HOW DO LIMITATION CLAUSES, DAMAGES, AND GOOD FAITH DUTIES ALIGN?

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This article considers the following issues related to damages for the breach of generally applicable good faith duties emanating from the general organizing principle of good faith identified by the Supreme Court in Bhasin v Hrynew. The first is what damages are in fact appropriate for breaches of such good faith duties and do they correspond with what the Supreme Court has said about them? The second is what damages may be appropriate for breaches of the duty to exercise contractual discretion in good faith, specifically? The third, how do good faith duties and limitation clauses interact? The article answers all three and offers an explanation as to what damages may be appropriate for the breach of good faith duties, and why such damages ought to be recoverable regardless of whether a valid limitation clause otherwise.

L'auteur de cet article traite de trois questions touchant les dommages-intérêts s'appliquant généralement en cas de manquement au devoir de bonne foi émanant du principe directeur général de bonne foi que la Cour suprême a établi dans l'arrêt Bhasin c. Hrynew. D'abord, quels dommages-intérêts conviennent, en fait, dans ce genre de manquement, et ceux prévus cadrent-ils avec l'arrêt de la Cour suprême? Ensuite, quels dommages-intérêts conviennent exactement en cas de manquement à l'obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi? Enfin, comment le devoir de bonne foi et les clauses limitatives de responsabilité s'influencent-ils mutuellement? L'auteur répond à ces trois questions et explique quels dommages-intérêts peuvent convenir en cas de manquement au devoir de bonne foi et pourquoi ils doivent être recouvrables, malgré l'existence d'une disposition limitative de responsabilité autrement valide.

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I. Introduction

The development of Canada's jurisprudence on contractual good faith is still very much in its infancy. Many questions have yet to be answered with respect to liability for the breach of specifically actionable good faith duties ("GFD" singular / "GFDs" plural) emanating from the general organizing principle of good faith that are generally applicable to all contracts, and more still have yet to be answered with respect to remedies for such breaches. This article will consider two such issues. First, what is the appropriate response in damages to the breach of a GFD, and specifically the duty to exercise contractual discretion in good faith ("DCDGF")? Second, what is the result where a Good Faith Duty conflicts with a clause that purports to limit the defendant's liability? Below, I will briefly outline what we currently know about good faith in the Canadian common law of contract and the remedies available for breaches of it. Next, I will summarize the current state of the jurisprudence on the regulation of limitation clauses in

Canadian common law contract. Finally, I will present a hypothetical that illustrates how good faith and limitation clauses may interact.

II. Parameters of the Discussion

To ensure that the analysis that follows in this article is taken as intended, the article's scope must be clarified in three key respects. The first is the nature of the good faith duties to which I refer and those to which I do not refer. The second is the type of limiting clauses upon which I am focussed. The third is the nature of the obligations that these clauses limit, or the obligations I am concerned with said limiting clauses limiting. I address each of these points in turn below.

1. To Which Duties Do I Refer?

Many readers will already be well familiar with the development of good faith in the Canadian common law of contract. Nonetheless, it bears stating the obvious for those unfamiliar with these developments and to set the stage for the argument to come. It also bears clarifying what exactly I am referring to in this article when I refer to good faith duties. Good faith duties that are specific to particular categories of contract such as insurance and employment have existed for some time, and centuries in fact in the case of insurance,[2] but these duties are outside the scope of the present article for two reasons. First, it is not clear how exactly these pre-existing categories of good faith duties relate to more recent Good Faith Duties said by the Supreme Court to emanate from the general organizing principle of good faith.[3] Second, it is not clear whether or to what extent these pre-existing context specific good faith duties possess the same characteristics as GFDs emanating from the general organizing principle of good faith. For both reasons, it is difficult to say whether any of the conclusions in this article with respect to GFDs and limitation clauses ought to apply with equal force to these pre-existing context-specific, good faith duties. For instance, context specific good faith duties can be readily modified to some extent by the parties[4], whereas only limited modification has been said to be permissible with respect to general GFDs.[5] As demonstrated

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2 H G Beale, ed, *Chitty on Contracts*, 35th ed, Common law library (London: Sweet & Maxwell, Thomson Reuters, 2023), ss 2–038; See *Carter v Boehm*, [1766], 97 ER 1162.

3 *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at paras 78-88.

4 The good faith duty of disclosure in insurance contracts can for instance be limited by the insurer's application document on the basis that specific questions may exclude the obligation to disclose risk information of a more general nature not contemplated by the questions asked; See *Katrichak v National Life Assurance Co of Canada*, [1992] BCJ No 134; See also *Stewart v Canada Life Assurance Co*, [1999] OJ No 2842.

5 *Bhasin v Hrynew*, 2014 SCC 71 at para 75 [*Bhasin*].

below, this difference in particular is highly significant with regard to the interplay between GFDs and limitation clauses and as such good faith duties specific to particular categories of contract must be left to one side for the sake.

2. To Which Clauses of Limitation Do I Refer?

With respect to the limiting clauses discussed in this article, I will be drawing a distinction between clauses that limit liability without eliminating it entirely ("Limitation Clauses") and clauses that eliminate liability entirely ("Exclusion Clauses") and focussing on the former. It is potentially important to do so given the Supreme Court's view that GFDs may potentially be modified but cannot be excluded entirely, which may mean that Exclusion Clauses will always be ineffective vis-à-vis a Good Faith Duty by default, whereas Limitation Clauses may potentially have effect according to the Court and could thus plausibly be raised in defence in future cases as the jurisprudence continues to develop.[6] Should a court, however, be called upon to consider whether a targeted Exclusion Clause could be effective vis-à-vis GFDs as a mere modification rather than a blanket exclusion, my analysis with respect to the intersection of Limitation Clauses and GFDs will still be relevant given that Exclusion Clauses and Limitation Clauses are both regulated by the three-part test from *Tercon v British Columbia*.[7]

3. With Which "Obligations" Am I Concerned?

The third distinction needed in order to properly define the parameters of this article is between primary and secondary obligations. Primary obligations in contract are those that oblige the relevant party to do, provide, or abstain from, the relevant thing called for by the contract ("Primary Obligations").[8] Secondary obligations by contrast mirror primary obligations and replace them in specie in the event of breach i.e., they are a party's obligation to pay damages in default of performance ("Secondary Obligations").[9] In theory, Limitation Clauses and Exclusion Clauses curtail a party's Secondary Obligations i.e., they exclude or limit a party's obligation to pay damages for breach but not the Primary Obligation itself.[10] As a practical matter, this distinction can be seen as one without a difference since Exclusion Clauses and strict Limitation Clauses

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6 *Bhasin*, *supra* note 5 at paras 75–78.

7 *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010] SCC 4.

8 John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 876 [McCamus, *Contracts*].

9 *Ibid*.

10 *Ibid*.

can render a party's Primary Obligations practically unenforceable, given that damages are the default remedy in contract and the only remedy ordinarily available as of right. Nonetheless, it is generally accepted that a Primary Obligation survives the elimination or limitation of its corresponding Secondary Obligation, and in this article, I will focus on Limitation Clauses that purport to limit a party's Secondary Obligations rather than clauses that may be taken to limit the scope of a party's Primary Obligations.

The reason for focusing on Secondary Obligations is two-fold. First, as a starting proposition, I submit that it follows from the Supreme Court's insistence that GFDs are contractual duties that GFDs must have a primary and secondary aspect the same as all other contractual duties. Second, if parties are permitted to modify GFDs while "respecting their minimum core requirements",[11] I submit that parties should only be able to directly influence the Primary aspect of GFDs and only affect the secondary aspect of these duties indirectly as a result. If this is correct, then it follows that attempts to curtail the secondary aspect of GFDs by limitation or exclusion ought to be ineffective since it would undermine GFDs in a way that appears likely to be impermissible[12] even though it is tolerated for ordinary contractual duties.[13] If that is correct though, one may wonder what there is to discuss then with respect to the intersection of GFDs and Limitation Clauses that purport to limit the secondary aspect of a GFD? The answer in short is that, even if directly limiting the Secondary aspect of GFDs ought to be outside the permissible scope for modification of GFDs suggested by the Supreme Court, it does not mean parties and their counsel will not argue that such modification is permitted.[14] Should

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[11] *Bhasin*, *supra* note 5 at paras 75–78; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, Justice Kasirer [*Wastech*] ("Accordingly, discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes a breach of contract. Even unfettered, the discretionary power will have purposes that reflects the parties' shared interests and expectations, which purposes help identify when an exercise is capricious or arbitrary, to stay with this same example." at para 62).

[12] Courts confronted with exclusion clauses that speak only to "liability", that is a party's secondary obligation to pay damages as opposed to the corresponding primary obligation to do or abstain from a given thing, have treated such clauses as impermissible attempts to exclude the primary obligation itself, i.e., the duty to actually perform the contract honestly; See *Berscheid v Government of Manitoba*, 2022 MBCA 12 at paras 9 & 56; *Canlanka Ventures Ltd v Capital Direct Lending Corp*, 2021 ABCA 115 at paras 14, 27–28.

[13] McCamus, *Contracts supra* note 8 at 876–877.

[14] This issue appears to have arisen in *2708266 Ontario Inc. v The City of Toronto*, 2022 ONSC 6315, however, because no explicit finding of a breach of DCDGF was made, neither was a determination of this point on the merits; See *2708266 Ontario Inc. v. The City of Toronto*, 2023 ONSC 383 at paras 30–31.

this occur though, there is another and further objection that can be made to the direct limitation of liability in damages for breach of a Good Faith Duty, which this article considers in Part IV.

4. The Nature of Liability

For all intents and purposes, the story of general good faith obligations in the Canadian common law of contract began with the Supreme Court of Canada's landmark 2014 decision in *Bhasin v Hrynew*.[15] In that decision, the Supreme Court recognized that an "organizing principle of good faith" underpinned the Canadian common law of contract.[16] This principle was said not to be independently actionable itself, but that particular manifestations of this principle could be actionable and in the case at bar, the Supreme Court recognized one such manifestation for the first time.[17] The doctrinal manifestation of good faith recognized in *Bhasin* was the duty of honest performance ("DHP"), and as the name suggests it requires contracting parties to be honest in the performance of their obligations, or rather prohibits dishonest or misleading conduct with respect to the performance of their contract.[18] In addition to DHP, the Supreme Court recognized a further manifestation of the aforementioned organizing principle in the form of the revamped duty to exercise contractual discretion in good faith ("DCDGF") in its 2021 decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*.[19] To satisfy this latter duty, parties are required to exercise any contractual discretion reasonably in light of the purposes for which the discretion was conferred.[20]

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15 *Bhasin*, *supra* note 5; CF Angela Swan, "It Matters How You Start to Think About a Contracts Problem", (2020), 96 SCLR (2d) 3-35.

16 *Bhasin*, *supra* note 5 at para 33.

17 *Bhasin*, *supra* note 5 at paras 33 & 64.

18 *Bhasin*, *supra* note 5, Justice Cromwell ("In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step." at para 73).

19 *Wastech*, *supra* note 11 at para 3.

20 *Wastech*, *supra* note 11, Justice Kasirer ("Stated simply, the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in Bhasin, to exercise their discretion reasonably." at para 63).

Other and further GFDs emanating from the organizing principle have yet to be developed by the courts post-*Bhasin*, or redeveloped in light of *Bhasin* as DCDGF was in *Wastech*. However, the Court in *Bhasin* stated that the categories are not closed and confirmed the existence, if not the parameters, of a duty of cooperation and a duty not to evade contractual responsibilities recognized in pre-*Bhasin* jurisprudence.[21] Further, it seems more than likely that further GFDs *will* be recognized given that the general problem that such duties respond to is bound to arise in ways not covered by existing doctrine. The general problem is non-breach misfeasance, which is essentially conduct that we intuitively object to as not quite cricket, but which does not actually contravene the parties' contract.[22] The general nature of this problem is also likely to guarantee that certain features of the GFDs already identified by the courts are likely to be present in other and further manifestations of the general organizing principle of good faith. Three of these aspects in particular are pertinent to understanding the way in which GFDs may constitute an inroad into the enforceability of Limitation Clauses.

The first and most obvious feature of GFDs that distinguish them from conventional contractual duties is that GFDs are quite clearly extra-contractual and externally imposed.[23] The second feature of note is that such GFDs are independent of the parties' intentions to a greater extent even than terms implied by law or custom.[24] With such implied terms, the law is clear that they need not have been actually intended to apply by the parties, but they must at least not be inconsistent with the expressed intentions of the parties.[25] By contrast, GFDs emanating from the

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21 *Bhasin*, *supra* note 5 at paras 47–51 & 66; See also Vanessa Di Feo, "You've Got to Have (Good) Faith: Post-Wastech and the Potential for a Duty to Renegotiate", 45 Dalhousie LJ 35 at 19–20 [Di Feo, "You've Got to Have (Good) Faith"].

22 Krish Maharaj, "Good Faith Not Good for Consistency: Irreconcilable Results in Wastech and Callow" (2022) 55:2 Univ Br Columbia Law Rev 511–546 at 515–516 [Maharaj, "Irreconcilable Results"].

23 John D. McCamus, "The Supreme Court of Canada and the Development of a Canadian Common Law of Contract" (2022) 45:2 Man LJ 7–54 at para 61 [McCamus, "Canadian Common Law of Contract"].

24 *Bhasin*, *supra* note 5, Justice Cromwell ("There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see Mesa Operating, at paras. 15–19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability." at para 74).

25 McCamus, *Contracts supra* note 8 at 832–849.

organizing principle of good faith are unconstrained by the express terms of the parties' contract.[26] Such GFDs cannot be excluded either expressly or by implication.[27] Admittedly, their application may be informed by the contract and its context, but it is also clear that a claim for the breach of one of these duties is not defeated merely because the contract appears to sanction the delinquent party's conduct.[28] After all, the whole point of the good faith endeavour is that behaviour that violates the spirit of the contract should not be excused merely because it complies with the letter of the contract.[29]

A further third potential common quality of GFDs that has yet to be explicitly confirmed is that they appear to be equitable in nature, and that they require the delinquent party's conscience to be enjoined before a breach of duty can be successfully pled. This aspect of DHP appears almost certain considering the Supreme Court's decision in *Wastech*, which confirmed that it is insufficient for a defendant to have been honest but incorrect and that subjective dishonesty is required for a breach of this duty to be made out.[30] The standing of DCDGF is less certain in this regard given that the circumstances of the *Wastech* case did not give rise to a successful claim.[31] However, the Court of Appeal for Ontario's decision in *2161907 Alberta Ltd. v. 11180673 Canada Inc.* suggests that an honest

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[26] Joseph T. Robertson, "Good Faith as An Organizing Principle in Contract Law: Bhasin v Hrynew—Two Steps Forward & One Look" (2016) 93:3 Can Bar Rev 809–866 at 845 [Robertson]; S M Waddams, *The law of contracts*, 7th ed (Toronto: Thomson Reuters, 2017), s 514 [Waddams].

[27] *Bhasin*, *supra* note 5 at paras 74–76.

[28] *Bhasin*, *supra* note 5, Justice Cromwell ("That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements." at para 77).

[29] Waddams, *supra* note 26 at s 514; Krish Maharaj, "Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith" (2020) 96 SCLR (2d) 107 at 107–109 [Maharaj, "Clarity"]..

[30] *Wastech*, *supra* note 11 at paras 55–56 (Note, the duty of honest performance was not in issue in *Wastech*, but the issue of dishonesty was raised by the very confusing arbitral decision at first instance.).

[31] *Wastech*, *supra* note 11 at paras 111–113 & 135; See also *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at para 101 (the majority discuss subjective versus objective intention concerning breaches of good faith, referencing *Callow* and presumably *DHP*, but omitting any mention of *Wastech* and the DCDGF, suggesting that the mental state required to establish a breach of the DCDGF may remain unsettled); See also Di Feo, "You've Got to Have (Good) Faith", *supra* note 21 at 20 (whether claims for breach of good faith duties are to be analysed subjectively or objectively remains unclear).

but improper exercise of discretion[32] does not constitute a breach of this duty and that the delinquent party must instead knowingly exercise their discretion for an improper purpose for a successful claim of bad faith exercise of discretion (i.e. a breach of DCDGF) to be brought.[33]

5. Remedies

If the nature and parameters of liability for breach of GFDs are still early in their development and yet to be fully hammered out, the nature and parameters of the corresponding remedies for their breach are at an earlier stage of development still. Some observations can be made with respect to remedies for the two GFDs whose existence and parameters have been confirmed by the Supreme Court post-*Bhasin*, and suggestions made as to how remedies for each should be understood or develop in the future. Below, I divide my remarks between the conventional monetary remedies—either currently available or potentially available—for breaches of the two GFDs recognized or confirmed by the SCC. Next, I discuss the possibility of more extraordinary remedies, such as gain-based monetary awards, in response to breaches of either duty or GFDs more share-based monetary awards more generally.

(a) Conventional Damages for Breach of The Duty of Honest Performance

Only two of the three decisions of the Supreme Court of Canada on GFDs have considered the remedies available for their breach. Both cases deal with breaches of DHP, and both have come in for criticism with respect to the Court's approach to damages in this context.[34] What these decisions purport to establish is that breaches of GFDs sound in to contract damages,

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[32] The trial judge did not have the benefit of the SCC's decision in *Wastech* in this case, and did not explicitly advert to DCDGF in their reasons. Nonetheless, the ONCA considered whether the appellant had breached DCDGF; *2161907 Alberta Ltd v 11180673 Canada Inc*, 2021 ONCA 590 at paras 45–48 & 56–64 ["*Tokyo Smoke*"].

[33] *Tokyo Smoke*, *supra* note 32 ("Put simply, in terminating the License Agreement, 216 did not seek to undermine 111's interests in bad faith. While 216's notice of termination was, by definition, an attempt to put an end to the agreement, the termination right in question formed part of the parties' bargain and reflected, among other things, the licensor's legitimate interest in protecting its brand in circumstances that the parties expressly stipulated would give rise to a right of termination. The fact that Mr. Farbstein erroneously believed those circumstances were present does not amount to bad faith." at para 72).

[34] Robertson, *supra* note 26 at 861; Bruce MacDougall, *Misrepresentation* (Toronto, Ontario: LexisNexis, 2016) at 65 (MacDougall characterizes the damages as very "tort-like"); Krish Maharaj, "An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel" (2017) 55:1 Alta L Rev 199 at 215 [Maharaj, "Action on the Equities"].

assessed on the basis of the expectation of measure ordinarily applicable to breach claims.[35] The majority in the latter of these two decisions goes so far as to insist that this is the case, even though GFDs are not terms and quite explicitly do not reflect the intentions or expectations embodied in the parties' contracts.[36] Further, it is quite evident that the application of DHP in both cases effectively led to the parties' contract and the intentions/expectations therein being explicitly overridden.[37] All of which makes it difficult to understand how exactly the monetary awards in these cases could be contractual or explicable as attempts to vindicate the plaintiffs' expectation interests. Nonetheless, this is the Court's position for the time being.

A better rationale for the Court's awards in *Bhasin* and *Callow* may be that they (and DHP) vindicated the plaintiffs' reliance interests in that they undid the detriment that the plaintiffs in these cases would have otherwise experienced as a result of relying on the defendants' dishonest statements.[38] o Although, this explanation further undermines the supposed contractual nature of DHP and the damages awards made for its breach in these cases, given that there is no independent reliance interest separate from the expectation interest recognized in the Canadian common law of contract.[39] Nonetheless, Justice Brown writing for himself and Justices Moldaver and Rowe in the minority in *Callow* took the view

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[35] *Bhasin*, *supra* note 5 at para 88; *CM Callow Inc v Zollinger*, 2020 SCC 45 at para 113, Justice Kasirer [*Callow*] (For the majority).

[36] *Callow*, *supra* note 35, Justice Brown ("The majority relies on Cromwell J.'s statement in Bhasin that a breach of the duty of honest contractual performance "supports a claim for damages according to the contractual rather than the tortious measure" [para. 88]. But when the purpose of the expectation measure of damages for breach of contract is examined and contrasted with the legal framework developed in Bhasin, the actual claim in Bhasin and the damages actually received, it becomes readily apparent that the reliance measure is precisely the measure that the Bhasin framework contemplates should be awarded. On this point, the majority's reasons represent not fidelity to Bhasin, but a regrettable departure that undermines the coherence between the interests sought to be protected in Bhasin and the remedy to be awarded." at para 140).

[37] Krish Maharaj, "Callow in More Ways Than One: The Supreme Court Causes More Confusion in Contract" 53:1 Ott L Rev 22 at 89–90 [Maharaj, "Callow in More Ways Than One"]; Maharaj, "Action on the Equities" *supra* note 34 at 203–204.

[38] Vanessa Di Feo, "CM Callow v Zollinger, Reconceptualized Through the Tort of Negligent Misrepresentation", (2022) 27 Appeal 103 at paras 19, 66 [Di Feo, "Reconceptualized"]; Anna SP Wong, "Duty of Honest Performance: A Tort Dressed in Contract Clothing", (2022) 100 Can Bar Rev 96 / (2022) 100 R du B can 96 at paras 26–32 [Wong]; See also Marcus Moore, "Developments in Contract Law: The 2020-2021 Term—Appeals to Fairness", (2022) 106 SCLR (2d) 3–48.

[39] *Bowlay Logging Limited v Domtar Limited*, (1978) 87 DLR (3d) 325 (BCSC) at 332–335, aff'd (1982) 135 D.L.R. (3d) 179 (BCCA); Maharaj, "Callow in More Ways Than One" *supra* note 37 at 76–80.

that the damages awards in these cases were grounded in reliance, and the rationale appears compelling not only with respect to the outcomes of these two cases, but also more generally with respect to the basis of DHP.[40] In short, DHP appears to undo detrimental reliance that would otherwise arise when expectations that have arisen *outside* of the parties' contract are unmet.[41] If that is correct, then it is not necessarily surprising that damages for breach of the duty do not align with the expectation/contract measure because the duty has nothing to do with upholding contracts at all. To the contrary, it is in fact the contract that would lead to the detrimental outcome that DHP attempts to undo, and as such for DHP the parties' contract is not the object, it is an obstacle.

(b) Conventional Damages for Breach of The Duty to Exercise Contractual Discretion in Good Faith

The conclusion in the preceding section with respect to damages for breach of DHP does not necessarily hold for all other GFDs. It may hold true for some, however, but as with DHP itself the question depends on the mischief addressed by the Good Faith Duty in question. As noted above, to date only two such GFDs have been explicitly confirmed and their parameters clarified in the Supreme Court's post-*Bhasin* jurisprudence,[42] and to my knowledge there have been no decisions from the Supreme Court or otherwise engaging explicitly with the damages recoverable for the second of the two, DCDGF, recognized/revised in *Wastech v Greater Vancouver Sewerage and Drainage District*. Nevertheless, based on what's been said about the duty, we can deduce the appropriate damages response in principle.

The mischief addressed by DCDGF is the use of a contractual discretion/power in a way that is unconnected to the purpose for which the discretion was conferred.[43] Where the terms of the discretion/power

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40 *Callow*, *supra* note 35 at para 145.

41 Di Feo, "Reconceptualized" *supra* note 38 at paras 19; Wong, *supra* note 38 at paras 26–32.

42 Other duties are alluded to By Justice Cromwell in *Bhasin*, but none of these has yet to be adjudicated by the Court; *Bhasin*, *supra* note 5, Justice Cromwell ("By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: [1] where the parties must cooperate in order to achieve the objects of the contract; [2] where one party exercises a discretionary power under the contract; and [3] where one party seeks to evade contractual duties [pp. 840-56; CivicLife.com Inc v Canada (Attorney General) (2006), 2006 CanLII 20837 (ON CA), 215 O.A.C. 43, at paras 49–50]" at para 47).

43 *Wastech*, *supra* note 11 Justice Kasirer ("The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion." at para 4).

reveal its limits or purpose the appropriate ambit of the power/discretions exercise is clear according to both the majority and the minority in *Wastech*.[44] Even where a discretion is expressed to be unfettered though, the majority view in *Wastech* is that the exercise of contractual discretion must nonetheless conform with the broad purposes of the venture.[45] What this tells us is that the purpose of *this* GFD is to promote the realization of the parties' expectations embodied *within* the contract by preventing or sanctioning any exercise of contractual discretion that falls outside of a range of choices that are contemplated by the parties' contract as rationally connected with its objects and the object of the discretion.[46] As such, unlike DHP, the object of this duty's concern is not outside of the contract, the object of this duty's concern *is* the contract.[47] If this is correct, it follows that the appropriate response in damages to a breach of this duty ought to be geared towards vindicating the expectation that has been denied by the defendant's inappropriate exercise of their contractual discretion i.e., contract damages on the expectation measure.

Further to the point in the preceding paragraph, DCDGF also appears to be more closely aligned with the parties' contract in that it appears to have a more obvious primary and secondary aspect as with conventional contractual obligations. The obligation to exercise the discretion in good faith can be understood as either positive or negative, but either way it is clearly an obligation to either act or abstain in a manner that is consistent

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[44] *Wastech*, *supra* note 11 at paras 72 & 131.

[45] *Wastech*, *supra* note 11, Justice Kasirer ("Writing extra-judicially, Lord Sales has recently explained that where the clause that confers a discretionary power is 'entirely general', a court will have to construe the ambit of the power itself [P.Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 L.Q.R. 384 at p. 393]. In those cases, he notes at p. 393: 'It is necessary instead to 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.'" at para 72).

[46] *Wastech*, *supra* note 11 at para 88; *Alteen Brothers Limited v Rolex Canada Ltd*, 2022 NLSC 174, PN Justice Brown ("In other words, a party must 'exercise their discretion in a manner consistent with the purposes for which it was granted in the contract … or in the terminology of the organizing in Bhashin [sic], to exercise their discretion reasonably' [para. 63]. Effectively, the duty of good faith does not eliminate a party's power to choose, but rather limits its discretion to the range of options that are consistent with the contract [para. 75]." at para 32).

[47] Maharaj, "Irreconcilable Results" *supra* note 22 at 542–543 ("The duty to exercise contractual discretion in good faith as applied or explained by the Court in *Wastech* departs sharply 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.").

with the purpose behind the discretion or the contract as a whole and thus primary in nature. And where a party fails to act or abstain as required by the duty, a corresponding obligation to pay damages can be readily understood to arise as a substitute for the benefit expected by the plaintiff under the contract that has been denied by the defendant's failure to act/abstain as required. Specifically, the obligation to pay damages for a breach of DCDGF can be understood as a secondary obligation that replaces the primary obligation in the event of a breach.

(c) Gain-Based Damages and Good Faith

In *Atlantic Lottery Corporation Inc v Babstock*[48] the Supreme Court drew upon the House of Lords decision in *Attorney General v Blake*[49] to establish the test for the availability of disgorgement type remedy in response to a breach of contract.[50] A disgorgement remedy, also called a gain-based remedy or gain-based damages, ties the monetary award to what the defendant gained from the breach, rather than what the plaintiff lost[51]—the usual approach to contract damages, other than aggravated or punitive damages.[52] The test for the availability of such a gain-based award is available with respect to a given breach requires first, that other remedies be inadequate, and second, that the circumstances warrant such an award.[53] As explained in a prior article, the inadequacy as opposed to unavailability of other remedies, and expectation damages in particular, depends on the ability of said remedies to respond to the diminution or deprivation of the interest affected by the breach.[54] Where other remedies cannot respond to the diminution or deprivation of the relevant interest as a result of the breach, they are inadequate. However, where other remedies

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48 2020 SCC 19 [*Atlantic Lottery*].

49 *Attorney-General v Blake (Jonathan Cape Ltd, Third Party)*, [2001] AC 268 [*Blake*].

50 *[2001] AC 268 [Blake]*.

51 *Atlantic Lottery*, *supra* note 48 at paras 24 & 110; James Edelman, *McGregor on Damages*, 21st ed (London: Sweet & Maxwell/Thomson Reuters, 2021) at para 15–100.

52 *Blake*, *supra* note 49 at 282, Lord Nicholls ("Leaving aside the anomalous exception of punitive damages, damages are compensatory. That is axiomatic."); Adam Kramer, *The Law of Contract Damages*, 3rd ed (Oxford: Hart Publishing, Bloomsbury Publishing Plc, 2022) at paras 1–39 ("The aim of the award is not to deter or punish, nor to strip the defendant of any gain … but rather to measure the loss of the claimant, that loss being the difference the situation the claimant is in and that it would have been in.").

53 *Atlantic Lottery*, *supra* note 48 at para 53.

54 Krish Maharaj, "Alternatives to Expectation: When Can You Get Disgorgement, Gain-Based, or Restitutionary Damages for Breach of Contract?" (2022) 48:1 Queens Law J 120 at 130–133 [Maharaj, "Alternatives to Expectation"].

do not respond because there is no harm to a recognized interest, they are not inadequate—they are simply unavailable.[55]

Whether the circumstance of the breach warrant the award of a gain-based remedy, and thus the second part of the test from *Atlantic* is satisfied, is a more complicated question than the first. It is said to turn on whether the plaintiff has a "legitimate interest" in the defendant's "profit making activity", but when exactly that will be the case is a question that both the Lords in *Blake* and the majority in *Atlantic* thought best left to be resolved in "concrete cases".[56] Nonetheless, it has been suggested that this aspect of the test could be met within two broad categories. The first of these is when the interest at stake is intrinsically, as opposed to extrinsically valuable in that the interest is valuable for its own sake as opposed to valuable in terms of quantifiable benefits that the interest conveys or creates.[57] The second category is circumstances in which the defendant's breach has undermined the economic function of the parties' contract, which is to permit the realization of a surplus from the parties' exchange.[58] Whether a given breach of contract falls within the first category generally depends on what has been contracted for and may thus be readily identified according to the terms of said contract and the background factual matrix.[59] Whether a given breach falls within the latter category is less obvious, but not every breach fits within this category even though every breach must, to some extent, stymie the plaintiff's realization of the expected benefits/surplus. Where the defendant's breach has the effect of misappropriating the benefit/surplus that the plaintiff would otherwise have expected to accrue to them, however, the defendant has undermined the economic function of the contract in a way to which conventional damages awards cannot typically respond.[60] This makes conventional remedies in all likelihood inadequate, and in my view ought to make a gain-based award warranted as a means of protecting the institutional function of contract.

Where the breach of a Good Faith Duty has led to the realization of a gain in the hands of the defendant, there is potentially a strong argument in favour of finding that the test from *Atlantic Lottery* is satisfied and that a gain-based award is appropriate. First, conventional damages for breach may not respond adequately or at all to the deprivation/diminution of the relevant interest experienced by the plaintiff, as was the case with breaches

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55 *Atlantic Lottery*, *supra* note 48 at para 60; *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at para 85; Maharaj, "Alternatives to Expectation" *supra* note 54 at 130–135.

56 *Atlantic Lottery*, *supra* note 48 at para 55.

57 Maharaj, "Alternatives to Expectation" *supra* note 54 at 143–144.

58 *Ibid*.

59 Maharaj, "Alternatives to Expectation" *supra* note 54 at 145.

60 *Ibid* at 145–146.

of DHP in *Bhasin* and *Callow*.[61] Second, as was the case in *Bhasin*, the effect of the breach may be the misappropriation of the expected benefits or surplus that the plaintiff had hoped to realize, even though no explicit or implied term has been breached, and the defendant's behaviour is otherwise consistent with the parties' contract.[62] The two-part test was also, in my view and that of the dissenting minority, even more clearly satisfied in the circumstances of *Atlantic Lottery* itself with respect to a breach of DHP by Atlantic Lottery vis-à-vis the class plaintiffs.[63] The availability of a gain-based award with respect to a breach of DCDGF is less clear cut than it is with respect to breaches of DHP in the sense that the former has a clearer alignment with expectation damages, as discussed above. However, as we'll see in the example below, in certain circumstances the loss to the plaintiff arising from misuse of contractual discretion may be best understood or assessed by reference to any gain made by the defendant. Ergo there may still be good reason to assess the plaintiff's award in light of the defendant's gain and grant what is a gain-based award whether it is described in those terms or not.[64]

III. Exclusion and Limitation Clauses in Canada

In *Tercon v British Columbia* the Supreme Court of Canada set out a framework for determining whether an Exclusion Clause that otherwise appeared to form a part of a binding and enforceable contract would itself be enforced to bar a plaintiff's claim arising in connection with said contract.[65] This framework applies equally to Limitation Clauses,[66] and consists of the following three steps: 1) Determine whether the clause applies to the loss in the circumstances, 2) if the clause does apply to the loss, determine whether the clause is voidable by reason of unconscionability, and 3) if the clause is neither inapplicable nor unconscionable, determine whether there is nonetheless some overriding concern of public policy that justifies overriding freedom of contract in the circumstances and

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61 Wong, *supra* note 38 at paras 32–36.

62 Maharaj, "Alternatives to Expectation" *supra* note 54 at 150–152.

63 *Ibid* at 154-160.

64 Justice Brown writing for the majority in *Atlantic Lottery* was of the view that evidentiary impossibility of assessing the plaintiff's loss does not make compensatory damages inadequate, and that a gain based remedy is not merely appropriate because the plaintiff's loss is argued to be equivalent to the defendant's gain, but it may be more appropriate to say that where loss can be proven the plaintiff does not have an election between a conventional damages award based on their loss and a gain-based award; See *Atlantic Lottery*, *supra* note 48 at paras 59–60.

65 *Tercon*, *supra* note 7.

66 *Ferrer v 589557 BC Ltd*, 2020 BCCA 83; *September Seventh Entertainment Ltd v The Feldman Agency et al*, 2017 ONSC 552 at para 19.

disallowing the clause's application.[67] This article is principally concerned with the third step.

The third step in the *Tercon* test was the most novel aspect of the Court's decision and an apparent response to the gap left by the abolition of fundamental breach, albeit an unhelpfully ambiguous one. The confusion around what the third step in the *Tercon* test meant owed both to the open-textured nature of "public policy" and the Court's choice of examples.[68] Readers already familiar with the case will remember Justice Binnie's references to children in China who were poisoned by milk intentionally contaminated with melamine,[69] consumers poisoned by tainted cooking oil,[70] and the slightly less extreme example of *Plas-Tex v Dow* involving the intentional sale of a defective resin that would go on to be used in the manufacture of natural gas pipelines creating a risk of fire and explosions. Of course, no one doubts that these examples were correct, but even without *Tercon*, I do not think there was any serious doubt as to whether an Exclusion Clause was a licence to kill children. These were also strange examples in context given that *Tercon* was a tendering case about the selection of an ineligible bidder.[71] As such, we were told very little about what concerns of public policy counted that we could not have already figured out. Justice Binnie himself admits as much in his judgment when he said the following:

> "Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract."[72]

Post-*Tercon* jurisprudence has also been somewhat limited with respect to explaining what else may constitute a "substantially incontestable" consideration of public policy.[73] Although, in fairness they have at least

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67 *Tercon*, *supra* note 7 at paras 122–123; *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20 at paras 70-71 [*Earthco]*.

68 McCamus, *Contracts supra* note 8 at 897–898.

69 *Tercon*, *supra* note 7 at para 118.

70 *Ibid*.

71 *Plas-Tex Canada Ltd v Dow Chemical of Canada Limited*, 2004 ABCA 309.

72 *Tercon*, *supra* note 7 at para 120.

73 McCamus, *Contracts supra* note 8 at 901–904.

confirmed and clarified some of Justice Binnie's dicta in more temperate language:

> "… [A] party seeking to rely on an exclusion clause either knew it was putting the public in danger by providing a substandard product or service, or was reckless as to whether it was doing so." [74]

Lower courts have also confirmed that an Exclusion Clause cannot be used to defeat responsibilities imposed by statute, and that fraud (the tort of deceit) occurring after the contract has been entered into may also disentitle reliance on an Exclusion Clause specifically, as opposed to undoing the contract in its entirety.[75] This latter point has in my view helpfully addressed in part a concern with respect to what effect the nature of the breach should have on the delinquent party's ability to rely on an exclusion clause to avoid responsibility for breach or other wrongdoing given that fundamental breach is well and truly defunct.[76] And what's more, this approach to post-contractual fraud points to a potentially more expansive basis in public policy for intervention to disallow an Exclusion Clause or a Limitation Clause in circumstances falling short of fraud or public endangerment. That basis, as I will explain below, is good faith. Or at least the Canadian common law conception of it.

IV. Good Faith as an Incontestable Consideration of Public Policy

As mentioned in the introduction to this paper, a hypothetical can be used to illustrate how Canadian good faith jurisprudence and the *Tercon* test for the enforceability of Exclusion Clauses and Limitation Clauses may intersect. Imagine the facts set out in the fact pattern below.

1. The Dr. Algae Affair—The Facts

Dr. Alex Algae, renowned marine biologist and amateur nature photographer, needs a break and decides to book a weeklong stay from July 1 to July 7 at a five-star hotel (the Paradise Cove Resort & Spa) in a seaside location on a tropical island. Dr. Algae has picked the particular hotel not only because of the agreeable weather, and excellent hotel amenities, but also because an unusually large bloom of bioluminescent plankton is predicted to light up the waters along the hotel's beach front during the

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[74] *Loychuk v Cougar Mountain Adventures Ltd*, 2012 BCCA 122 at para 46 [*Loychuk*].

[75] *Gendron v Doug C Thompson Ltd (Thompson Fuels)*, 2019 ONCA 293; *Niedermeyer v Charlton*, 2014 BCCA 165; McCamus, *Contracts supra* note 8 at 903.

[76] Waddams, *supra* note 26 at s 488.

week that Dr. Algae wishes to stay. Dr. Algae sees the plankton bloom as a prime opportunity for long exposure photography of the luminescent plankton, assuming that the good doctor can get a room with a view. On June 1, Dr. Algae logs in to the website for the Paradise Cove Resort & Spa (PCRS) and finds that there is one ocean view room left available between July 1-7, a king suite with a balcony and uninterrupted views of the ocean from one end of the cove to the other (the "King Suite"). Dr. Algae, a career academic blanches slightly at the price of $900 per night but decides to live a little and proceeds to book the King Suite anyway. On the PCRS website guests are advised that bookings are subject to terms and conditions, which can be accessed by clicking a link. The terms and conditions are not particularly lengthy or difficult to read, and include the following term:

> …
>
> Room Availability
>
> PCRS does not guarantee the availability of any particular room or room type booked by guests. PCRS reserves the right to substitute rooms booked according to room availability at time of check-in, and guests hereby agree that PCRS shall not be liable for any loss or damage arising from any substitution of room or room type beyond any difference in the ordinary per-night rate for rooms booked versus the applicable per-night rate for substitute rooms provided.
>
> …

On June 29, two days before Dr. Algae is set to arrive at PCRS, the reception desk at the hotel receives a phone call. The call is from the personal assistant (PA) of a wealthy individual (Philip Flush) who wishes to know whether the King Suite at the hotel could be made available between June 30 and July 9. After being informed that the room is already booked from July 1-7 the PA asks to speak to hotel management. The PA advises management at PCRS that Philip will gladly pay five times the ordinary rate to have the King Suite for the 10 nights. PCRS management mulls it over and concludes that Dr. Algae can be fobbed off with a substitute room at a discounted rate and some bubbles, and that they can safely go ahead with booking the King Suite for Flush. Two days later, on July 1, Dr. Algae arrives at PCRS to check-in and is told at that time that the King Suite is unavailable and that a substitute room will be provided. Unfortunately, the only rooms that are currently unoccupied are garden view, which means that Dr. Algae's room will not have a view of the bioluminescent plankton at night. Dr. Algae is understandably crushed about the loss of the view and the opportunity for long exposure photography of the plankton, but stays at the resort, nonetheless. Dr. Algae goes from disappointed to

deeply disgruntled at the end of her trip just before she is due to leave however, upon learning that the King Suite would have been available if PCRS management had not booked it for Flush at an inflated rate starting on June 30.

Assuming that Dr. Algae's contract with PCRS is governed by the law of a Canadian common law province and no statute applies to alter the parties' rights and responsibilities, one might think that Dr. Algae would have an uncertain claim against PCRS if the doctor were to sue for disappointment and distress arising from breach of contract à la *Jarvis v Swan*[77] tours in light of the Room Availability clause. However, a potentially successful argument can be made on Dr. Algae's behalf despite the Room Availability clause, albeit not for PCRS's failure to provide the King Suite *per se*.

2. The Claim

The potentially successful argument that could be made on Dr. Algae's behalf is a claim for the breach of PCRS's duty to exercise its discretion under the Room Availability clause in good faith when it double-booked the King Suite knowing that a comparable substitute room was not available. The rejoinder to this claim that PCRS is likely to advance is that the Room Availability clause negates any enforceable expectation that Dr. Algae could have had with respect to getting the specific room booked, and that PCRS's discretion to substitute the room or room type is unfettered and that it could exercise its discretion as it saw fit subject to the requirement to credit the guest for any difference in the per-night rate between the rooms. The minority in the Supreme Court decision in *Wastech* that established/revamped DCDGF, would have likely sympathized with this argument.[78] The majority decision is however far less favourable to PCRS's position. The view advanced by the majority, as mentioned above, is that there is no truly unfettered discretion, and that all contractual discretion must be exercised reasonably in light of the purposes for which it is conferred, even if the relevant clause/contract is not explicit as to what those purposes are.[79] How exactly such purposes are to be divined when they are not explicit is not entirely clear cut, but the following passage sets out the majority position:

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77 *Jarvis v Swan Tours Ltd*, [1973] QB 233 [Jarvis].

78 *Wastech*, *supra* note 11 at para 132; Daniele Bertolini, "Toward a Framework to Define the Outer Boundaries of Good Faith in Contractual Performance" (2021) 58:3 Alta L Rev 573 at 592–593.

79 *Wastech*, *supra* note 11 at para 72.

> "Sometimes, the text of the discretionary clause itself will make the parties' contractual purpose clear. In other circumstances, purpose can only be understood by reading the clause in the context of the contract as a whole. Writing extra-judicially, Lord Sales has recently explained that where the clause that confers a discretionary power is "entirely general", a court will have to construe the ambit of the power itself (P. Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 L.Q.R. 384, at p. 393). In those cases, he notes at p. 393: "It is necessary instead to 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."'[80]

Immediately following the passage quoted above the majority are careful to qualify their position by stating that this approach leaves "elbow room" for the pursuit of self-interest and that it is not an invitation to ad-hoc judicial moralism or "palm tree justice".[81] As such, we are told to put questions of moral rectitude or reasonableness to one side, and to consider only whether the exercise of discretion is connected to its purpose, whatever it may be.[82] Nonetheless, one could venture that even if the purpose of the contract between Dr. Algae and PCRS in the facts above is not the pursuit of virtue, it is clearly not only for the provision of accommodation. To the contrary, the hotel's location on the sea in a tropical destination and the cost of the rooms suggests that this particular hotel is clearly not merely a place to sleep and that a premium is being paid for the experience, and for enjoyment and relaxation. If that is correct, it arguably says a great deal about PCRS's discretion to substitute a room under the Room Availability clause of the contract. It suggests that room allocation is not merely up to the whim of PCRS, because it would undermine the whole purpose of the booking for a guest if their preferences were entirely unimportant in the performance of the contract given that a guest's enjoyment will to some extent be predicated on the provision of the particular amenities they were promised. As such, as the name of the clause suggests, the purpose for which the discretion in the Room Availability clause was conferred/reserved appears to be so that substitution would be permitted where a given room or room type was unavailable and could not be provided and not merely when PCRS did not wish to provide it. Ergo PCRS's decision to substitute the room Dr. Algae had booked (the King Suite) because it had the opportunity to rebook the King Suite at a higher rate does not appear to be a reasonable exercise of discretion in the circumstances in light of the discretion's purpose, meaning that Dr. Algae ought to be able to bring

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80 *Ibid* at paras 73–74.

81 *Wastech*, *supra* note 11 at paras 73–74.

82 *Wastech*, *supra* note 11, Justice Kasirer ("In this context, then, courts must only ensure parties have not exercised their discretion in ways unconnected to the purposes for which the contract grants that power." at para 74).

a successful claim for PCRS's breach of its duty to exercise said discretion in good faith as a result.

Assuming for the sake of argument that a successful claim for PCRS's breach of the duty to exercise its discretion under the Room Availability clause in good faith does lie in these circumstances the next issue would be to determine the appropriate remedy. As mentioned in section II above, the jurisprudence on remedies for the breach of GFDs emanating from the general organizing principle of good faith is still in its infancy and beset by inconsistency.[83] Despite this, I would venture that damages for breach of DCDGF ought to be assessed on the contract measure for the reasons given above—specifically based on Dr. Algae's loss of enjoyment or amenity in the mould of *Jarvis v Swan Tours*.[84] The reason that the approach from *Jarvis* is apt in Dr. Algae's case, despite the fact that her claim is not for breach of the contract itself and is thus not a claim for the denial of a specific expectation in the form of a term, is that Dr. Alage's claim for PCRS's misuse of discretion is a claim for the denial of her expected benefit under the contract that would have otherwise been realized if PCRS had used its discretion as expected. Quantum is obviously an issue even if we accept the premise that damages for loss of enjoyment on the contract measure are recoverable in this scenario, which brings us to the point discussed earlier with respect to the availability of gain-based damages for breach of contract.

In these circumstances, PCRS's misuse of its discretion has led to the misappropriation of the portion of Dr. Algae's expected benefit under her booking over and above any difference in room rate and the mere value of the King Suite as a place to sleep. Assessment of that value in dollar terms is difficult given that this aspect of the benefit of the contract to Dr. Algae pertains to subjective preference and the intrinsic value to her of witnessing the bioluminescent plankton from her balcony and being able to capture it with long-exposure photography. In principle, one might infer that the dollar value of this aspect of Dr. Algae's loss of expected benefit would be equal to the dollar value (over and above any adjustment in the per-night room rate) she would be willing to accept to have given it up voluntarily.[85] However, PCRS' behaviour has ensured that this transaction will not happen because its decision to unilaterally misappropriate her benefit without paying for it. As such, the most obvious ordinary remedy for breach of contract, expectation damages, may not be able to meaningfully

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83 Maharaj, "Callow in More Ways Than One" *supra* note 37 at 81–92.

84 *Jarvis*, *supra* note 77.

85 Contract damages assessed under this theory as the lost value of a sum that could have been negotiated have some accepted precedent; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, [1974] 1 WLR 798 at 812; *Experience Hendrix LLC v PPX Enterprises Inc*, [2003] EWCA Civ 323 at para 44.

respond to the deprivation of her interest in having the view from the King Suite in that the assessment of this aspect of her expectation is likely to be a guess at best. If this is correct, then one can conclude that the first part of the test from *Atlantic Lottery* for the availability of gain-based damages is satisfied, leaving aside aggravated and punitive damages, in that expectation damages as the most obvious ordinary remedy are probably inadequate. The second aspect of the test from *Atlantic Lottery* is likely also satisfied in that a gain-based award appears warranted in the circumstances given that PCRS has undermined the economic function of the parties' contract and profited thereby. A gain-based remedy equal to PCRS' profit over and above the regular room rate for the King Suite may therefore be the most appropriate award for Dr. Algae since one can infer a legitimate interest in PCRS's "profit making activity" in the circumstances since the profit has arisen from the misappropriation and sale of rights that were uniquely valuable to Dr. Algae (i.e., Dr. Algae's loss may be equivalent to PCRS's gain, or is it at least connected to it).[86] However, even if a court preferred to simply do the best it could to assess the value of Dr. Algae's expected benefit short of being mathematically precise and to award expectation damages in the vein of *Jarvis v Swan Tours*, we can conclude that there would at least be some sum that would be recoverable in principle, which for present purposes is enough to ground an assessment of the enforceability of PCRS's Limitation Clause, uncertainty as to quantum notwithstanding.

Remoteness likewise is not an insuperable obstacle to concluding that PCRS must be liable in some amount in the circumstances in light

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[86] Above, I noted that the majority in *Atlantic Lottery* had taken the view that evidentiary difficulties in assessment of the plaintiff's loss did not make ordinary remedies inadequate, and that argument to the effect that the plaintiff's loss was equal to the defendant's gain does not make a gain-based remedy appropriate. However, the Supreme Court's approach to the assessment of damages for the breach of Good Faith Duties has been expressly forgiving towards plaintiffs from an evidentiary perspective, particularly where the nature of the breach has contributed to the difficulty of proving loss. As such, it should not lie in the defendant's mouth to object to an award for want of proof when their very conduct has contributed to the absence of proof, nor does it appear that there is any reason to restrict the plaintiff to remedies that they cannot access as a result and to deny them a gain-based remedy simply because a conventional remedy would be preferable in principle; See *Bhasin*, *supra* note 5 at paras 108–111; See also *Callow*, *supra* note 35, Justice Brown ("Of course, we cannot say with certainty that Callow would have secured other work. He might have sat idle in any event, assuming that the winter service contract was in good standing. But this evidentiary difficulty is the product of Baycrest's dishonesty, and Baycrest should not be relieved from liability simply because Callow cannot definitively prove what would have occurred had it not been misled [Wood v. Grand Valley Rway. Co. (1915), 1915 CanLII 574 (SCC), 51 S.C.R. 283, at pp. 288-91; see also Lamb v. Kincaid (1907), 1907 CanLII 38 (SCC), 38 S.C.R. 516, at pp. 539–40]" at para 149] at paras 116 & 149).

of *Fidler v Sun Life Assurance*.[87] The application of mitigation is less clear cut given that it is not clear how or whether mitigation applies to claims for breach of GFDs. Should mitigation apply to claims for breach of GFDs generally, the doctrine is nonetheless unlikely to pose an obstacle to Dr. Algae's claim given that the "duty" to mitigate does not arise until the injured party becomes subjectively aware of their injury,[88] and in this instance Dr. Algae only learned of PCRS's duplicitous conduct at the end of her stay when not much could have been done about it. That being the case, we can now say that Dr. Algae appears to be a valid claim for breach of DCDGF, which means we are now at the point where the metaphorical rubber will meet the road and the good faith aspect of Dr. Algae's claim will collide with the aspect of the Room Availability clause that limits PCRS's secondary obligations to pay damages for breach.

3. Intersection With the Limitation

The Room Availability clause in the scenario under consideration has a dual aspect. The first is the discretion to substitute room or room type as discussed in the preceding section. The second aspect is the limitation of liability on PCRS's part for any loss arising from any such substitution beyond difference in room rate. Whether or not Dr. Algae's claim for PCRS's breach of its duty to exercise its discretion under the first aspect of the Room Availability clause in good faith can succeed despite the second aspect of the Room Availability clause is a hitherto untested question. The authority we do have does point to an answer, though. To reach that conclusion we must begin with the following test from *Tercon* referred to in the introduction to this paper:[89]

1. Determine whether the clause applies to the loss in the circumstances,

2. If the clause does apply to the loss, determine whether the clause is voidable by reason of unconscionability, and if the clause is neither inapplicable nor unconscionable,

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87 2006 SCC 30.

88 *Canadian Western Natural Gas Co v Pathfinder Surveys Ltd*, [1980] AJ No 648 (ABCA), Prowse JA ("A further question arises and that is whether this appeal could be resolved by applying the doctrine of mitigation. In my view the doctrine has only been applied where the evidence makes it clear that the person suffering damages was aware that such damage was being sustained. This question is resolved by applying a subjective test." at para 66.)

89 *Tercon*, *supra* note 7 at paras 122–123.

3. Determine whether there is nonetheless some overriding concern of public policy that justifies overriding freedom of contract in the circumstances and disallowing the clause's application.

(a) Does The Clause Apply?

Canadian courts are not unknown to engage in mental and linguistic gymnastics to justify finding that a given exclusion clause does not apply to a claim being brought under the auspices of or in connection with a given contract. The majority's decision in *Tercon* itself is arguably an example of this, as the dissenting minority points out.[90] The possibility of such sleight of hand is however not a terribly sound basis upon which to reach a conclusion under this first part of the test. A more reliable conclusion is instead likely if we focus simply on the text of the provision itself: "… and guests hereby agree that PCRS shall not be liable for any loss or damage arising from any substitution of room or room type beyond any difference in the ordinary per-night rate for rooms booked versus the applicable per-night rate for substitute rooms provided." The language used appears broad enough to encompass all claims in contract or otherwise that might arise from room or room type substitution by PCRS, which means that the exclusion more than likely passes the first hurdle with respect to determining whether it debars Dr. Algae's claim.[91]

(b) Is The Limitation Void by Reason of Unconscionability?

The most currently authoritative Canadian statement of the test for unconscionability comes from the Supreme Court's 2020 decision in *Uber v Heller*, and requires that the party seeking to invoke the doctrine demonstrate that there was:

1. An inequality of bargaining power arising out of:

   - "necessity" (i.e., the weaker party has little choice), or
   - "cognitive asymmetry" (i.e., the weaker party lacks experience or understanding)

   of the weaker party, which left them unable to adequately protect their interests in the contracting process, and

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90 *Tercon*, *supra* note 7 at paras 127–129.

91 *Earthco*, *supra* note 67 at paras 73, 80-81 & 92.

2. A resulting improvident bargain (or contractual provision) that unduly advantages the stronger party or unduly disadvantages the more vulnerable. [92]

In the scenario outlined above, this test is unlikely to be satisfied by reason of failure at the first step. It is simply implausible to suggest that Dr. Algae did or could not understand a hotel booking form. It is also very unlikely that Dr. Algae could successfully plead that necessity created an inequality of bargaining power in these circumstances, especially in light of recent authority that has held that there can be no inequality of bargaining power when it comes to parties contracting for luxuries as opposed to necessities.[93] Whether the Room Availability clause could satisfy the second step of the test is effectively moot given that the first part of the test is clearly not met. I would suggest that if the discretion in the clause were truly unfettered and subject to no limitation at all, it may well qualify as unduly disadvantageous to guests like Dr. Algae. But if that were the case, there would also be no basis for Dr. Algae's claim for breach of DCDGF.

(c) Is There an Incontestable/Overriding Concern of Public Policy That Justifies Overriding Freedom of Contract?

Here we finally get to the heart of the matter—and the thorny question as to when the circumstances of the breach or wrong may have some effect on the enforceability of an exclusion clause. Following confirmation in *Hunter v Syncrude*[94] that fundamental breach had been abolished in Canada by the

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92 2020 SCC 16.

93 *Petty v Niantic Inc*, 2022 BCSC 1077, aff'd 2023 BCCA 315, Mayer J ("I am not satisfied that an inequality of bargaining power justifying a finding that the arbitration clause is unconscionable is made out on the facts of this case. As the Supreme Court in Uber and the British Columbia Court of Appel [sic] in Pearce indicated, an analysis of unconscionability focuses on the vulnerability of the weaker party and unfairness of a contract or one of its terms. Unlike the nature of the service at issue in Douez [communication and social networking] and Uber [an employment relationship], there is no evidence that use of the games Pokémon Go and Harry Potter: Wizards Unite, or the ability to purchase loot boxes within those games, are important elements of everyday life which make the plaintiffs particularly dependant or vulnerable in terms of their need to access the game platforms. The games themselves are free and the user has the choice whether to purchase loot boxes." at paras 59–60); *Difederico v AmazonCom*, 2022 FC 1256, ("For the reasons set out earlier, it is my view that Ms. Difederico should be held to the terms of the Arbitration Clauses. I do not agree that the nature of the goods offered by Amazon would put the facts of this case on par with the employment agreement considered in Uber. As similarly found in Petty, I am not satisfied that the nature of the goods offered on Amazon could be classified as important elements of everyday life that would make Ms. Difederico particularly dependant or vulnerable …" at para 124).

94 [1989] 1 SCR 426 at 462 [*Hunter*].

Supreme Court's earlier decision in *Beaufort Realties*,[95] it was unclear as to when circumstances arising post-contractually in relation to the breach, as opposed to pre-contractual circumstances related to contract formation, could or should have any influence on the enforceability of such clauses. Madame Justice Wilson in *Hunter* had opined that courts should be able to deny enforcement of an exclusion clause when it would be unfair or unreasonable.[96] Dickson CJC rejected this approach, and instead (appears to have) focused on unconscionability in the pre-contractual environment alone as the sole basis for the restricting the operation of an exclusion clause.[97] Neither approach commanded majority support however, leaving an uncertain gap in the jurisprudence, which *Tercon* has done a modest job of filling with the third part of the test currently under consideration.

As explained above, what *Tercon* told us itself was limited to what might be described as obvious. What later courts appear to have confirmed is modest in scope. What can be said with some certainty is that outside of situations in which public policy is captured in a specific statutory/

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95 [1980] 2 SCR 718 at 725.

96 *Hunter*, *supra* note 93, Justice Wilson ("The other way would be to import some 'reasonableness' requirement into the law so that courts could refuse to enforce exclusion clauses in strict accordance with their terms if to do so would be unfair and unreasonable. One far-reaching 'reasonableness' requirement which I would reject [and which I believe was rejected in Beaufort Realties both by this Court and the Ontario Court of Appeal] would be to require that the exclusion clause be per se a fair and reasonable contractual term in the contractual setting or bargain made by the parties. … Nevertheless the Court, in approving the approach taken by the Ontario Court of Appeal in Beaufort Realties, recognized at the same time the need for courts to determine whether in the context of the particular breach which had occurred it was fair and reasonable to enforce the clause in favour of the party who had committed that breach even if the exclusion clause was clear and unambiguous. The relevant question for the Court in Beaufort Realties was: is it fair and reasonable in the context of this fundamental breach that the exclusion clause continue to operate for the benefit of the party responsible for the fundamental breach? In other words, should a party be able to commit a fundamental breach secure in the knowledge that no liability can attend it? Or should there be room for the courts to say: this party is now trying to have his cake and eat it too. He is seeking to escape almost entirely the burdens of the transaction but enlist the support of the courts to enforce its benefits." at paras 508–510).

97 *Hunter*, *supra* note 92, Dickson CJC ("I have had the advantage of reading the reasons for judgment prepared by my colleague, Justice Wilson, in this appeal and I agree with her disposition of the liability of Allis-Chalmers ... I do not favour, as suggested by Wilson J., requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck, and I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable." at 455).

regulatory regime, breaches that only inadvertently or coincidentally contravene a consideration of public policy in competition with freedom of contract do not tend to satisfy this third step.[98] Thus, a breach without fault or mere negligence is not on its own enough for a competing concern of public policy to override freedom of contract and prevent enforcement of an exclusion.[99] This leaves a confined space for the 'public policy that favours freedom of contract to be outweighed by the public policy that seeks to curb its abuse', to paraphrase Justice Binnie elaborating on this part of the test in *Tercon*.[100] Good faith duties may however thread this needle.

The first and most telling argument in favour of GFDs prevailing over exclusions is that, as a response to non-breach misfeasance, GFDs are inextricably bound up with preventing the abuse of contractual freedom by preventing acts deemed wrongful that a given contract might otherwise permit.[101] The second is that like cases of fraud or deceit, or reckless or willful endangerment of public safety, the breach of GFDs appears to require an element of subjective knowledge or intent.[102] This means that successful claims for breach of GFDs will be more infrequent than mere claims for breach and that any conflict between a good faith duty and a Limitation Clause is likely to arise in circumstances in which the delinquent party has acted cynically in reliance on the clause, which would circumscribe the conflict in a manner that would appear acceptable to Canadian courts. Finally, however one describes the policy behind the organizing principle of good faith and the duties stemming from it, it is evident that when said policy is engaged it can and does override freedom of contract by overriding express terms of the contract itself.[103] In fact, it must do so, otherwise Good Faith duties would be no further reaching than implied terms and the ordinary action for breach and therefore could not sanction behaviour that said contract implicitly or explicitly permits. As such, there is no reason in principle as to why the policy in favour of the organizing principle of good faith does not justify overriding a Limitation Clause or an Exclusion Clause (and freedom of contract) under this limb of the *Tercon* test. An exclusion clause is after all no more or less important than any other part of a contract, and the point of GFDs, if anything, is to

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98 McCamus, *Contracts supra* note 8 at 902–903.

99 *Loychuk*, *supra* note 74 at para 40; *Felty v Ernst & Young LLP*, 2015 BCCA 445 at paras 51–53.

100 *Tercon*, *supra* note 7 at para 119.

101 Maharaj, "Clarity" *supra* note 29 at 107; Maharaj, "Irreconcilable Results" *supra* note 22 at 515.

102 *Wastech*, *supra* note 11 at paras 55–56; *Tokyo Smoke, supra* note 32 at para 72.

103 Di Feo, "You've Got to Have (Good) Faith", *supra* note 21 at 57; McCamus, "Canadian Common Law of Contract" *supra* note 23 at para 61; Waddams, *supra* note 26 at s 514.

prevent a party from relying on any part of its agreement in a manner that seems improper in the circumstances.

In the circumstances of Dr. Algae and PCRS, it seems that if a breach of PCRS's duty to exercise its discretion under the Room Availability clause in good faith were found, it ought to follow that PCRS cannot rely on the exculpatory aspect of that same clause to absolve itself of liability. Even if the exclusionary language were not a part of the same clause as the discretion in question though, I would argue that the outcome should be the same because the effect of a separate clause would be the same in substance.

V. Conclusion

In this article, I have set out to consider two outstanding issues related to remedies for breach of GFDs in contract. With regard to the appropriate measure of damages, it is evident that a "one size fits all" approach likely will not work in this area, and that each Good Faith Duty will require a remedial response that responds appropriately to the mischief the duty seeks to prevent when it comes to assessing damages that respond to the relevant loss/harm suffered from the plaintiff's perspective. Gain-based awards by contrast may admit a greater degree of generality as between GFDs, if a given breach satisfies the test from *Atlantic Lottery*. However, the majority decision in *Atlantic Lottery* itself leaves considerable doubt as to how gain-based awards and GFDs will in fact intersect. Finally, on the latter point considered in this article though, it is apparent that there is a commonality between all actionable GFDs and their intersection with Limitation Clauses and reason for certainty in light of the jurisprudence on both. In short, a Good Faith Duty must ordinarily overcome an inconsistent Limitation Clause in so far as such clauses are the same as any other part of the parties' contract, and all GFDs must to some extent override the parties' contract in order to be effective. What is more, no special exception to the governing test from *Tercon* for the enforceability of Limitation Clauses is needed to justify this result, given that the emphasis on subjective knowledge or intent in GFDs brings them quite clearly within the scope of the third step of the *Tercon* test. Whether the evolving jurisprudence on good faith in Canadian contract will confirm these conclusions is of course uncertain, but as a matter of principle, these conclusions are compelling.