faith, creating new, unbargained-for rights and obligations or permitting alteration of contract's express terms; rather, courts implying duty of good faith with view to securing performance and enforcement of contract made by parties); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellOnt 390 (Sask. C.A.) (court declining to decide whether independent duty of good faith existing, as finding defendants breaching good faith requirement in performance of agreement transferring business); Newswest Corp. v. Glendar Holdings Ltd. (2001), 2001 CarswellSask 457 (Sask. Q.B.) (trial courts more willing to apply concept of good faith than appellate courts, which largely uphold trial decisions without specific reference to good faith obligation; too soon to conclude Canadian courts have recognized as general principle that contracts to be performed in good faith); but see Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.) (Supreme Court of Canada creating new common law duty under broad umbrella of good faith performance of contracts and holding that there is general duty of honesty in contractual performance).

Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (motions judge erring by striking plea of purchaser of shares regarding seller's duty to disclose facts coming to its attention during due diligence potentially prejudicing purchaser's position); Newswest Corp. v. Glendar Holdings Ltd. (2001), 2001 CarswellSask 457 (Sask. Q.B.) (trial courts more willing to apply concept of good faith than appellate courts, which largely uphold trial decisions without specific reference to good faith obligation; too soon to conclude Canadian courts have recognized as general principle that contracts must be performed in good faith); see also Belobaba, "Good Faith in Canadian Contract Law", 1985 Special Lectures of the Law Society of Upper Canada (Richard De Boo Publishers, 1985) at p. 73; Bridge, "Does Anglo-Canadian Law Need a Doctrine of Good Faith?" (1984), Canadian Business Law Journal 413; McCamus, "The Duty of Good Faith Contractual Performance at Common Law" (paper presented to the N.J.I.: Civil Law Seminar, Contract Law: From Form to Remedies, Osgoode Hall Law School, May 17, 2000 (unpublished)); Tetley, "Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering" (2004), 35 JMLC 561.


Aldo Group Inc. v. Moneris Solutions Corp. (2015), 2015 CarswellOnt 4734 (Ont. S.C.J.) (Canadian courts not recognizing stand-alone duty of good faith that is independent from terms of contract or objectives that emerge from those provisions); Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2678 (S.C.C.) (tenant not owing duty of care to landlord in renewal negotiations such that negligence claim could be made for economic loss arising out of conduct of negotiations); National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc. (2005), 2005 CarswellAlta 1728 (Alta. Q.B.) (landlord assuming existing lease with tenant manufacturer; tenant alleging landlord breached contractual duty of good faith in failing to warn tenant that tenant polluting environment; Alberta law not recognizing general duty of good faith between contracting parties and case outside category of special relationships where such duty acknowledged); Princeton Light & Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.) (while Canadian courts not recognizing independent duty, standard electricity supply contract including duties of good faith and fair dealing; bad faith conduct evident); 1193430 Ontario Inc. v. Boa-Franc (1983) Ltée (2005), 2005 CarswellOnt 5661 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 2317 (S.C.C.) (both parties believing contract obliging them to act in good faith; questionable whether general duty of good faith could require party to disclose change in ownership to other party, since creating new, unbargained-for obligation independent from contract's terms and parties' objectives); IT/NET Inc. v. Cameron (2006), 2006 CarswellOnt 201 (Ont. C.A.) (no stand-alone good faith duty recognized by Canadian courts); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (Canadian courts not recognizing independent stand-alone duty of good faith, creating new, unbargained-for rights and obligations or permitting alteration of contract's express terms; rather, courts implying duty of good faith with view to securing performance and enforcement of contract made by parties); Rogers & Rogers Inc. v. Pinehurst Woodworking Co. (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.); Amaren Corp. v. Cara Operations Ltd. (1999), 1999 CarswellOnt 350 (Ont. Gen. Div.) (while no independent duty of good faith and fair dealing in Ontario, duty existing to fulfill obligations of contract in good faith); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (court declining to decide whether independent duty of good faith existing, as party breaching good faith requirement in performing agreement transferring business); but see Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.) (Supreme Court of Canada creating new common law duty under broad umbrella of good faith performance of contracts and holding that there is general duty of honesty in contractual performance); Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 1991 CarswellNS 320 (N.S. T.D.); affirmed on other grounds (1992), 1992 CarswellNS 518 (N.S. C.A.) (law requiring contracting parties to exercise rights honestly, fairly and in good faith; duty breached when party acting in "bad faith", defined as conduct contrary to community standards of honesty, reasonableness or fairness); LeMesurier v. Andrus (1986), 1986 CarswellOnt 670 (Ont. C.A.); leave to appeal refused (1986), 74 N.R. 239 (note) (S.C.C.) (vendors and purchasers owing duty to each other to perform contract honestly and in good faith; "approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts"); TSP-Intl Ltd. v. Mills (2006), 2006 CarswellOnt 4037 (Ont. C.A.) (contractor, exercising
discretionary contractual power, making unilateral contractual decisions defeating contractual objectives; trial judge finding conduct not according with objective community standards of reasonableness and fairness; however, appellate court finding that duty of good faith, not pleaded by parties, should not be ruled on; Elite Specialty Nursing Services Inc. v. Ontario (2002), 2002 CarswellOnt 2575 (Ont. S.C.J.) (exercise of discretion in allocation of nursing care cases among several facilities; court opining that explicitly recognizing doctrine of good faith would make law more certain, understandable and fair, and avoid interpretive judicial contortions to obtain desired result); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (plaintiffs purchasing goodwill of defendants' business and parties forming new business; after parties falling out, plaintiffs purchasing defendants' shares, and defendants later breaching non-competition and non-solicitation agreements; defendants, owing obligation to use best efforts to transfer their clients to new business, breaching duty of good faith in performance of contract; defendants owing plaintiffs fiduciary duty independent of contract based on power to affect plaintiffs' interests); see also McCamus, The Law of Contracts (Irwin Law, 2005) at p. 806; McCamus, "The Duty of Good Faith Contractual Performance at Common Law" (paper presented to the N.J.I.: Civil Law Seminar, Contract Law: From Form to Remedies, Osgoode Hall Law School, May 17, 2000 (unpublished)); Belobaba, "Good Faith in Canadian Contract Law", 1985 Special Lectures of the Law Society of Upper Canada (Richard De Boo Publishers, 1985) at p. 73; Swan, "Whither Contracts: A Retrospective and Prospective Overview", Special Lectures of the Law Society of Upper Canada: 1984, In Transition: Contracts (Richard De Boo Publishers, 1984), p. 125.

Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2679 (S.C.C.) (although tenant not owing duty of care to landlord in renewal negotiations such that negligence claim could be made for economic loss arising out of conduct of negotiations, whether contractual negotiations to be governed by duty of good faith described as "question for another time"); Princeton Light & Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.); Stelco Inc., Re (2006), 2006 CarswellOnt 335 (Ont. C.A.) (specific wording in memorandum of understanding calling on parties to negotiate and pursue opportunities in good faith; existence of stand-alone duty of good faith, independent from terms expressed in contract, not settled; not plain and obvious that statement of claim should be struck); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (motions judge erring by striking plea of purchaser of shares regarding seller's duty to disclose facts coming to its attention during due diligence potentially prejudicing purchaser's position); 530888 Ontario Ltd. v. Sobeys Inc. (2001), 2001 CarswellOnt 240 (Ont. S.C.J. [Commercial List]) (conflicting authority and academic debate about independent good faith duty in contract law; erroneous to conclude such claim could not possibly succeed); McColl-Frontenac Inc. v. Petro-Canada Inc. (1998), 1998 CarswellOnt 6224 (Ont. Gen. Div.) (court holding, without deciding, that assuming independent common law obligation of good faith was developing in Canadian contract law, no such duty in light of bargain made by parties).

Bhasin v. Hrynew (2014), 2014 CarswellAlta 2046 (S.C.C.); Canaccord Genuity Corp. v. Pilot (2015), 2015 CarswellOnt 16345 (Ont. C.A.) ("two incremental steps" doctrine applied); Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd. (2016), 2016 ONCA 324 (Ont. C.A.); leave to appeal refused (2017), 2017 CarswellOnt 1201 (S.C.C.) (duty of good faith in performance of contractual obligations discussed; Court of Appeal reversing decision to strike claim that duty of good faith owed by franchisor to franchisee, despite lack of direct contractual relationship, based on vulnerability of franchisee, level of control and special obligations; not plain and obvious that claim could not succeed; novel claim requiring decision based on full record); Mayotte v. Ontario (2016), 2016 CarswellOnt 2647 (Ont. S.C.J.) (court rejecting claim from private issuers of vehicle licences under contract with province that remuneration unreasonable and in bad faith as a matter of substance; no precedent for commercial reasonableness being tethered to outcome as opposed to process or performance; no indication that discretion of province used in bad faith during process of determining remuneration).


See §§222, 223, 233; Trusts.


directly with another joint venturer's bankers to secure direct benefits in liquidation of joint venture's assets and payments of its debts); see also WHA 820 Holdings Ltd. v. Daymax Management Inc. (2003), 2003 CarswellBC 3103 (B.C. S.C.) (agreement requiring each party to bear proportionate responsibility for any liabilities incurred by defendants respecting development project, giving rise to good faith obligation on part of defendants, including duty to plaintiffs to disclose activities affecting project).

See §§187-199, 204, 207; Agency; see also Trophy Foods Inc. v. Scott (1995), 1995 CarswellNS 218 (N.S. C.A.) (while principal and agency relationship giving rise to fiduciary duties, extent of such duties vary; equitable duties imposed should reflect nature of relationship and, particularly, terms of contract between commercial parties).

Whiten v. Pilot Insurance Co. (1999), 1999 CarswellOnt 269 (Ont. C.A.); reversed on other grounds (2002), 2002 CarswellOnt 537 (S.C.C.) (insurer's high handed and reprehensible conduct toward policyholder in handling claim breaching duty of good faith and constituting independent actionable wrong justifying punitive damages award); Shea v. Manitoba Public Insurance Corp. (1991), 1991 CarswellBC 60 (B.C. S.C.) (insurer's exclusive discretionary power to settle claims placing insured at insurer's mercy; insured's vulnerability imposing on insurer duties of good faith and fair dealing, requiring at least as much consideration to insured's interests as to own interests, and disclosure of all material information touching on insurer's position in litigation and settlement negotiations); Ernst & Young Inc. v. Chartis Insurance Co. of Canada (2014), 2014 CarswellOnt 891 (Ont. C.A.) (duty to act in good faith separate from duty to compensate for loss covered by policy and thus giving rise to separate and independent cause of action); see also Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co. (1994), 1994 CarswellOnt 661 (Ont. C.A.) (excess insurer's duty to act in good faith not giving rise to general fiduciary duty); Manifest Shipping Co. v. Uni-Polaris Shipping Co. (2001), [2001] 2 W.L.R. 170 (U.K. H.L.); see also §§25 (regarding good faith during negotiations), 437, 951; Insurance.

Martel Building Ltd. v. R. (2000), 2000 CarswellNat 2678 (S.C.C.) (full extent of obligation of fair and equal treatment to be determined from tender documents); M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd. (1999), 1999 CarswellAlta 301 (S.C.C.) (implied obligation that only compliant bid would be accepted); Double N Earthmovers Ltd. v. Edmonton (City)(2005), 2005 CarswellAlta 276 (Alta. C.A.); affirmed (2007), 2007 CarswellAlta 36 (S.C.C.) (duty of fairness to biddernot including obligation to investigate allegations concerning capacity of another bidder to comply with own bid prior to acceptance); J. Oviatt Contracting Ltd. v. Kitimat General Hospital Society (2002), 2002 CarswellBC 1506 (B.C. C.A.) (hospital able to rely on privilege clause, as no bad faith found); Chinux Aggregates Ltd. v. Abbotsford (Municipal District) (1989), 1989 CarswellBC 203 (B.C. C.A.) (implied term of fairness inherent aspect of tendering process; unannounced local preference policy breaching duty to treat all bidders fairly); Canadian Logistics Systems Ltd. v. Canadian National Transportation Ltd./Transports Nationaux du Canada Ltée (2000), 2000 CarswellBC 400 (B.C. S.C.) (breach in allowing successful bidder to amend non-compliant bid, and in failure to fairly evaluate plaintiff's bid); Rockwood v. Eastern Newfoundland & Labrador Regional Health & Community Services Board (2004), 2004 CarswellNfld 178 (N.L. T.D.) (privilege clause clearly reserving right not to proceed with tender; board, required to act fairly and in good faith, not obliged to any bidder to pay more than it felt it could afford, investigate other financing sources, or rework objectives to award contract to particular bidder); Health Care Developers Inc. v. Newfoundland (1996), 1996 CarswellNfld 352 (Nfld. C.A.) (doctrine of good faith part of law of tendering for government contracts; bad faith to award something other than contract B, to fail to reject non-compliant tenders, or to award contract B on basis of undisclosed preference); Provincial Fence Products Ltd. v. Conception Bay South (Town) (2013), 2013 CarswellNfld 233 (N.L. T.D.) (town acting in good faith in call for tenders; evidence supported town's reasons for cancelling tender as being budgetary in nature); but see McNamara Construction Co. v. Newfoundland Transshipment Ltd. (2002), 2002 CarswellNfld 124 (Nfld. T.D.) (good faith not implied in construction contract on basis of either intention of parties or implication by law; unlike public tendering cases, circumstances not engaging broad issues of public policy and interest); see also §§25 (regarding good faith in negotiations), 47; Building Contracts.


GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1996 CarswellOnt 1434 (Ont. Gen. Div. [Commercial List]) (grantor of right of first refusal must act reasonably and in good faith; duty not discharged where essential purpose of sale to third party being to frustrate right of first refusal); Landymore v. Hardy (1991), 1991 CarswellNS 102 (N.S. T.D.) (grantor of right of first refusal required to offer property at lowest fair market price that prepared to accept; relations to be characterized by good faith and reasonableness); but see 1376273 Ontario Inc. v. Knob Hill Farms Ltd. (2003), 2003 CarswellOnt 2239 (Ont. S.C.J.); affirmed (2003), 2003 CarswellOnt 4936 (Ont. C.A.) (in case of exercise of simple option to purchase, no duty of good faith on vendor to remind purchaser of expiry date of option or to tell purchaser that request for extension will be denied); Morningstar Homes Ltd. v. 545918 B.C. Ltd. (2005), 2005 CarswellBC 96 (B.C. S.C.) (option to purchase; term requiring reasonable efforts to register subdivision plan not required as matter of business efficacy).
Wallace v. United Grain Growers Ltd. (1997), 1997 CarswellMan 455 (S.C.C.) (unlike ordinary commercial contract, power inequality informing all aspects of employment relationship and requiring courts to hold employers to duty of good faith and fair dealing in manner of dismissal; breach of obligation compensable by adding to length of notice period; however, dismissed employee having no right to sue in contract or tort for bad faith conduct in manner of dismissal); see also McKinley v. BC Tel (2001), 2001 CarswellBC 1335 (S.C.C.) ("... obligations [of good faith and fair dealing] subsist throughout the employment relationship until, and including its termination" (in obiter); Babcock v. Canada (Attorney General) (2005), 2005 CarswellBC 937 (B.C. S.C.) (implied obligation of good faith not extending beyond dismissal; applying only to manner of dismissal); Gismondi v. Toronto (City) (2003), 2003 CarswellOnt 1498 (Ont. C.A.); leave to appeal refused (2004), 2004 CarswellOnt 718 (S.C.C.) ("Wallace damages" not limited to employer's acts at very moment of dismissal; in appropriate circumstances may include employer's conduct both pre- and post-termination, but only as component of manner of dismissal); Barnard v. Testori Americas Corp. (2001), 2001 CarswellPEI 29 (P.E.I. C.A.) (employment contracts not carrying implied term of good faith and fair dealing); Bower v. J.M. Schneider Inc. (1986), 1986 CarswellBC 397 (B.C. C.A.) (trial judge erroneously implying term to ensure employee's mortgage subsidy payment continuing to end of reasonable notice of termination; court unable to rewrite business contracts to impose own notion of fairness or to imply term contradicting contractual express term).

Joo v. Shin (2005), 2005 CarswellBC 1460 (B.C. S.C.) (franchisor terminating relationship by bad faith conduct, substantially nullifying benefits for which franchisee contracted); Imasco Retail Inc. v. Blanaru (1996), 1996 CarswellMan 591 (Man. C.A.); Key Equipment Finance Canada Ltd. v. Jacques Whitford Ltd. (2006), 2006 CarswellNS 81 (N.S. C.C.) (special relationship with franchisee including positive obligation to disclose accurate financial information and facts to prospective franchisee at time of entering into franchise agreement); Ismail v. Treats Inc. (2004), 2004 CarswellNS 24 (N.S. C.C.) (applicable duty of care in franchise relationship one of good faith, including requirement to prepare accurate pro forma statements and generally to disclose accurate financial information; and facts to prospective franchisee at time of entering into franchise agreement); Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.) (franchisees owning duty of good faith to franchisees even apart from Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3); Triple 3 Holdings Inc. v. Jan (2004), 2004 CarswellOnt 2649 (Ont. S.C.J.) (franchisor, abusing power and acting dishonestly, liable for $350,000 in punitive damages); Mincom Corona Realty Inc. v. Mincom Realty Systems Inc. (2003), 2003 CarswellOnt 3370 (Ont. S.C.J.); varied on other grounds (2004), 2004 CarswellOnt 4779 (Ont. C.A.) (franchisor's admission of purposefully leaving language of franchise agreement ambiguous demonstrating bad faith in dealing with franchisee; negotiation of sale of adjoining territory contrary to agreement constituting act of bad faith revealing franchisor's intention not to be bound unless agreement suited its purposes; punitive damages warranted); 1005633 Ontario Inc. v. Winchester Arms Ltd. (2000), 2000 CarswellOnt 2207 (Ont. S.C.J.); affirmed (2000), 2000 CarswellOnt 4748 (Ont. C.A.) (failure of good faith and performance in establishment of pub franchise); Pizza Pizza Ltd. v. 805837 Ontario Inc. (1997), 1997 CarswellOnt 5494 (Ont. Gen. Div.) (no evidence of lack of good faith on part of franchisor in calculating payments to be made under agreements, and no evidence that calculations inaccurate); Perfect Portions Holding Co. v. New Futures Ltd. (1995), 1995 CarswellOnt 3126 (Ont. Gen. Div.); Courtesy Chrysler (1987) Ltd. v. Chrysler Canada Inc. (2012), 2012 CarswellAlta 1843 (Alta. Q.B.); see also McKinley Motors Ltd. v. Honda Canada Inc. (1989), 1989 CarswellNfld 9 (Nfld. T.D.) (franchisor allocating limited resources or products among various distributors required to act in good faith and not rely on pretexts for action outside scope of circumstances contemplated by contract); Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd. (2005), 2005 CarswellOnt 1954 (Ont. S.C.J.) (duty imposed on car manufacturer to act fairly to dealership, as relationship akin to franchise; decision to terminate dealership agreement exercised unfairly and in bad faith); but see Sultan v. Blenz The Canadian Coffee Co. (2005), 2005 CarswellBC 877 (B.C. S.C.); affirmed (2005), 2005 CarswellBC 2862 (B.C. C.A.) (franchise agreement containing entire agreement clause but no provision for renewal; while relationship between parties imposing duty of good faith upon franchisor short of fiduciary duty, duty of fair dealing not compelling party to renew expiring relationship when not commercially reasonable to do so); Sultani v. Blenz The Canadian Coffee Co. (2005), 2005 CarswellOnt 877 (B.C. S.C.); affirmed (2005), 2005 CarswellOnt 2862 (B.C. C.A.) (franchise agreement containing entire agreement clause but no provision for renewal; while relationship between parties imposing duty of good faith upon franchisor short of fiduciary duty, duty of fair dealing not compelling party to renew expiring relationship when not commercially reasonable to do so); 530888 Ontario Ltd. v. Sobeys Inc. (2001), 2001 CarswellOnt 600 (Ont. S.C.J. [Commercial List]) (no inherent right existing to force franchisor to enter into new sublease with franchisee where sublease agreement expiring and containing no option to renew); see also §26 (regarding duty of good faith in negotiating in context of long term relationship).

Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 1989 CarswellOnt 126 (S.C.C.) (fiduciary relationships not to
be presumed in commercial contracts, as equity’s drastic remedies reserved for special circumstances; instead, parties should protect themselves by contract; National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc. (2005), 2005 CarswellAlta 1728 (Alta. Q.B.) (tenant manufacturer alleging successor landlord breaching contractual duty of good faith in failing to warn tenant that tenant polluting environment; Alberta law not recognizing general duty of good faith between contracting parties and case outside category of special relationships where such duty acknowledged); Weiss v. Schad (2002), 2002 CarswellOnt 1498 (Ont. C.A.) (share purchase agreements not falling into special class of contracts of utmost good faith imposing obligation to disclose); 962789 Ontario Ltd. v. Newmarket Plaza Ltd. (2006), 2006 CarswellOnt 5086 (Ont. S.C.J.) (landlord and tenant relationship not analogous to franchise relationship; landlord having no control over day-to-day operation of tenant's business, and lease being typical commercial bargain between parties of equal bargaining power; landlord not owing tenant duty of good faith regarding type of business it leased vacant premises to); Rogers & Rogers Inc. v. Pinheurst Woodworking Co. (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.) (supplier and installer of store fixtures claiming manufacturer breached good faith in misappropriating business opportunity; as relationship between parties not fiduciary, no duty of good faith on manufacturer in fiduciary capacity and no operative good faith standard breached; provided manufacturer not breaching restrictive covenant, entitled to act in own self-interest without regard to supplier's interests); see also Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd. (1999), 1999 CarswellAlta 141 (Alta. C.A.); reconsideration refused (1999), 1999 CarswellAlta 348 (Alta. C.A.); leave to appeal refused (2000), 253 N.R. 193 (note) (S.C.C.) (duties of loyalty and avoidance of conflict of interest inherent in fiduciary relationship unlikely to be implied in absence of such relationship; while code of professional ethics cannot create fiduciary relationship, may be considered in determining scope of fiduciary relationship); 978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 2001 CarswellOnt 1290 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 3809 (S.C.C.) (no duty of good faith in negotiations where no special relationship between parties; mentor relationship not displacing normal contractual principle of self-reliance, since defendant in ascendant position; plaintiff not having good faith obligation to disclose clear and visible termination provision to defendant who signed agreement without reading it; defendant’s trust in plaintiff insufficient to create good faith obligation); Courtesy Chev Olds Ltd. v. Hadfield (2006), 2006 CarswellOnt 1937 (Ont. S.C.J.) (defendant owing implied contractual duty of good faith to car lessee to notify of proposed repairs and allow inspection prior to repairs; also breaching duty by not showing labour rates and hours spent in billing to customer); Khorshid v. Donway Ford (2005), 2005 CarswellOnt 7968 (Ont. S.C.J.) (car repairers owing implied good faith duty); but see Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (2001), 2001 CarswellOnt 579 (Ont. C.A.), per Weiler J.A., concurring in result (developer marketing condominium project designed around recreation area to be conveyed to condominium corporations, but then deciding to develop it; duty of good faith to condominium owners owing due to manner in which developer marketed property, unequal bargaining power, and owners’ lack of access to information concerning future development of recreation area lands); Ward v. Manufacturers Life Insurance Co. (2006), 2006 CarswellOnt 3391 (Ont. S.C.J.); affirmed (2007), 2007 CarswellOnt 8048 (Ont. C.A.) (producers’ agreement prepared by successor insurer overwhelmingly favouring insurer despite plaintiffs’ long term dedicated service to predecessor companies; plaintiffs’ vulnerability substantial and known to insurer; unequal bargaining power); Canadian Imperial Bank of Commerce v. Brown (1999), 1999 CarswellOnt 4107 (Ont. S.C.J.) (bank, making loan to debtors under conflict of interest, having duty to act in good faith, regardless of lack of prior or fiduciary relationships between bank and debtors); Computer Workshops Ltd. v. Banner Capital Market Brokers Ltd. (1988), 1988 CarswellOnt 107 (Ont. H.C.); affirmed (1990), 1990 CarswellOnt 1445 (Ont. C.A.) (implied term in contract for supply of computer hardware that vendor not to sell similar system to competitor; customer’s trust and confidence in supplier creating fiduciary duties); Ascent Financial Services Ltd. v. Blythman (2006), 2006 CarswellSask 83 (Sask. Q.B.); affirmed (2007), 2007 CarswellSask 390 (Sask. C.A.) (plaintiffs purchasing goodwill of defendants’ business and parties forming new business; after parties falling out, plaintiffs purchasing defendants’ shares, and defendants later breaching non-competition and non-solicitation agreements; defendants, owing obligation to use best efforts to transfer their clients to new business, breaching duty of good faith in performance of contract; defendants owing plaintiffs fiduciary duty independent of contract based on power to affect plaintiffs’ interests).


33 O’Neill v. General Motors of Canada Ltd. (2013), 2013 CarswellOnt 9803 (Ont. S.C.J.) (duty of good faith inherent in employment relationship; court thus concluding that duty of good faith favouring plaintiff’s claim that benefits could not be reduced after employee had retired); Ward v. Manufacturers Life Insurance Co. (2007), 2007 CarswellOnt 8048 (Ont. C.A.); Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 1991 CarswellOnt 320 (N.S. T.D.); affirmed on other grounds (1992), 1992 CarswellOnt 518 (N.S. C.A.) (good faith standard breached when party acting in bad faith manner in performing contract, contrary to community standards of honesty, reasonableness or fairness; insistence on good faith requirement in discretionary conduct in contractual formation, performance and enforcement fulfilling courts’ obligations to justly resolve disputes between contracting parties); TSP-Intl Ltd. v. Mills (2006), 2006 CarswellOnt 4037 (Ont. C.A.) (independent contractor providing service at lower cost directly to employer’s customer; trial judge finding duty of good faith may arise from parameters of parties’ contractual relationship and conduct, rather than inherent power imbalance in relationship; as
contractor, exercising discretionary power, making unilateral decisions defeating contractual objectives, conduct not according
with objective community standards of reasonableness and fairness; however, appellate court finding that as duty of good
faith not pleaded, should not be ruled on); LeMesurier v. Andrus (1986), 1986 CarswellOnt 670 (Ont. C.A.); leave to appeal
refused (1986), 74 N.R. 239 (note) (S.C.C.) (purchaser refusing to close purchase and sale agreement because fence and
curb of driveway placed over lot line by less than one foot; reliance on rescission clause not justified; vendors and purchasers
owing duty to each other to perform contract honestly and in good faith; "approach may be merely an example of the
development of an independent doctrine of good faith in contract law at least in the performance of contracts"); Elite Specialty
care cases among several facilities; explicit recognition of doctrine of good faith making law more certain, understandable and
fair, and avoiding judicial interpretive contortions to obtain desired result); but see Wallace v. United Grain Growers
Ltd. (1997), 1997 CarswellMan 455 (S.C.C.) (dismissed employee having no right to sue in contract or tort
for bad faith conduct in manner of dismissal; however, unlike ordinary commercial contract, power inequality informing all
aspects of employment relationship, requiring courts to hold employers to duty of good faith and fair dealing in manner of
dismissal; breach of obligation compensable by adding to length of notice period); Mesa Operating Ltd. Partnership v. Amoco
((requiring performance of contract according to reasonable expectations of parties obviating need for any separate doctrine of
good faith; duty arising as matter of contractual interpretation rather than imposed by law); Salt Ventures Inc. v.
quarry owing duty not to nullify reasonably expected benefits by personally exploiting another quarry project; contract creating
reasonable expectations of parties by implication and not based on any good faith doctrine); 1193430 Ontario Inc. v. Boa-
2317 (S.C.C.) (parties believing that distributorship contract obliging them to act in good faith, particularly since involving on-
going relationship; however, general duty of good faith not requiring distributor to disclose change in ownership to other party,
as creating new, unbargained for right and obligation independent from contract's terms and parties' objectives); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (implied duty of
good faith not having gone so far as to create new, unbargained-for rights and obligations, nor used to alter contract's express
terms); see also D. Waters, "Corporate Behaviour and Equity's Standards of Conduct" (2004), C.L.R. (3d) 248 (arguing that
good faith doctrine of equity going beyond literal and implied terms of contract, and emphasizing spirit of agreement and
fairness prevailing between parties); D. Stack, "The Two Standards Of Good Faith In Canadian Contract Law" (1999), 62
Sask. L. Rev. 201 (one standard of good faith relying on concepts like commercial standards, fair play, fairness, and
reasonableness; second standard relying on expectations and intentions of contracting parties as manifested in their contract;
court applying first standard looking to a tort-like norm outside parties' agreement to decide if bad faith has occurred, while
court employing latter arriving at appropriate standard of conduct by interpreting parties' agreement).

Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. (1994), 1994 CarswellAlta 89 (Alta. C.A.); leave to appeal refused (1994), 179 N.R. 80 (note) (S.C.C.) (party unable to exercise contractual power in way substantially nullifying contractual objectives or causing significant harm to other party contrary to parties’ original purposes; defendant failing to consider both main methods of pooling under royalty agreement, contrary to industry practice and parties’ expectations); CivicLife.com Inc. v. Canada (Attorney General) (2005), 2005 CarswellOnt 4228 (Ont. S.C.J.); reversed in part on other grounds (2006), 2006 CarswellOnt 3769 (Ont. C.A.) (implied term of contract to build internet portal that government would act in good faith so as not to nullify software developers’ reasonable expectations); Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038 (Ont. C.A.) (discretion under contract must be exercised reasonably, fairly and with regard to how other party’s interests affected); EdperBrascan Corp. v. 177373 Canada Ltd. (2000), 2000 CarswellOnt 4084 (Ont. S.C.J.); affirmed on other grounds (2002), 2002 CarswellOnt 698 (Ont. C.A.) (contracting parties obliged to act in good faith in some circumstances, such as duty to use best efforts, and in exercise of discretion (in obiter)); Greenberg v. Meffert (1985), 1985 CarswellOnt 727 (Ont. C.A.); leave to appeal refused (1985), 64 N.R. 156 (note) (S.C.C.) (contract providing that payment of commission to real estate agent after termination of agreement being at agency’s sole discretion; agency required to act reasonably, fairly, and with regard to how other party’s interests affected); Elmdale Investments Ltd. v. Myers (2001), 2001 CarswellOnt 4499 (Ont. S.C.J.) (purchaser obliged to act in good faith in dealing with conditions set out in agreement of purchase and sale; not entitled to exercise discretion capriciously); see also P. & G. Cleaners Ltd. v. Johnson (1995), 1995 CarswellMan 187 (Man. Q.B.) (vendor of shares having absolute right to withhold consent to purchaser acquiring shares in related company, unless business efficacy necessitating limitation of reasonableness; however, minimal duty to act in good faith existing); Muhammad v. Mental Health Program Services of Metropolitan Toronto (2006), 2006 CarswellOnt 5013 (Ont. S.C.J.); affirmed (2008), 2008 CarswellOnt 2370 (Ont. C.A.) (contract stipulating that transfer of contract could be unreasonably withheld; implied duty of good faith would contradict terms of contract); Degelder Construction Co. v. Dancorp Developments Ltd. (2000), 2000 CarswellBC 1484 (B.C. S.C. [In Chambers]); affirmed on other grounds (2002), 2002 CarswellBC 2218 (B.C. C.A.) (mortgagee held to subjective duty of acting in good faith; no implied term placing objective duty upon mortgagee to reasonably exercise powers under mortgage); J.D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005); J.D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2005) 29 Advocates’ Q. 72; see also §767.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1998), 1998 CarswellAlta 1088 (Alta. Q.B.) (debt restructuring agreement creating reasonable expectation that company would sell designated assets and give proceeds to bank when unable to pay dividends or redemptions; company breaching duty of good faith by refusing to sell designated assets); Princeton Light & Power Co. v. MacDonald (2005), 2005 CarswellBC 1254 (B.C. C.A.) (duties of good faith and fair dealing implied elements of standard electrical utility supply contract; utility acting in bad faith in unreasonably back-billing customer, justifying punitive damages); Schlussel v. Maier (2001), 2001 CarswellBC 193 (B.C. S.C.) (in unreasonably back-billing customer, justifying punitive damages); see also Kubota Canada Ltd. v. Merchant Private Ltd. (1997), 1997 CarswellOnt 1685 (Ont. Gen. Div.) (good faith equally applicable to all contracts, including lease and financing agreements; allowing lessor to retain payment resulting from lessee’s mistake in failing to give notice under technical provisions of lease inconsistent with good faith and fair dealing); J.D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005); J.D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith in Contractual Performance" (2005) 29 Advocates’ Q. 72; but see M.A. Hanna Co. v. Sydney Steel Corp. (1995), 1995 CarswellOnt 45 (N.S. S.C.); Richard B. Potter, Q.C., Annotation; see also §§759-766.

Markakis v. Yuck (2003), 2003 CarswellAlta 208 (Alta. Q.B.) (defendant’s representations when soliciting investment in business ventures from plaintiffs carrying undertaking that defendant would act reasonably and in good faith, arising both as matter of contractual interpretation and by operation of law); Rodaro v. Royal Bank (2000), 2000 CarswellOnt 281 (Ont. S.C.J.); reversed on other grounds (2002), 2002 CarswellOnt 1047 (Ont. C.A.) (bank’s statements and fact that bank
expecting future requests for loans from developer creating duty to act in good faith regarding requests for future loans; see also No. 151 Cathedral Ventures Ltd. v. Gartrell (2003), 2003 CarswellBC 2974 (B.C. S.C.) (since land owners extracting undertaking from developer to advise them of any disadvantage resulting from contract's implementation, reasonable for developer to expect owners not to take advantage of it; owners, contrary to such known expectation, deliberately delaying advising developer until expiry of deadline for condition removal, that developer's draft new offer considered repudiation of contract; breach of implied term of good faith); but see Galaxy Sports Inc. v. Umbro Holdings Ltd. (2005), 2005 CarswellBC 481 (B.C. S.C.) (relationship between parties nothing other than licensor/licensee in commercial enterprise; merely negotiating toward acquisition agreement not creating fiduciary relationship; representations not made with intention of promoting sale of licences).
