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GOOD FAITH NOT GOOD FOR CONSISTENCY: IRRECONCILABLE RESULTS IN *WASTECH* AND *CALLOW*

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I. INTRODUCTION

In 2019, the Supreme Court of Canada concurrently heard appeals in two separate cases, *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*[1] and *CM Callow Inc v Zollinger*.[2] The cause for combining the cases was the commonality of the issues raised between them—specifically, extra-contractual obligations said to arise from the general organizing principle of good faith in Canadian contract law. To the surprise and consternation of many, the release of the Court's reasons was unusually delayed after its hearing, and furthermore, the reasons—ultimately released in late 2020—covered only *Callow*. There was no mention of *Wastech*, and no explanation for the disjuncture of the two judgments. However, this decoupling has turned out to be somewhat fitting, as it augured the sharp divergence in the underlying rationale of the decisions that became readily apparent when *Wastech* was released in early 2021.

The underlying difference between the two decisions relates to the implicit understanding reflected in each case with regard to what "good faith" is, and what kind of conduct will contravene the requirements good faith imposes. In this article, I will

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1 2021 SCC 7 [*Wastech*].

2 2020 SCC 45 [*Callow*].

demonstrate why this is highly problematic in three steps: first, by reiterating that establishing an underlying rationale for good faith is a fundamental prerequisite for the imposition of good faith obligations; second, by identifying and explaining the divergent underlying rationales apparent in *Wastech* and *Callow*; and finally, by comparing the two different rationales apparent in each set of reasons to demonstrate their inconsistency and thus, the alarming incoherency of the Court's approach to good faith.

II. WHAT IS THE *RAISON* FOR A RATIONALE?

Historically, the common law has treated contracts akin to laws that parties make unto themselves.[3] Courts' interference in this

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[3] See especially Patrick S Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1985). Atiyah provides at 408 that:

> The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law. Its influence is to be found in every corner of contract law, but I shall limit myself here to a number of key areas. It is necessary to stress at the outset that the importance attached to free choice, and to the idea that a contract was a vehicle for giving effect to the will of the parties, had a profound effect on the very functions of contract law, as it was perceived by the Courts. The primary function of the law came to be seen as purely facultative, and the function of the Court was merely to resolve a dispute by working out the implications of what the parties had already chosen to do.

See also Gerald HL Fridman, *The Law of Contract in Canada*, 2nd ed (Toronto: Carswell, 1986). Fridman characterized a contract at 3–4 as:

> [A] jural relation that is founded upon agreement, that is, upon the manifestation of a mutual concordance between the parties as to the existence, nature and scope of their rights and duties. A contract is a legally recognized agreement between two or more persons, giving rise to obligations that may be enforced in the courts. By such an agreement the parties not only restrict their present or future freedom to act, by the limitations imposed upon themselves by the agreement, they are creating a legal rule, or set of legal rules . . . binding as regards themselves and only themselves. It might be suggested that, through the device of a contract, parties legislate for themselves, that is to say they create a miniature legal system by and under which they are governed. . . . The parties are taking advantage of the law, and a recognized legal institution, in order to create certain legal consequences.

See also *Dolter v Media House Productions Inc*, [2002] SKQB 228. In an attempt to reconcile the *sanctity of contract* with principles of equity, Justice Klebuc stated at para 18 that:

> It is well recognized that the conduct of daily social and commercial affairs is dependent upon the private legislation negotiated by contracting parties constituting binding obligations upon which other social and commercial activities

practice of private legislating has by and large been very limited.[4] There are proscriptions as to what parties may not contract for—such as gambling and slavery—but these remain scarce and tend to pertain to matters that are more obviously obnoxious or abhorrent.[5] Positive prescription is perhaps rarer still, or at least

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may be undertaken. In the result, the sanctity of contract in our society is of fundamental importance and should only be interfered with in exceptional circumstances.

4 See especially Atiyah, *supra* note 3 at 387:

> By 1870 the Courts had not only adopted the principle of freedom of contract but had extended it to its highest point. The remarks of Jessel M.R. in a case in 1875 are so often quoted, even in modern textbooks, that it is worth remembering that the opinions of the political economists on which freedom of contract had been so firmly established, were already beginning to change significantly by this time. So, too, was much political opinion, as we shall see later. But in the Courts, opinion was still firm in favour of freedom of contract. This is what Jessel M.R. said: "If there is one thing which more than another public policy requires, it is that men of full 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 in that you are not lightly to interfere with this freedom of contract."

See also *Printing and Numerical Registering Co v Sampson*, (1875) LR 19 Eq 462 at 465, 44 LJ Ch 705 [*Sampson*]; Hugh Beale, ed, *Chitty on Contracts*, 33rd ed (London: Sweet & Maxwell, 2018) at paras 1-031–1-032; S M Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 446 [Waddams, *The Law of Contracts*].

5 The list of common law heads of public policy that may lead to a finding of "illegality" are not necessarily closed, and statutory and regulatory prohibitions that may be inadvertently infringed by contracting parties continue to proliferate, but not every statutory infraction attracts the full force of the ex turpi causa rule and considerable support remains for the position set out in Sampson, supra note 4. See *ibid* at 465, wherein Sir George Jessel MR provides that:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because 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. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce

has been historically.[6] Such prescriptions—whether implied in custom, fact or law—have only prevailed where they are not inconsistent with the expressed will of the parties.[7] As such, historically it has arguably been unnecessary for courts or the common law to commit to a theory as to why courts ought to recognize and enforce contracts, or to elucidate some particular purpose in doing so, because only the parties' purposes appeared to matter. Today, we can no longer realistically say this—not as a matter of principle, nor as a matter of practice—in light of the increasing importance of extra-contractual obligations said to emanate from the general organizing principle of good faith.[8] This is because such good faith-type obligations clearly cannot derive their legitimacy or their content from parties' agreements

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> another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further.

See generally Beale, *supra* note 4 at paras 4-190, 16-005–16-009; Waddams, *The Law of Contracts*, *supra* note 4 at paras 562–82 (for further illustrations of historic proscriptions for contracting parties).

6 See e.g. Atiyah, *supra* note 3 at 419–24 (the transition from executed contracts to executory contracts deligitmated judicial intervention and the judicial imposition of terms to an extent, as indicated for instance by the eample given of the reticence of 19th century courts to award interest where the parties had not bargained for it); Gerald HL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 464. See also *Ter Keurs Bros Inc v Last Mountain Valley (Rural Municipality)*, 2021 SKCA 55 (where Ottenbreit JA states that "[w]hile courts will give primacy to the express terms of a contract . . . and should generally 'be cautious in their approach to implying terms to contracts' . . . on occasion, it may be necessary for a court to imply a term in order to resolve a legal dispute" at para 70).

7 See *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 1012–1013 (for an authority for the principle that even terms implied by law can be excluded). See also *G Ford Homes Ltd v Draft Masonry (York) Co Ltd*, (1983) 1 DLR (4th) 262 at 264, 2 CLR 210 (on when a term may be implied in a contract). Per Cory JA, a court tasked with implying a term into a contract must "first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract": *ibid* at 264.

8 Three Supreme Court of Canada decisions have been handed down in the last decade dealing with two of these specific manifestations. See *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*]; *Wastech*, *supra* note 1; *Callow*, *supra* note 2.

as a teleological extension of the same, given that their function is to impose standards or requirements that the parties have not agreed to, and in some respects, to override the terms to which the parties themselves have decided to agree.[9] Instead, such obligations must be said to reflect some other purpose—a purpose of contract law's own.

Unfortunately, if there is a unifying purpose behind good faith obligations and by extension contract law, it has not been identified. More unfortunate still, as I will explain in the following section, it is likely that the good faith decisions rendered to date do not reflect a single coherent purpose at all. Readers may wonder why or whether identifying such a purpose is important if it has not already occurred. To understand why it matters and why it is important, I ask the reader to reflect on what exactly good faith is responding to and why it has arisen in the first place. In short, the answer lies in the kind of behaviour that courts characterize as misfeasance in the context of a particular contractual relationship, but which does not amount to a breach. Such "non-breach misfeasance" poses a quandary for courts who acknowledge that a defendant's conduct does not violate the parties' agreement, contract law, or the law generally, yet whose conduct seems to contravene the *spirit of the game*. Ordinarily, there might not be much that a court can do in response to such conduct, but good faith-type obligations—including the duty of honest performance, and now also the duty to exercise contractual discretion in good faith—have arisen to redress some such *non-breach wrongs*. Readers may further wonder how this is problematic, lack or not of apparent purpose. Of concern is how to determine which behaviour counts as *bad* if we are given no definition of the *spirit of the game* and thus, no clear understanding of the limits to good faith obligations.

Despite causing uncertainty for contracting parties, the absence of an identifiable "spirit of the game" has to date not translated into litigation on the issue. However, disagreements among the judiciary of the Supreme Court of Canada, as well as

[9] See *Bhasin*, *supra* note 8 at paras 74–75; Krish Maharaj, "Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith" (2020) 96 SCLR (2d) 107 at 108–09.

difficulties reconciling *Wastech*, *Callow*, and a third and earlier case—*Bhasin*—likely means more appeals are forthcoming in order to clarify the lodestar for parties to follow. As indicated above, this lodestar or spirit is equivalent to some underlying purpose behind the institution of contract as a whole, or the *raison d'être* for the common law's choice to recognize and enforce contracts at all. As I will explain in the following section, this need is perhaps more pressing than it was at the time of the Supreme Court's first decision on good faith duties in 2014 (*Bhasin*), because the two most recent decisions on point do not appear to agree as to the purpose of good faith.[10] In fact, *Wastech* and *Callow* appear to reflect irreconcilable philosophical underpinnings. All in all, it is a situation of surprising disorder for decisions that are said to flow from an "organizing principle".[11] But if the need for clarity is still not apparent, the following discussion of the cases themselves will make it clear.

III. DIFFERENT REASONS WITH DIFFERENT REASONS

In this section, I will review *Callow* and *Wastech*, first providing an overview of their facts and the Court's reasons, followed by an explanation of each decision's review of the underpinnings of good faith and the purpose(s) apparently pursued by the Court (or the law of contract) through the Court's approach to good faith in the particular case. Once I have established the purposes reflected in each set of reasons, I will then proceed to the final stage of my analysis, where I will compare the rationale reflected in each set of reasons and explain how they are irreconcilable.

A. CALLOW V ZOLLINGER

Ordinarily, the fact that *Callow* was decided first would perhaps have some significance for its place in the jurisprudence, given our general assumption that last in time is best in law, as far as the persuasive or jurisprudential value of authority goes. However, in these circumstances—given the combination of the appeals and the identical composition of the Court—it is unlikely

10 See *Bhasin*, *supra* note 8.

11 *Ibid* at para 33.

that *Wastech* can be understood to supersede *Callow* despite having been decided last. As such, even though I am decidedly more sympathetic to the reasons and rationale on display in the second decision, I am compelled to consider both on equal footing, and *Callow* appears to be as good a place to start as any.

1. FACTS

Callow involved two contracts between CM Callow Inc (a landscaping and maintenance company run by a Mr. Callow) and 10 condominium corporations (with shared assets) collectively known as *Baycrest*.[12] Baycrest is located somewhere in Ontario, and made decisions in relation to the common property of the constituent corporations, including maintenance, through a Joint Use Committee (JUC) representing the 10 corporations.[13] In April 2012, Baycrest entered into two separate two-year maintenance agreements with Callow.[14] One of these was a winter service agreement for the provision of snow removal services that was set to run from 1 November 2012 to 30 April 2014.[15] The other was a summer service agreement for summer landscaping set to run from 1 May 2012 to 31 October 2013.[16] In March or April 2013, Baycrest decided that it would terminate the winter service agreement with Callow but did not do so immediately.[17] Instead, Baycrest delayed until 12 September 2013, when it finally exercised its right under clause 9 of the parties' contract to terminate the agreement on 10 days' notice without cause.[18] Callow was unsurprisingly displeased with this development and expressed shock that the agreement had been terminated unexpectedly given the preceding communications between the parties in the months prior.[19]

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12 See *Callow*, *supra* note 2 at paras 6–7.

13 See *ibid* at para 6.

14 See *ibid* at para 126.

15 See *ibid* at paras 8–9, 208.

16 See *ibid* at para 208.

17 See *ibid* at para 209.

18 See *ibid*.

19 See *ibid* at paras 210, 212.

The relevant communications between Callow and Baycrest in the months between Baycrest's decision to terminate and their delivery of notice of the same to Callow were of two kinds.[20] The first related to potential renewal of the winter services agreement beyond its expiry on 30 April 2014.[21] The second related to "freebie" work carried out during the summer that Baycrest accepted while knowing that it was performed by Callow to encourage Baycrest to renew its winter service agreement.[22] It should be noted that nothing appears to have been said explicitly about Baycrest's satisfaction with Callow's services, nor about a planned early termination of the winter services agreement.[23] Nonetheless, the majority led by Justice Kasirer, and the concurring minority led by Justice Brown, accepted Callow's submission that if someone is led to believe that a renewal of their contract is possible or likely, it is reasonable for that person to infer that their opposite is satisfied with their present performance. Both also accepted that based on this inference of satisfaction with performance, it is reasonable to conclude that the existing agreement would not be terminated early.[24] Both the majority and concurring minority also concluded that because Baycrest had created this apprehension, it was incumbent on Baycrest to correct it.[25] The failure to do so was a breach of Baycrest's duty not to lie to or knowingly mislead Callow about matters directly linked to performance of the

20 See *ibid* at para 95.

21 See *ibid.*

22 See *ibid* at para 97.

23 The majority appear to place great weight on the trial judge's finding that Baycrest had led Callow to believe that "all was fine with the winter [contract]": *ibid* at para 96. In contrast, Justice Côté's dissent stated that, "I note there is no finding that Baycrest communicated any particular sign of satisfaction pertaining to the performance of the winter agreement past March 19, 2013,": *ibid* at para 228. Further, Côté J noted that "the trial judge's finding pertained to what Callow had thought, not to what Baycrest had said [trial reasons, at para. 41], which is something quite different": *ibid* at para 217.

24 See *ibid* at paras 32, 37, 98, 101, 134, 135.

25 See *ibid* at paras 78, 132–134.

contract; it was therefore a breach of Baycrest's duty of honest performance.[26]

2. THE COURT'S REASONS

Although it only indirectly underpins my conclusion in this part of the article, I must note at the outset that I cannot accept the overall conclusion described above. I can certainly accept that the communications referred to above could lead one to believe that the winter services agreement would not have been terminated early owing to dissatisfaction with Callow's services. However, for the reasons ably articulated by Justice Côté, I can neither accept nor understand the leap required to infer that satisfaction with present performance meant that the winter services agreement would not be terminated for any reason *at all*[27]—especially in light of the operative wording of clause 9 (i.e., the termination provision) of the winter service agreement which read as follows:

> If the Contractor [i.e. Callow] fails to give satisfactory service to the Corporation [i.e. Baycrest] in accordance with the terms of this Agreement and the specifications and general conditions attached hereto or if for any other reason the Contractor's services are no longer required for the whole or part of the property covered by this Agreement, then the Corporation may terminate this contract upon giving ten (10) days' notice in writing to the Contractor . . .[28]

I note that Justice Kasirer disagrees with the notion that the actual statements made to Callow concerning renewal and "freebie" work can only be understood as concerning termination for unsatisfactory service and did not extend to termination for any other reason.[29] I also note that, in doing so, he places an inordinate emphasis on the "finding" of the trial judge that the representations made by Baycrest meant that the

26 See *ibid* at paras 104, 134.

27 See *ibid* at paras 211–229.

28 *Ibid* at para 208 [emphasis added].

29 See *ibid* at para 100.

contract was not in danger *at all*.[30] I disagree with this conclusion because his reliance on the trial judge's finding appears to be an abdication of the Court's responsibility to consider whether the facts found in terms of the actual communications made provided an adequate evidentiary foundation for this inference *as a matter of law*.[31] It is possible that this is what Callow sincerely believed or expected, but it is a different question to ask whether he was right to do so, or *had a right to do so*, and thus whether this inference on his part and the

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30 *Ibid*.

31 In the dissenting judgment, Justice Côté points out that if the inference in question is unsupported, it is a palpable and overriding error as per *Housen v Nikolaisen*, 2002 SCC 33, and in the Court's more recent decision on appellate review, it was emphasized by Justice Fish for the majority that there is no meaningful difference between an inference being "palpably wrong" and being "not reasonably supported" by the facts, and that an appellate court *must* correct such errors. See *Callow*, *supra* note 2 at para 220, where Côté J states as follows:

> Both of my colleagues accept Callow's submission that it can be inferred from the discussions about renewal that the winter agreement was not in danger of termination. I would agree with such a proposition in the following circumstances: if one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review [Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23]

See also *HL v Canada (AG)*, 2005 SCC 25 at paras 71, 73, and 75, where Fish J states:

> And yet, again as indicated earlier, I agree with Bastarache J. that there is no meaningful difference between '. . . concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts.' . . . These passages from the majority reasons in Housen should not be taken to have decided that inferences of fact drawn by a trial judge are impervious to review though unsupported by the evidence. Nor should they be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached . . . In short, appellate courts not only may—but must—set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of 'primary' facts, or facts proved by direct evidence.

Court's part was in fact appropriate. Neither Justice Kasirer nor Justice Brown appear to have asked, let alone answered this question. For instance, they did not consider whether Baycrest would have been right to cancel because they had received a better offer, or because Baycrest could no longer afford Callow's services, or any other reason one could imagine. They also did not consider or explain why Callow's belief about satisfaction somehow absolved it of all risk of early termination for reasons such as these, even though the parties' contract expressly provided that termination for "any other reason" was allowed.

Having set out the majority and minority positions on liability, the next important aspect to address is the Court's position on remedy. Here, the majority and the minority part company with respect to the rationale for the amount awarded, but oddly enough, not as to the amount.[32] Both agree that the quantum of the award ought to be assessed so as to put Callow in the position it would have been had the relevant communications or statements made by Baycrest (however little these had to do with termination) not been dishonest—i.e., if Baycrest had told the truth rather than been misleading as it had.[33] It is important to note that this is not the same as putting Callow in the same position it would have been had the actual communications or statements made *been* true. Although, in the circumstances of this case, this was perhaps a distinction without a difference, which may have contributed to the majority's misunderstanding. What, then, was the position that Callow would have been in had Baycrest not been dishonest? According to Justices Kasirer and Brown, Callow's position—if Baycrest had not been dishonest in its communications before Baycrest terminated the contract, i.e., if it had not (however implausible it may sound) misled Callow into thinking that the winter services agreement would not be terminated—would have been the same as the position it would have been in had Baycrest not terminated the winter services agreement.[34] Justices Kasirer and Brown reached this conclusion

32 *Callow*, *supra* note 2 at paras 117, 182.

33 *Ibid* at paras 114–16, 145.

34 See *ibid* at paras 117, 149.

on the basis that during the summer months of 2013, Callow could have bid on other work for the winter of 2013/2014 if it had known that its winter contract with Baycrest was in jeopardy (i.e., if Baycrest had not lied or misled Callow), and Callow would have thus presumably (according to the Court) obtained a replacement contract of similar value.[35]

The majority's justification for the above conclusion is, with respect, entirely erroneous. The majority position can be summarized thus: the duty of honest performance is a contract doctrine and has been held (also, with respect, erroneously) to sound in contract damages, or in other words, to be compensable in damages on the contract measure, which is the expectation measure.[36] Damages on the expectation measure are assessed so as to put the plaintiff in as good of a position as they would have been had the contract been performed.[37] This is generally understood to correspond with the position the plaintiff *expected* to be in—hence the name—and as such, these damages are said to vindicate the plaintiff's "expectation interest"[38], i.e., the

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35 See *ibid*.

36 See *ibid* at para 109. See also *Bhasin*, *supra* note 8 (Cromwell J stating that "breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on, and breach of it supports a claim for damages according to the contractual rather than the tortious measure . . ." at para 88); *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 (providing that "[t]he customary remedy for a breach of contract is compensation, usually measured in the form of expectation damages" at para 108).

37 See S M Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) [Waddams, *The Law of Damages*] (asserting that "the normal rule of contract damages [is that] the promisee is entitled to the full value of the promised performance" at para 5.30). See also *Robinson v Harman*, [1848] 1 Exch 850 (Parke B stating that "[t]he rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed" at 855).

38 See Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 409:

> According to orthodox law, damages for breach of contract are intended to put plaintiffs in the same position, so far as money is able, that they would have been in had their contracts been performed. This approach is often summarized by

plaintiff's interest in remaining in as good of a position as they expected to be in, or as they would have been in, had the contract been performed. The majority judgment seems to suggest (again, erroneously) that the duty of honest performance, and their award in this particular case, vindicates Callow's expectation interest because Callow expected Baycrest to be "honest".[39] This, however, turns our understanding of expectation on its head, because Callow's "expectation" that Baycrest would be honest is equivalent to saying that Callow expected Baycrest not to lie. As such, the Court's position equates things that we generally *do not* expect people to do because they have no right to do them, and which we probably do not even think of, with things we specifically *do* expect them to do, because we have intentionally acquired a right to demand them. If the majority is correct that compensation to undo the effects of the former—that is, lies we do not expect people to tell because they have no right to tell them— fall within the expectation/contract measure as much as the latter, then so too must all damages intended to undo the effect of any tort. No other conclusion is possible if the majority is correct because there is no difference between a general negative expectation of honesty (i.e., no lies) and the general negative expectation that can be readily ascribed to tort—i.e., that would-be tortfeasors will leave us alone because they have no right to commit the acts that constitute the relevant tort. Clearly, we cannot accept this—and thus the majority's position—as correct unless we are willing to dissolve the distinction between contract and tort altogether. For this reason, I am adamant that the majority is entirely incorrect on this point.

The better explanation of the Court's award in *Callow* is provided by the concurring minority led by Justice Brown. Justice Brown focuses on the fact that damages provided for a breach of the duty of honest performance are assessed so as to put the injured party in the same position as they would have been in had the defendant not lied. This typically means undoing the effects

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saying that the apparent aim of damages is to compensate plaintiffs' 'expectation' interest [on the basis that plaintiffs get the benefit they 'expected' to get from performance].

39 *Callow*, *supra* note 2 at paras 83, 103, 107.

of the plaintiff's acts carried out on the faith of the lie.[40] In *Callow*, said act was the decision not to bid on other work that would have allowed Callow to replace its winter services agreement with Baycrest.[41] As such, the damages awarded undid the effects of Callow's *reliance* on Baycrest's deceptive behaviour. If these damages vindicate anything, it is Callow's interest in being able to rely on what it was told over the course of the contract's performance, i.e., Callow's "reliance interest". This is Justice Brown's conclusion for the concurring minority, and in my view, it is undeniably the correct one. Unfortunately, this does not mean that the minority's avowed rationale for the award is entirely correct. There is one further aspect of the Court's approach to remedy that is reflected in the majority and minority's reasons and requires attention, not only because it is incorrect, but also because it has profound implications for understanding good faith in this case.

Most readers familiar with contract damages will know that if a contract may be performed in more than one way, and the value of the promised performance needs to be assessed in order to determine its equivalent monetary worth for the purposes of assessing damages, the court must assume that the defendant would have picked the *least* onerous or costly method of performance, i.e., the defendant would have acted in its own self-interest.[42] What this means in the context of an agreement that is

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40 See *ibid* at para 145, Brown J stating:

> The measure applied in Bhasin was, therefore, clearly not based on expected performance, and indeed it appears to have had nothing to do with placing Bhasin in the position he would have occupied had the contract been performed . . . . Rather, it was directed solely towards making good the detriment that flowed from Bhasin's reliance on a dishonest misrepresentation—a measure characterized by one scholar [MacDougall] as 'very tort-like'.

41 See *ibid* at paras 116, 149.

42 See Waddams, *The Law of Damages*, *supra* note 37 at para 13.390; *Hamilton v Open Window Bakery Ltd*, [2004] 1 SCR 303 [*Hamilton*]. Arbour J asserts at para 20:

> The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. The plaintiff agreed at the outset

terminable on notice is that if damages are to be assessed for the value of the unexpired portion of an agreement—the part of an agreement left unperformed if the agreement is prematurely brought to an end—then damages must be capped according to the length of the notice period.[43] This might sound somewhat opaque in the abstract, but the following extract from the judgment of Justice Arbour, writing for the Supreme Court in *Hamilton* and referring to the judgment of Scrutton LJ in *Withers v General Theatre Corporation,* will likely clarify what this means in practice:

> If one substitutes duration in time for quantity of goods into Scrutton L.J.'s statement, then it directly addresses the case at bar. Indeed, the application of this general principle to a breach of a contract with various possible durations is addressed immediately following the above example by Scrutton L.J., at pp. 549-50: "[Consider] a lease for seven, fourteen or twenty-one years which is wrongfully determined at the end of five years by the landlord. On what basis are damages to be assessed? Answer: On the basis that the landlord can determine the lease in seven years, and therefore the plaintiff can only recover damages on the assumption that he had only two more years of the lease to run." This passage speaks directly to our case, and is persuasive in its application.[44]

With this in mind, one would think that damages for the value of the remainder of Callow's winter services agreement with Baycrest would have to be assessed on the basis that Baycrest would have terminated the agreement at its earliest convenience, since terminating the agreement would have been the least

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that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.

See also *Withers v General Theatre Corpn Ltd*, [1933] 2 KB 536 at 548–50. Scrutton LJ states:

> Now where a defendant has alternative ways of performing a contract at his option, there is a well settled rule as to how the damages for breach of such a contract are to be assessed. . . . The damages are assessed . . . on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff.

43 See *Hamilton*, *supra* note 42 at paras 20–23.

44 *Ibid* at para 13.

onerous thing for Baycrest to do without being in breach. However, this was not the basis upon which the Court assessed damages for Baycrest's breach of the duty of honest performance. Instead, the majority and minority both concluded that the least onerous method of performance for Baycrest was to not be dishonest, which is disappointing because it entirely misses the point.[45] What makes this conclusion more surprising is that the Court's mistake appears to reflect the same error made by the trial judge in *Hamilton*, which was criticized by Justice Arbour in terms that appear apposite in the context of this case as well:

> The trial judge erred in this case in engaging in a tort-like inquiry as to what would have happened if OWB had not breached its contractual obligations to Hamilton, and in concluding that OWB would not have terminated at the earliest opportunity. . . . The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.[46]

With respect to the "least onerous method" standard for the assessment of damages, the upshot of the error described above is that either the Court in *Callow* has radically altered a long-standing tenet of contract law, or it tells us something important about the purpose of the duty of honest performance and, by extension, good faith. Fortunately, we are now at the point where I can proceed to explain what that might be.

3. WHAT DOES THIS TELL US ABOUT GOOD FAITH?

Obvious shortcomings of majority and minority opinions aside, what we can take away from these two sets of reasons is that the duty of honest performance permits substantial revision to the parties' rights and their allocation of risk under their contract. Admittedly, relief of this sort is not entirely unheard of, and has

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45 See *Callow*, *supra* note 2 at paras 114–47.

46 *Hamilton*, *supra* note 42 at paras 19–20.

been known to arise from estoppel, election, and waiver.[47] However, what is unique about the application of the duty of honest performance in the circumstances of *Callow* is that relief has not been provided according to the content of the relevant communication(s). Instead, the Court in *Callow* appears to have taken this as only the starting point from which to concoct a whole new entitlement unconnected to the content of the parties' contract. In effect, this entitlement was a right to a continuing contract unless Baycrest had grounds for dissatisfaction with Callow's services. I realize that some might think this overstates the case, but I would remind the reader of the point I made in relation to the Court's disregard for the least onerous method of performance standard for damage assessment, and thus its disregard for the termination provision in the contract. If Callow had no right to a continuing contract, the damage award should have been limited to reflect *only* the period for which Callow was entitled to a continuing contract, i.e., the length of the notice period. Thus, by the same token, if there was no limit on the damages award, then the Court has implicitly asserted that Callow had a right to expect that the contract would continue and could not be cancelled early.

What the foregoing tells us about the duty of honest performance, and by extension good faith and contract generally, is that—in the Court's view in this particular case—the purpose behind each is the protection or promotion of reliance. I hesitate to say "reasonable reliance"—which has a long pedigree as a potential explanation for the enforcement and recognition of contract—for two reasons.[48] The first is my concern about the

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47 See *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490 at 499–500, 115 DLR (4th) 478.

48 See Smith, *supra* note 38 (providing that "[r]eliance theories have a long historical pedigree, but their popularity in modern times can be traced to Fuller and Perdue's 1936 article. The Reliance Interest in Contract Damages, and to later work by Patrick Atiyah and Grant Gilmore" at 78). See also Patrick S Atiyah, *Promises, Morals, and Law* (Oxford: Oxford University Press, 1983) at 3; L L Fuller & William R Jr Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46:1 Yale L J 52 (asserting that "[t]hus in the early stages of its growth the action of assumpsit was clearly dominated by

Court's conclusion that it was appropriate to infer that the winter services agreement would not be terminated based on communications relating to possible renewal and "freebie" work in the summer. The second is that, given that these communications had nothing to do with termination per se, and that clause 9 of the winter service agreement was clear that Baycrest could terminate on notice without cause, the Court's reasons do not support reliance on the parties' actual *agreement*. Instead, the Court's rationale appears to support reliance on the other party regardless of what the parties' contract states or whether or not the injured party's reliance was requested or reflects any form of bargain. What troubles me most about this development is that it appears to relegate contract, and by extension consent, to a secondary role (at best) in the Court's assessment of responsibility for any unfortunate outcome. This is because it countenances the imposition of responsibilities that may be in clear conflict with the rights and responsibilities for which the parties actually *contracted*. It is also surprising that this approach is in clear conflict with the Court's approach to good faith and the purpose of contract in *Wastech*, as I will explain in the apotheosis of this article. Before that, however, I must first explain what that case decided and what it signifies.

B. Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District

Wastech differs from *Callow* in a number of respects, but in particular it does not raise the same issues of dishonesty that concerned the Court in *Callow* and as such, has nothing to do with the duty of honest performance despite the arbitrator's opinion to the contrary.[49] Instead, at issue was the exercise of contractual

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the reliance interest, so much so that Ames assumed, even in the absence of cases in point, that recovery in assumpsit must originally have been limited to compensation for change of position" at 68); James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge, Mass: Harvard University Press, 1913) at 144.

[49] Brown J provides that "[t]he issue of honesty arose here because the arbitrator described Metro's conduct as 'dishonest', by which he meant that

discretion and the now officially recognized duty to exercise said discretion in good faith.[50] What makes the cases comparable despite this difference is the fact that the duty that each is concerned with is said to be a specific manifestation of the general organizing principle of good faith first recognized in *Bhasin*.[51] Therefore, each case has something to say about what good faith means in terms of identifying the particular purpose that justifies the imposition of these extra-contractual obligations and dictates how they are to apply. As already mentioned, these two cases lend themselves to very different answers to this question and appear apt to cause confusion when it comes to asking what good faith requires. Before I can demonstrate the depth of this difference and the scale of the problem, I must first engage with the particular decision and explain what it has to say.

1. Facts

Wastech and the Greater Vancouver Sewerage and Drainage District (hereafter "Metro") were party to a contract for haulage of municipal waste by Wastech to three different landfill sites.[52] The contract was entered into in 1996 for a term of 20 years, and it notably only *continued* a long-standing commercial relationship between the parties by replacing and extending four earlier agreements between Wastech and Metro entered into in 1986, 1988, and 1992.[53] Payment rates for haulage services under the contract varied according to which of the three facilities Wastech was to transport the waste.[54] The allocation of waste between the three sites was financially significant for Wastech's business on account of differing profit levels for

it was 'wholly at odds' with Wastech's 'legitimate contractual expectations'": *Wastech*, *supra* note 1 at para 137.

50 See *ibid* at paras 1, 58–59.

51 See *ibid* at paras 54, 58, 62.

52 See *ibid* at paras 9, 10.

53 See *ibid* at para 9.

54 See *ibid* at para 10.

haulage to each site.[55] Given the potential for fluctuation in the profitability of the contract for Wastech depending on both the volume of waste transported and the sites to which it was allocated, it is significant that the contract gave Metro the sole discretion to allocate waste between the different sites, and that the contract did not guarantee a particular level of profitability in any particular year.[56] The contract did specify a target "operating ratio", or "OR" (effectively a profitability percentage) of 0.890 (which would lead to an 11% profit) and did provide for adjustments in the event of deviation from the target. This however fell well short of guaranteeing that the target would always (or ever) be met.[57] The absence of a profitability guarantee by Metro was also clearly not an oversight, as the parties had explicitly considered including such a clause but ultimately decided against it, which meant that nothing approaching an implied term to that effect could realistically be found in fact.[58]

The three sites covered by the parties' contract were Burnaby Waste to Energy, the Vancouver Landfill, and the Cache Creek Landfill.[59] The first two were classified as short-haul and waste transported to these two sites was paid for at reduced rates.[60] The third site was classified as long-haul, and waste transported to it was paid for at a higher and more profitable rate.[61] Any reallocation of waste away from the Cache Creek Landfill thus had potentially negative financial consequences for Wastech.[62] Unfortunately for Wastech, Metro decided in 2010 to reallocate waste between the three sites resulting in a 31% reduction in the amount of waste transported to Cache Creek the following year.[63]

55 See *ibid* at paras 11–14.

56 See *ibid* at paras 11, 13, 123.

57 See *ibid* at paras 11–12, 124.

58 See *ibid* at paras 22, 126.

59 See *ibid* at para 10.

60 See *ibid*.

61 See *ibid*.

62 See *ibid* at paras 14, 123.

63 See *ibid* at paras 16, 125.

Although the overall amount of waste transported in 2011 was itself down by 8%, it is clear that the reduction in waste transported to Cache Creek reflected a conscious choice by Metro to reallocate waste from Cache Creek to Vancouver.[64] After financial adjustments provided for by the contract, this level of waste and its allocation between the three sites left Wastech with an operating profit for the year of only 4%, a significant 7% short of the target.[65]

Wastech was not content with the financial downturn and disputed whether Metro was right to reallocate waste in this way.[66] The matter was referred to arbitration as per the contract, and Wastech alleged that Metro had breached the contract by depriving Wastech of the opportunity to achieve the target OR of 0.890 and corresponding 11% profit because of the way Metro exercised its discretion to allocate waste between the three sites.[67] Wastech framed its argument in two ways: First, it argued that Metro's decision was contrary to an implied term that required Metro to compensate Wastech if its allocation of waste made it impossible for Wastech to achieve the target OR.[68] Second, Wastech argued that Metro's discretionary power to allocate waste between different sites "was subject to a duty of good faith such that it could not be exercised in a way that would deprive Wastech of the opportunity to achieve the target OR" and that Metro had breached this duty.[69] The first argument failed because it conflicted with the record of the parties' negotiations and the fact that the parties *had* considered including such a term, but ultimately decided not to.[70] The second argument succeeded before the arbitrator, ruling that Metro had failed to show appropriate regard for Wastech's "legitimate contractual expectations", but this argument failed to convince on appeal to

64 See *ibid* at para 16.

65 See *ibid* at para 17.

66 See *ibid* at para 18.

67 See *ibid*.

68 See *ibid* at para 20.

69 *Ibid* at para 21.

70 See *ibid* at paras 22, 126.

the British Columbia Supreme Court and the British Columbia Court of Appeal.[71] The arbitrator's reasons on this point were subject to heavy criticism at both levels of appeal[72]—such criticism being well-deserved, in my opinion. Nonetheless, Wastech's final appeal to the Supreme Court of Canada claimed that the British Columbia Supreme Court and the Court of Appeal erred in disagreeing with the arbitrator and as such, an explanation of the arbitrator's alleged error is in order.[73] For now, however, I will move on to relate the Court's reasons for dismissing Wastech's appeal and address the arbitrator's error in the context of the Court's decision.

2. THE COURT'S REASONS

As with *Callow*, the Court in *Wastech* split between a majority led by Justice Kasirer and a concurring minority led by Justice Brown. A key difference, however, was the fact that Justice Côté joined Justices Brown and Rowe in the minority, which provides greater reassurance of the correctness of the result in this case as compared with *Callow*.[74] It should be noted the minority raise concerns about the majority judgment's diversion into "civilian methodology" and they suggest that the Court must first consider whether the defendant has acted dishonestly in performance before considering whether they have exercised any contractual discretion in bad faith.[75] I will leave the former concern to one side, since it is ably addressed by Justice Brown, with whom I agree, in both *Callow* and this case, and because it will likely attract much more attention from other writers than the strictly commercial aspects of the decision that I intend to canvass. I will also leave the minority's other concern about the connection between honest performance and the duty to exercise contractual discretion to the side, since the criticism in short is only that the majority's diversion into this doctrine was

71 See *ibid* at paras 31–41.

72 See *ibid*.

73 See *ibid* at para 48.

74 See *Callow*, *supra* note 2.

75 See *Wastech*, *supra* note 1 at paras 137–40.

unnecessary and risked causing confusion. I agree that it was unnecessary, but I am not persuaded that it will cause any more confusion than *Callow* may already have. What I will focus on is the common ground between the majority and the minority regarding the nature of the duty to exercise contractual discretion in good faith and its application here, as well as one point of contention before explaining what this decision tells us about the purpose of good faith generally.

The first thing to note about this decision is that it *does* establish what is effectively a new duty in the Canadian common law of contract (prior decisions dealing with misuse of contractual discretion notwithstanding).[76] It is important to understand this duty and to consider what this decision says about the parameters of this duty as distinct from older manifestations, because the duty described here is clearly not a successor to earlier incarnations. Three points particularly stand out in this respect and should be set out before stating what the substance of the new doctrine requires. Firstly, this doctrine is not confined to particular categories of contractual relationship.[77] Although the relationship in *Wastech* was

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[76] Both the minority and majority take the position that the duty to exercise contractual discretion in good faith already exists and cite *Mitsui & Co (Canada) Ltd v Royal Bank of Canada*, [1995] 2 SCR 187 [*Mitsui*] and the Court's reference to the doctrine in *Bhasin*, *supra* note 8, in support of the proposition. In the same breath, however, they both note that no one actually knows what the doctrine demands yet, which appears oddly inconsistent with the idea that it already exists, unless we are to return to the declaratory theory of the common law. *Mitsui* also did not suggest that any such duty was extra-contractual as opposed to implied. As such, I am of the view that the duty is undeniably new. See *Wastech, supra* note 1 at paras 58, 129. See also *Bhasin*, *supra* note 8 at para 50; *Mitsui*, *supra* note 76 at paras 33–34, where Major J states:

> The duty to act in good faith to comply with stipulated conditions precedent was recognized in Dynamic Transport Ltd. v. O.K. Detailing Ltd. . . . In Dynamic Transport, supra, Dickson J. also recognized that in appropriate circumstances, the courts will find an implied promise by one party to take steps to bring about the event constituting the condition precedent. This would involve the party upon whom the obligation rests to use its best efforts to fulfil the condition precedent.

[77] In their exposition of the doctrine, neither the majority nor the minority make any reference to "relational character" as a prerequisite to the

undoubtedly long-term and relational, nothing appears to turn on that fact as far as whether the duty may apply.[78] Secondly, this doctrine is said to stem from the general organizing principle of good faith. Consequently, it is extra-contractual in nature such that its existence does not depend on the parties' contract per se in the same manner as an implied term.[79] However, one would think that the existence of a contract and some discretion on the part of one of the parties would be a prerequisite. Thirdly, a "nullification" or "evisceration" of the benefit of the contract for the injured party is no longer the touchstone for determining whether the duty to exercise contractual discretion in good faith has been breached, nor is it a prerequisite to such a finding.[80] It may well be that such an evisceration is indicative of a breach in that it may evidence that the party exercising the discretion has deviated from the new standard, but this is not determinative.[81]

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application of the duty to exercise contractual discretion in good faith, which is telling given the emphasis placed upon it by Wastech in its submissions which the majority do engage with when they apply the doctrine they have now defined. See *Wastech*, *supra* note 1 at paras 57–95, 96–107, 128–35.

78 See *ibid* at para 102.

79 The minority appears somewhat agnostic on this point, but do not reject it when they say: "[s]econdly, our colleague says that the duty to exercise discretion in good faith is a general doctrine of contract law. Consequently, 'it need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties' (Kasirer J.'s reasons, at para. 91). Whether or not such judge-made rules operate irrespective of the intentions of the parties, we are steadfast in our view that the purpose of a discretion is always defined by the parties' intentions, as revealed by the contract.": *ibid* at paras 91, 133.

80 See *Wastech*, *supra* note 1 (where the Court writes "I am of the view that requiring 'substantial nullification'—that is to say, the evisceration by one party of the better part of the benefit of the contract of the other—is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith" at para 82).

81 The Court concludes "that the 'substantial nullification' or 'evisceration' of the benefit of a contract is not a necessary prerequisite to finding that a party breached the duty to exercise contractual discretionary powers in good faith. However, the fact that an exercise of discretion substantially nullifies or eviscerates the benefit of the contract could well be relevant to

What, then, is the new standard? According to both the majority and minority, the duty to exercise contractual discretion in good faith requires that parties exercise contractual discretion in a fashion consistent with the purpose for which the discretion was created.[82] Both judgments refer to the exercise of discretion in a way that conforms to this standard as "reasonable", yet emphasize that the standard of reasonableness is not "in the air", but must be defined according to the purpose for which the discretion was conferred.[83] Furthermore, both judgments distance the new standard from epithets such as "arbitrary" and "capricious", emphasizing again that the question is not whether a contracting party's behaviour appears this way in the abstract, but whether or not the relevant party's decision is unconnected with the purpose(s) for which the discretion was created or conferred in the contract.[84] Despite this consensus, there is one potential difference between the majority and minority: the means by which a court should ascertain the relevant contractual purpose defining the proper scope of the discretion. The majority states that where discretion is entirely general and gives no indication of purpose on its face, the court must "form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power."[85] The minority argues that such an approach suggests that even a power that the parties choose to leave unfettered must be exercised in a way that advances the objectives of the contract.[86] They further suggest that this gives rise to a risk of ad hoc judicial moralism wherein courts will rewrite clauses to add restrictions.[87] But the minority

show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.": *ibid* at para 84.

82 See *ibid* at paras 63, 129.

83 See *ibid* at paras 87–88, 129–31.

84 See *ibid* at paras 87, 130–31.

85 Phillip Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 *LQR* 384 at 393, as cited in *Wastech*, *supra* note 1 at para 72.

86 See *ibid* at para 132.

87 See *ibid*.

also suggests that it is proper to look beyond the clause itself, stating that "the purpose of a discretionary power arises from the terms of the contract, construed objectively, and having regard to the factual matrix."[88] If the terms of the contract and the factual matrix are all that a court can look to in order to "form a broad view of the purposes of the venture", then it does not appear that there is necessarily a difference between the minority and majority on this point. The minority insists that effect should generally be given to unfettered discretion, which the majority does not commit to as clearly;[89] however, this distinction may well be without a difference.

In the end, applying the foregoing standard to the facts of this case was fairly straightforward. Two aspects of the contract in particular prevented the finding that Metro's exercise of its discretion amounted to a breach of its duty to do so in good faith. Firstly, the recitals to the contract made clear that the parties intended to "maximize efficiency and minimize costs", to maximize the solid waste disposal capacity of the Cache Creek site.[90] Secondly, the contract provided for adjustments to payments owing to Wastech in order to share the financial burden between the parties in the event that the target OR was not realized, which by necessary implication means that the parties contemplated that the target OR may not always be reached.[91] Read together, these aspects of the parties' agreement indicated that a decision to divert waste from Cache Creek in

88 *Ibid* at para 131.

89 *Wastech*, *supra* note 1 (stating that "[i]t follows that, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, must give effect to that intention" at para 133).

90 *Ibid* at para 98.

91 See *ibid* at para 134:

> Indeed, through the Outside Band Adjustment and the adjustment that applies if Wastech's compensation falls outside of the Target OR for three consecutive years, the Agreement expressly contemplated that there might well be years in which Wastech would be unable to achieve the Target OR. The parties managed this risk by agreeing to formulae that adjusted the total compensation towards the Target OR. Finding that the discretion was constrained in the manner Wastech suggests would ignore these features of the Agreement.

See also *ibid* at para 99.

order to preserve capacity at that site was not inconsistent with the purpose for which the discretion had been conferred to Metro, even though it would lead to Wastech's operations falling below the target OR that year.[92] Put another way, the decision fell within the range of decisions Metro could have reasonably made in connection with the underlying purpose of the provision conferring the discretion. As such, it was clear that Metro's decision did not fail to "show adequate regard" for Wastech's "legitimate contractual expectations", as the arbitrator had found. These expectations should have been tempered by the knowledge that the target OR was not guaranteed, and that operational efficiency and capacity management may have required Metro to make decisions that would cause Wastech to miss its target.[93]

3. What does this tell us about good faith?

The aspects of the decision canvassed above potentially tell us a great deal about the underlying rationale or purpose behind good faith and by extension, contract law as a whole. I say potentially, because this decision diverges substantially from the philosophical direction indicated by *Bhasin* and more recently, *Callow*. This gives rise to a great deal of potential uncertainty as to how other manifestations of the general organizing principle of good faith will develop, and how courts will resolve disputes if both of the good faith duties identified to date are at play in the same case. This conflict, though, is fodder for the next and final part of the article.

In *Wastech*, the majority and minority's shared emphasis on the underlying purpose of discretion, or the reason for which it was conferred, creates the impression that the Court's key concern is to regulate discretion in such a way as to ensure that parties do not use such powers in a way that undermines their common intention. The difference between the two groups is the degree to which they appear willing to depart from the strict wording of the contract as the manifestation of that intent. The

92 See *ibid* at paras 100–01, 134–35.

93 See *ibid*.

impulse underlying each set of reasons nonetheless appears the same, and it is best understood in essence as a desire to preserve the parties' bargain, to ensure that each gets what they were supposed to be given, and to ensure that each gives what the other was supposed to have received. In economic terms, this can be described as a desire to preserve the equilibrium position established by the parties in making their contract and agreeing to the exchange of rights as consideration for their corresponding assumption of responsibilities and risk.[94] What makes such a position arguably important is that it can be presumed that free agreement to such an exchange would enrich everyone involved.[95] Such an outcome can be described as economically efficient because it results in a surplus of value over and above the value of its inputs, because to each party the consideration received is presumably worth more than the consideration it is giving up.[96] Wittingly or not, then, the Court in this case appears

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94 See Peter M Gerhart, *Contract Law and Social Morality* (Cambridge: Cambridge University Press, 2021). Gerhart asserts at 62:

> More broadly, a bargain represents a unique equilibrium point with a fixed ratio of burdens and benefits for each party, as adjusted by the risks taken by each party. To protect the ex ante exchange equilibrium, courts must, in theory, preserve the ratio of burdens to benefits represented in the equilibrium, after adjusting for the risks that each party accepted when determining the terms of the bargain. Changing circumstances may increase or decrease the surplus generated by the relationship, but each party is entitled to its private surplus, the share of the excess of benefits over burdens represented by the original equilibrium, given the risks each party accepted in the exchange.

95 See Richard A Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication Symposium on Efficiency as a Legal Concern" (1980) 8:3 Hofstra L Rev 487 at 489.

96 See Avery W Katz, "Economic Foundations of Contract Law" in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014) at 176:

> From a normative perspective, furthermore, it is easier to justify applying the efficiency norm to commercial agreements than to the typical tort case involving persons drawn together involuntarily and outside of market institutions. This is not just because one can plausibly claim that the contracting parties have consented to have their affairs be governed by economic criteria. Various features of the commercial setting also make it more likely that efficiency gains will be shared, rather than being appropriated by one of the parties. The main reason for this likelihood is that contracts are largely based on voluntary exchange; and self-interested actors do not knowingly enter into voluntary exchange unless the

to be pursuing the promotion of economic efficiency with its particular application of good faith. If this purpose is sufficiently important so as to arguably justify extra-contractual intrusion into a free and otherwise valid contract, and interference with behaviour that may otherwise appear to be consistent with said contract, it suggests that the pursuit of economic efficiency must be the underlying "spirit of the game" referred to earlier, defining what contract is about overall.

The split between the majority and the minority on the degree of intervention that is appropriate for the purposes of protecting the equilibrium position established by the parties' contract might be taken to indicate that the minority is pursuing a different purpose with its prescription as to how contractual discretion is to be regulated. For instance, Justice Brown's insistence on strict adherence to the terms in which the discretion itself is described could be taken as indicative of a preference for the preservation of party autonomy as an end in itself rather than merely as a means to their mutual enrichment.[97] This perspective on the minority judgment suggests that the minority's purpose is to preserve the sanctity of the contract as an act of promising or an act of "will" by the parties. As I have written elsewhere, the "will theory" of contract that has this purpose at its heart is ultimately incompatible with the imposition of good faith obligations, and it thus seems unlikely the minority would suggest that any intervention is acceptable if the preservation of the contract as an end itself were their primary motivation.[98] Instead, the difference between the majority and minority may simply reflect a difference of opinion as to whether or not the pursuit of economic efficiency dictates that parties must be left free to pursue their self-interest entirely and to create surpluses of value only coincidentally, or whether they can be expected to cooperate with their opposite for their

expected benefits of the exchange are greater than those of the available alternatives.

See also Richard A Posner, "Utilitarianism, Economics, and Legal Theory" (1979) 8:1 J Legal Stud 103 at 120.

97 See *Wastech*, *supra* note 1 at para 133.

98 See Maharaj, *supra* note 9 at 112–13.

mutual benefit and to promote surplus creation as an end itself. The majority's reference to Lord Sale's extra-judicial remarks regarding good faith requiring "loyalty to that venture" suggests that they favour the latter view requiring cooperation.[99] By contrast, the minority appears more amenable to the former view.

Apart from being the opinion of the majority of the Court, the view of economic efficiency requiring cooperation to achieve the parties' common ends commends itself for two further reasons. The first is that if this view dictates that good faith obligations are completely constrained by the text of the agreement, then it effectively undermines the existence of any extra-contractual obligation. All that would be realistically left are obligations that satisfy the tests for implication of terms in fact on the basis of necessity or business efficacy.[100] If that is all good faith requires, then it is hard to see why its introduction and development have been so controversial. It is also doubtful that the Court would refrain from interfering even if this view of economic efficiency were ostensibly preferred. Imagine, for instance, if Metro in the *Wastech* case had not merely allocated waste away from Cache Creek to maximize efficiency, but had done so to intentionally inflict financial pain on Wastech in order to compel it to renegotiate the agreement. Even if the agreement were absolutely clear that Metro was to have an entirely free hand to allocate waste as it saw fit, it is hard to believe that the minority in this case would accept that such behaviour ought to be allowed.

The second reason that cooperative view of economic efficiency commends itself over the purely self-interested perspective is that it is not as inherently objectionable to expect parties to consider the interests of those with whom they contract as we might otherwise think. If one remembers that contract exists only because the state recognizes and enforces it, the expectation that parties will have some regard for the state's purpose when pursuing their own purposes appears like nothing

99 *Wastech*, *supra* note 1 at para 72.

100 See Paul S Davies, "The Basis of Contractual Duties of Good Faith" (2019) 1:1 J Commonwealth L 1 at 6–7.

so much as quid pro quo—the cost of doing business, one might say. There is no obvious reason as to why the state should be any less entitled to expect something for its efforts than any other party. Contracts under seal notwithstanding, exchange is undeniably at the heart of what we understand about contract.

Like the analysis of *Callow* before it, the foregoing analysis of *Wastech* has established what we can understand about the nature of good faith and the underlying rationale for its existence as revealed by the decision. What may already be clear is that the upshot of each decision is not consistent with what we have been led to believe about good faith from the other case. A more fulsome explanation of this conflict will be considered next, and while I cannot reach a conclusion as to which approach reflects the true state of the law as later courts will understand it, I will clarify why neither case can be reconciled with the other.

IV. CLARIFYING THE CONFLICT

It is not uncommon in private law to get different answers to the same problem if they are framed differently, or if one applies a different doctrine to try to resolve the dispute. A claim in negligence will lead to a different outcome compared to a claim for damages in contract.[101] Similarly, a successful plea of mistake will typically give rise to a different remedy than a successful plea in misrepresentation.[102] The fact that more than one doctrine or cause of action may cover the same facts, thus leading to divergent results, is nothing new. It is also not necessarily troubling to the extent that the different doctrines or causes of action that may apply to the same facts reflect different concerns. The quantum for a claim of unjust enrichment for the

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[101] See Waddams, *The Law of Damages*, *supra* note 37 at para 5.20.

[102] See Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, 2nd ed (Toronto, Ontario: LexisNexis, 2021). Notably, MacDougall explains at paras 1.147–48 that:

> Both misrepresentation and mistake are somewhat complicated in terms of their remedial impact, but they are complicated in different ways. Perhaps most importantly, mistake can (though not always) operates as a doctrine of law not dependent on any one party's election. In this way it is similar to frustration. Mistake generally makes a contract void. . . . Misrepresentation, on the other hand, operates, in the context of relief by way of rescission. . .

unauthorized use of property, for instance, should be assessed differently from a claim for unpaid rent owing for the use of said property, and differently again from a claim for trespass.[103] Each claim simply reflects different purposes, and has arisen in response to rather different problems even though they may occasionally collide. What *is* troubling, by contrast, is different responses to what is fundamentally the same problem. Not only does it have the potential for confusion, but it also offends the foundational assumption behind the common law that like cases should be decided alike. As I will explain, the conflict between *Wastech* and *Callow* is of this type, despite the fact that each ostensibly deals with a different doctrine. First, however, I will explicitly set out how exactly the two decisions differ.

I have explained earlier that the duty of honest performance applied in *Callow* protected a reliance interest on Callow's part, albeit not an interest in being able to rely on the actual contract. If one considers that Callow's interest in being able to rely on what it was told was important enough to justify a specific manifestation of the "general organizing principle of good faith" intervening and imposing an obligation on the defendant Baycrest that was not reflected in the parties' contract, this strongly suggests that the general organizing principle must be particularly concerned with the promotion of reliance. Furthermore, if good faith is effectively a means of trying to engender compliance with the spirit of the rules as well as their letter, this strongly suggests that the underlying purpose behind the recognition and enforcement of contract overall is the promotion of reliance as well. I note that this is somewhat difficult to accept given that what was relied on in *Callow* was not the *contract*. However, I am not claiming that the Court's reasons or its underlying rationale are coherent. I am merely reiterating what I have already explained to be the unavoidable ratiocination arising from the Court's reasons in order to better juxtapose *Callow* with the second case.

The duty to exercise contractual discretion in good faith as applied or explained by the Court in *Wastech* departs sharply

[103] See James Edelman, *McGregor on Damages*, 20th ed (London: Sweet & Maxwell, 2018) at paras 14-046–14-047, 15-004–15-007, 28-039.

from the decision in *Callow*. Instead of an emphasis on extra-contractual reliance, both the majority and minority of the Court emphasize the importance of purpose embedded in the contract and the importance of mutual satisfaction with the exercise of discretion in light of the purpose underpinning the creation of discretion in the contract in the first place.[104] As I explained, this wittingly or unwittingly appears to prioritize the economic efficiency of the parties' actions by holding them to the equilibrium position, or the basic exchange enshrined in their agreement. This tends to suggest that the promotion of economic efficiency is or ought to be the underlying rationale for extra-contractual intervention in the parties' relationship by a specific good faith doctrine such as this one, and this correspondingly suggests that the promotion of economic efficiency is the point of the common law recognizing and enforcing contracts at all.

There is no way to reconcile the two approaches reflected in *Callow* and *Wastech*. Protecting reliance on extra-contractual statements that conflict with the terms of the parties' contract is in no way consistent with holding parties to the substance of the exchange that they contracted for. Likewise, "loyalty to the venture" does not permit a departure from the terms of the agreement on the basis of extra-contractual statements that amount to less than an un-contracted-for variation. In short, the promotion of un-contracted-for reliance is inconsistent with the promotion of efficient exchange enabled by contract and vice versa. The fact that different doctrines are engaged does not help. Going back to *Bhasin*, the Court has been at pains to point out that there is no general duty of good faith, only a general organizing principle of good faith that manifests and intervenes through specific doctrines.[105] But the fact that the doctrines are distinct does not suggest that they can properly pursue incompatible

[104] See *Wastech*, *supra* note 1 at paras 68–70, 129–31.

[105] See *Bhasin*, *supra* note 8 (where Cromwell J provides that "[a]s the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations" at para 64).

purposes if they are supposed to emanate from a single principle—particularly where each doctrine will be expected to provide the basis for further development by analogy under the umbrella of this principle. The fact is that one cannot synthesize any kind of common core from these two cases. Each one responds to behaviour that is allegedly objectionable despite being permitted by the parties' contract, but the similarity ends there as far as the Court's reasons are concerned.

The difference between the Court's reasons in *Callow* and *Wastech*, explained above, is of serious concern for two reasons. First, it makes it impossible for lower and later courts to further develop or advance the law falling under the umbrella of good faith because it undermines the very foundation upon which they are supposed to build. Put simply, other courts cannot know what good faith requires in other contexts if the Court's own decisions do not appear to agree. Second, this conflict between cases coming contemporaneously from the highest court in the country undermines clarity and thus undermines certainty—not just in relation to future developments. It would also be extremely hard today to advise a client whose dispute raises both of the specific good faith doctrines discussed above as to which one will prevail and why, and thus what the outcome of their case ought to be.

Such a conflict is far from a mere theoretical possibility. It is arguably evident in *Wastech* itself because the parties' decision to omit a profitability guarantee in the contract was underpinned by their mutual understanding that the reallocation of waste away from the Cache Creek site by Metro was "highly unlikely".[106] Such an understanding clearly cannot have come out of the ether, and Metro must in all likelihood have contributed to that belief on Wastech's part. The fact is, of course, that any contribution by Metro to that belief would have preceded entry into the contract and is arguably outside the scope of the duty of honest

[106] See *Wastech*, *supra* note 1 (noting that "both parties were aware that this could preclude Wastech from achieving the Target OR. Both parties believed that such a scenario was highly unlikely. Given their mutual desire to simplify the Contract, Wastech and Metro agreed not to include an adjustment provision dealing with that scenario in the Contract" at para 14).

performance on that basis.[107] Nonetheless, this is still arguably an example of a contracting party relying on an extra-contractual statement that turned out to be untrue. While an element of subjective dishonesty now appears necessary to ground a claim for breach of the duty of honest performance, it is not difficult to imagine a scenario in which recklessness or less would satisfy this requirement.[108] At that point, it arguably becomes a coin toss between competing manifestations of the same principle. Will the bargain with its agreed allocation of risk prevail over what is said outside of it, or will what is said prevail despite its inconsistency with, and even its irrelevance (as in *Callow*) to what was actually agreed? Is the matter simply determined by the timing of statements relative to contract creation? Can *Callow* and *Wastech* simply be squared on the basis that last in time (whether the contract or the statement) is best in law regardless of how pertinent the extra-contractual statement may be to the plaintiff's claim? In *Wastech*, the Court ignored the earlier inconsistent statement(s) and focused the act of exercising the discretion by Metro after the contract had been created. So, perhaps timing does settle it. But frankly, I do not know whether that really does settle the matter once and for all. I also doubt the Court does either.

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[107] One would think that a contract must rationally arise prior to any duty to perform said contract honestly. *Contra Basyal v Mac's Convenience Stores Inc*, [2021] 2021 BCSC 1002 (where the proposition is rebutted and the judge does "not accept that the duty of honest performance has been explicitly limited to dishonest behaviour after the parties enter into the contract or commence its performance. In my view, any temporal limitations of the doctrine are an open question best suited for determination at trial" at para 57).

[108] See *Wastech*, *supra* note 1 at paras 55–56; *Owen Sound Public Library Board v Mial Developments Ltd et al*, (1979) 26 OR (2d) 459 at 467, 102 DLR (3d) 685 (for the proposition that knowledge is treated as equivalent to intent for the purposes of promissory estoppel); MacDougall, *supra* note 102 at para 5.21 (providing that reckless disregard for the truth of a statement is sufficient to ground a claim in fraudulent misrepresentation). Contra *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 (SCC), at para 21; Krish Maharaj, "Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada: Changes to Promissory Estoppel That May Be Problematic" (2022), 66 CBLJ 133 at 139.

V. CONCLUSION

The foregoing analysis of *Callow* and *Wastech* demonstrates that each decision reflects the pursuit of a particular purpose by the Court through the mechanism of good faith. It also demonstrates that the same Court has pursued two completely different purposes and that neither case is compatible with the other. What can be done about this is difficult to say. For myself, I favour the purpose underlying the majority judgement in *Wastech*. This is neither here nor there, however, since it does not clarify as a matter of authority which approach is to be preferred. It is possible that each doctrine can pursue distinct purposes, of course. But it would be undeniably oxymoronic for doctrines that allegedly stem from the same organizing principle to have absolutely *nothing* in common. If this ends up being the case because no clear purpose underpinning good faith emerges, then the nomenclature of "good faith" will end up meaning nothing in particular, despite what the Supreme Court's recent decisions purport to offer.