The Good Faith Challenge

John Enman-Beech*


* SJD Candidate, University of Toronto.

Contents

The Good Faith Challenge ................................................................. 1
Avoidance .......................................................................................... 6
Containment ......................................................................................10
Embrace .............................................................................................17
Conclusion ........................................................................................20

Good faith worries contract law. It poses the challenge of how to reconcile—if indeed reconciliation is possible—private ordering with contract’s public, institutional role. This raises issues about the source of good faith—is it imposed on the parties by the court or always to be found implicit in an agreement?—and interpretation—what are the limits of this implication? The rhetoric that surrounds good faith engages deeper values. Does contract law respect hard-nosed rational businessmen, or does it enable cut-throats who will lie and cheat whenever they can? Does it promote ethical and socially responsible commercial citizenship, or does it infantilize contractors by protecting them from themselves?

This article wades through some of the rhetoric to clarify the stakes of the good faith challenge. The challenge has been met with three strategies: avoidance ("there is no principle of good faith"); containment ("good faith is just respecting the parties’ agreement"); and embrace ("the common law should move toward a good faith regime"). I investigate the three strategies and evaluate their chances for success in Canada—with the odd feint at other Commonwealth jurisdictions.
Before I get into the strategies, I ought perhaps to say something about what good faith is. While I will give in to this temptation momentarily, I first want to say that what good faith is is perhaps not so important a question as it seems. Certainly from a practical perspective the details of a good faith-related doctrine will sometimes need arguing and will help in deciding a case. But in legal theory, the three strategies have arisen in response to good faith independently of the various theories about its form and substance. Thus my interest here is not in good faith itself, whatever that means, but in the rhetorical and legal responses to good faith—and these responses tell us something about the common law of contract that "good faith" taken alone does not.

Stephen Waddams writes that good faith...

has been used in different senses to address several distinct questions in contract law. These questions include, among others, whether pre-contractual negotiations can be broken off, whether material facts known to one party must be disclosed to the other in pre-contractual negotiations, whether contracts are enforceable if induced by misrepresentation or mistake, whether and to what extent the courts should imply terms into contracts, whether terms that are very unfair can be enforced, whether non-performance by one party excuses the other, whether deliberate breaches of contract justify punitive damages and whether the exercise of contractual rights may in some circumstances be precluded.¹

In such doctrinal instances, "good faith" is used in an almost colloquial sense. Finding good faith or lack thereof is merely part of another test. No grand theory of contract law is needed to understand these instances of good faith, and so Waddams does not provide any. As other authors have done,² he divides the


treatment of good faith among the particular doctrines to which it happens to relate without attempting to form them together into some kind of whole. In some of these doctrines, the (alleged) role played by good faith is entirely implicit. This gives rise to what Gerard McMeel calls the "functional equivalence approach" view of good faith in the common law of contract: there is no general rule of good faith akin to that found in civilian jurisdictions, but there are doctrines that add up to much the same thing.³

It is easy to lose sight of the common sense of good faith in the legal context, but this sense is important to the common-sensical common law's ad hoc use of the term through a myriad of doctrines. Oxford puts it thus: "faithfulness, loyalty, truthfulness; esp. honesty or sincerity of intention".⁴ The trick lies in noticing that honesty can take on a special meaning in the pursuit of joint projects. When you say "let's do it", being honest about the content of the statement might mean intending to co-operate to work toward a common goal. Requiring honesty can mean holding people to the meanings of their statements, and in contract this can entail imposing forward looking obligations to pursue an agreed goal. Thus in contract honesty can mean co-operation and loyalty—whether loyalty to the deal or to one's counterparty.⁵ This is the basic intuition behind another approach to good faith, that it is a part of the interpretation of contracts,⁶ or relatedly helps define the reasonable expectations of parties that contract aims to effect.⁷

---


⁵ Fried at 88 (or at least, I suspect this is what he was getting at when he wrote "loyalty to the promise itself ... closes the gap between good faith as sincerity and good faith as loyalty").

⁶ Waddams, note 1 above at paras 502-514; Leggatt J in eg Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB); Elisabeth Peden, Good Faith in the Performance of Contracts (Sydney: LexisNexis Butterworths, 2003); Marilyn Warren, "Good Faith: Where Are We At?" (2010) 34 Melb U L Rev 344 ('good faith as a doctrine does not exist independently of the rules
This points up other of the common distinctions. Good faith as just described does not really "require" honesty of the parties; rather it dings them if and when they are dishonest. Depending on whom you ask this can be ascertained subjectively (did they mean what they said?) or objectively (did they act as a reasonable person who meant what they said would act?). The dinging can take the form of an expectation measure of damages based on objectively honest performance or can result in the loss of reliance costs in the form of estopped enforcement. The effect of this dinging is a subject of controversy. At base it might "protect" people through compensation when their trust proves misplaced. Some suppose that the dinging will have an incentive effect on parties and promote actual honesty. Others have argued that "requiring" honesty robs it of some of its power. First, it is not clear that such a requirement will encourage trust. People might come to question whether their counterparty is just playing honest where the law requires it but will cut and run when an opportunity arises that the law does not exclude. Second, putting a price on dishonesty might be taken to suggest that it is for sale. Where once social and reputational sanctions discouraged certain conduct, now one feels free to do it so long as one compensates one's counterparty surrounding the construction and interpretation of contracts, or the rules of implication": 349). Note that there are several roles good faith can play in contract interpretation, most carefully distinguished in Peden's work. Good faith obligations can be implied in fact or in law, or good faith can inform the construction of contracts at a more general level—Peden's preferred approach: see paras 1.5-1.10.


8 Brownsword generally describes his "good faith regime" as protective: Brownsword’s Reception, note 3 above at 36-37; Roger Brownsword, "'Good Faith in Contracts' Revisited" (1996) 49:1 Current Legal Problems 111["Brownsword Revisited"] at eg 139.

9 Swan at 405. Brownsword also describes good faith as encouraging co-operative behaviour though he is never clear on the mechanism: Brownsword Revisited, note 8 above at eg 139.

in the appropriate amount. Market norms crowd out social norms.\textsuperscript{11} We might suppose though that the contumelious aspect of a finding of bad faith keeps something of the social in the sanction.

Sometimes the common law good faith doctrines are stitched into a whole. This raises the issue of whether this whole is best conceived of as a duty that attaches to all contracts, an interpretive presumption, or as a general or organizing principle that shapes contract law. Canada, after \textit{Bhasin v Hrynew},\textsuperscript{12} has taken the organizing principle route.\textsuperscript{13} Good faith "states in general terms a requirement of justice from which more specific legal doctrines may be derived".\textsuperscript{14} The court is clear that this refers to some doctrines of contract law, but not all.\textsuperscript{15} The doctrines it refers to include some terms implied by law\textsuperscript{16} and in fact,\textsuperscript{17} in contract interpretation generally since "[p]arties may generally be assumed to intend certain minimum standards of conduct",\textsuperscript{18} and in a newly enunciated "duty of honest performance", a general duty (not unlike the duty of good faith in other jurisdictions) that applies to all contracts "irrespective of the intentions of the parties".\textsuperscript{19} The court has been bounteous: Canadian contract law now has just about every kind of good faith there is.\textsuperscript{20}

\begin{flushleft}
\textsuperscript{11} Uri Gneezy & Aldo Rustichini, "A Fine is a Price" (2000) 29 J of Legal Studies 1, particularly at 13-14; Paul MacMahon, "Good Faith and Fair Dealing as an Underenforced Legal Norm" (2015) 99 Minn L Rev 2051 at 2102.
\textsuperscript{12} 2014 SCC 71.
\textsuperscript{14} \textit{Bhasin} at para 64.
\textsuperscript{16} \textit{Bhasin} at para 44,
\textsuperscript{17} Ibid at eg para 56 (note here the court, while explicitly using the phrase "implied in fact", is characteristically blurring the line between implication in fact and by law: Enman-Beech, note 15 above at 382).
\textsuperscript{18} Ibid at para 45.
\textsuperscript{19} Ibid at para 74. Thus the duty of honest performance seems to be what Peden calls a "contractual duty" (and argues does not exist): note 6 above at 1.5-1.10.
\textsuperscript{20} The only notable absence now is good faith in the negotiation of contracts (outside the tendering context). Arguing that this can't be far behind: Reynolds, note 7 above.
\end{flushleft}
Given the scope of good faith it is remarkable we suppose anything general can be said about it at all. Good faith arguments only arrive before courts in discrete instances. Courts are never faced with elaborating a full notion of good faith because they only have to consider the issue when faced with particular (alleged) naughtiness. This no doubt spurred Summers’ famous "excluder" definition, that good faith only excludes bad faith behaviour, defined with a long list of examples.\textsuperscript{21} Angela Swan puts it succinctly: good faith means don't be a scumbag.\textsuperscript{22} And yet there is a lot of general work on good faith (just look at all my foot-notes\textsuperscript{23}) and there are many shared tendencies between responses to, for instance, good faith as an organizing principle and good faith as a specific duty.\textsuperscript{24} This is another reason that much of the import of good faith is in what we say about it rather than its doctrinal specifics. Good faith is largely a theoretical rather than a practical concept for the common law of contract: so far it is a mess of attempts to bring coherence to a list of discrete examples.\textsuperscript{25} I am now ready to turn to the three strategies that have been used in response to good faith.

**Avoidance**

First we find arguments that the common law of contract doesn't and shouldn't involve good faith.\textsuperscript{26} Civilian softies might need such a pampering


\textsuperscript{22} The specific formulation has not yet, to my knowledge, seen print, but see Ontario Bar Association, "Lawyer, Teacher, Writer, Tinkerer - OBA Celebrates The Career Of Angela Swan" (24 May 2016), on-line: <https://www.oba.org/JUST/Archives_List/2016/May-2016/Lawyer,-Teacher,-Writer,-Tinkerer-OBA-Celebrates-t>; and Swan & Adamski, note 2 above at para 8.134.

\textsuperscript{23} See notes 1-22 above and 24-88 below and accompanying text.

\textsuperscript{24} As an example, the American writers discussed below at note 58 are responding to duties of good faith implied by law (by common law for the Restatement (Second) Contracts and, in the case of the Uniform Commercial Code, by statute). Many responses to Leggatt J’s and Brownsword’s attempts are responses to good faith as a duty implied in fact and/or to good faith as a general principle of contract law, yet adopt the same containment strategy, eg Michael Bridge, "Good Faith in Commercial Contracts" in Brownsword, Hird, & Howells, note 3 above 140.

\textsuperscript{25} Bridge, note 7 above at 409, suggesting that good faith theorising "may well produce contemplative gains", and at 412, "However much [good faith] might stimulate research or encourage inquiry into theories underlying contract law, its appropriate home is the university where it can perform these functions without wreaking practical mischief".

concept; Englishmen need certainty and a hard nose. Good faith is nothing but a clumsy intruder into the Commonwealth. Need we discuss it further? In *Walford v Miles*, Lord Ackner said,

> the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. … A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.²⁷

This is a popular contemporary statement of the idea that the common law is about individualism, good faith is about fellow-feeling, and thus the two shan't meet.²⁸ In Canada, speaking on the related issue of whether a good faith-like duty of care should be imposed on negotiating parties, Iacobucci and Major JJ put it perhaps more strongly though with an economic twist:

> It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.²⁹

---

²⁷ *Walford and others v Miles and another* [1992] 2 AC 128 (HL). Ackner was working toward the conclusion that a duty to bargain in good faith would be too uncertain because of its conflict with his sense of negotiation. This is similar to the hypothetical contract disclaiming good faith posed by Swan and Adamski, discussed at note 55 below.

²⁸ See also McMeel, note 3 above at 24 (contrasting civilian's approach to good faith with "the more individualistic ethic of the common law"); Reinhard Zimmermann & Simon Whittaker, eds, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) at 698-699 (discussing "the idea of contract as being about ruthless bargaining and strict performance" and "the idea that good faith reflects a communitarian ideal rather than individualistic values"); Leggatt J in *Yam Seng* at para 125 ("It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism" (clearly Leggatt is referencing the idea without endorsing it)).

²⁹ *Martel Building Ltd. v Canada* 2000 SCC 60 at para 67. This remarkably similar tack was apparently taken without reference to *Walford v Myles*. 
The adversarial ethic posited here has multiple beginnings and multiple ends. Its roots include the instrumental value of competitive markets as well as the inherent value of freedom from obligation. Its ends include the notion that contract law should a) facilitate business and b) allow the certain ordering of affairs. Both are furthered, it is argued, by keeping a degree of fit between business practice and contract doctrine.\textsuperscript{30} This lets businesspersons order their affairs as they wish and have that order reflected in the law. It conduces to certainty because the law is what businesspersons expect it to be. A general notion of good faith, the argument goes, is out of keeping with competitive business practice, uncertain in its application, and would amount to imposing some kind of obligation on parties to which they did not agree.

The success of the avoidance strategy largely depends on the winds of different jurisdictions. I do not want to (nor am I in any position to) make a broad claim about whether "the common law of contract" can avoid recognizing good faith, or whether in those jurisdictions where it is not explicitly recognized it is already there implicitly.\textsuperscript{31} There are jurisdictions where avoidance is impossible in the face of explicit statutory and judicial pronouncements like that in \textit{Bhasin v Hrynew} or, in the USA, the \textit{Uniform Commercial Code}. In the rest avoidance might still be tenable, though partisans of good faith like to talk about opponents "swimming against the tide"\textsuperscript{32} or the "perverted pride"\textsuperscript{33} that can be the only explanation for refusal to accept what is plain to sensible people. Canada at least has averted from perversion with \textit{Bhasin} and prompted this symposium.


\textsuperscript{31} Though the conclusions of Zimmermann & Whittaker, note 28 above, seem to me to be about the best evidence one will be able to find: the common law treats many situations where good faith would arise in Continental systems in a functionally similar way. Of course, this is to a great degree a matter of emphasis: one can find similarities if one looks for them. It is not clear in any case what it would mean for a common law system to implicitly feature a principle of good faith if the claim is made on the basis of functional outcomes: the first seems a legal claim while the second is sociological: Catherine Valcke, "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems" (2004) 52:3 American Journal of Comparative Law 713 at 730 fn 95.

\textsuperscript{32} \textit{Yam Seng} at para 124.

A more extreme avoidance manoeuvre is to take decisions that rely explicitly on "good faith" and show them to be nothing of the kind. The avoider demonstrates that the court could have achieved the same result using more mundane doctrinal tools. This happened when one of Leggatt J's decisions went up to the Court of Appeal; it has happened also in Canada and Australia. Not only does this stem the spread of good faith, it is of a piece with the incremental nature of the common law in that it shows the re-characterised decision to fit existing doctrine. It also preserves judicial harmony: we can all agree on the outcome, so let us not trouble ourselves with the semantics. Judges and commentators who re-interpret good faith decisions in this way are saving the common law from the uncertainty, inefficiency, or calamitous confusion threatened by good faith.

While, as mentioned, these avoidance strategies seem non-starters in jurisdictions where good faith is firmly established, they have another more general problem: they rely on a quite specific image of how businesspersons operate. Are we sure this picture is accurate? Are business deals "jungle place encounters" where every man is for himself and the strong lunch upon the weak? On occasion, legal researchers have been so possessed by the greed for knowledge that they have gone and talked to businesspersons, or even acted as their

34 Compare *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (QB) at para 97 and *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 (CA) at para 45.

35 Geoffrey Kuehne, "Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles" (2006) 33 University of Western Australia L Rev 63; Warren, note 6 above; Krish Maharaj, "An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel" (2017) 55 Alberta L Rev 199. Consider also the implied "term to be fair and consistent in the assessment of the tender bids" in Martel, ibid at para 88, that was emphatically not a duty to negotiate in good faith, para 73 and Fridman, note 2 above at 471; but had somehow become "a duty of good faith, in the sense of fair dealing" by the time the court in Bhasin got to it: *Bhasin* at para 56.

36 Maharaj, note 35 above at 205: "This is not to say that DHP [the good faith-based duty of honest performance] is ultimately a negative development, but I argue that some classification other than 'contract' must be found for DHP, if we are to avoid having the doctrine inflict a calamity on our understanding of the law of obligations".


38 As Stewart Macaulay and Lisa Bernstein have done.
solicitors. The results have not been uniform. You might well find a confirmation of something like the stereotypical picture just posed; but you might also find out what has for decades been emphasised in relational theories of contract: businesspersons working together and trusting each other in the furtherance of mutual goals. It seems to depend on which businesspersons one talks to and when. Claims to have discovered the Platonic essence of business practice may have been over-stated.

## Containment

Michael Bridge's classic article, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?", is a masterpiece of containment. In it, Bridge argues that bringing a general duty of good faith into the common law would "wreak[] practical mischief"—an avoidance manoeuvre—but also that we do not need it anyway because the common law already does what people want such a duty to do through the construction of contracts—containment. If we are to admit good faith into the china shop of the common law of contract, we should ensure that it does a minimum of damage. Thus one containment strategy is to show that good faith is redundant with the rest of contract law. The court in Bhasin was anxious to show that recognizing an organizing principle of good faith and attendant duty of honest performance were merely incremental steps that "acknowledged" the state of the law as it already was. Now that good faith has been unleashed in Canada, a

---

39 As Angela Swan and Michael Bridge have done.
40 As Lisa Berstein and Michael Bridge have done.
41 As Stewart Macaulay and Angela Swan have done. Of course the specifics are more complex and I do not mean to imply that the scholars I am citing here and ibid are guilty of the simplification I put in the text. See also Granovetter, note 69 below.
42 Mitchell, note 30 above at 45-49.
43 Note 7 above.
44 Ibid at 412.
45 Ibid at 416-425. The process of contract construction Bridge discusses is precisely what some people mean by good faith—examples in note 7 above—yet this kind of construction is arguably now waning: McMeel, note 3 above. This robs Bridge's argument that good faith is not needed of some of its force.
46 Hugh Collins, in "Implied Terms: The Foundation in Good Faith and Fair Dealing" (2014) 67 Current Legal Problems 297 at 300 foot-note 10, ascribes the good faith in a china shop metaphor to Powell, note 1 above at 38.
47 Bhasin at paras 33, 73.
wash of containment strategies will be close behind. These responses will tend to show that we should not be worried about good faith: it does not have much effect on contract law.

For some good faith is just a word for the reasonable interpretation of contracts against background norms, implied terms controlling discretion, or even just performing one's contractual obligations otherwise agreed. Related is the functional equivalence approach: adopting a principle of good faith is just recognizing what already (functionally at least) exists in the common law. These containment strategies aim to maintain the place of the reasonable expectations of business parties at the heart of contract law by showing good faith to effect just those.

Such containment strategies are probably inevitable because they are of a piece with the incremental nature of common law development. No matter how revolutionary the proposed change, a good common judge or lawyer will demonstrate how it is really no change at all. This containment strategy is used even by proponents of good faith, aiming to assuage the avoiders' fears that it will wreak mischief and calamity. Thus Leggatt managed to make waves with a duty of good faith imposed, as he said, simply by "following the established methodology of English law for the implication of terms". This line was played up in Flynn v Breccia in Ireland to justify not recognizing some good faith, which may for now be the final word there. (I anticipate better information from the presenter from Dublin.) Promoters of good faith must find a balance: it must matter enough that it should be adopted but not so much that it would bring intolerable instability.

---

48 Steven J Burton & Eric G Andersen, "The World of a Contract" (1990) 75 Iowa Law Rev 861 at 869: "In the abstract, good faith is so basic to contract that it amounts to the principle of promise keeping itself". See also note 58 below and accompanying text discussing a USA line of thought.

49 Note 3 above.


52 Yam Seng at para 131.

However there is a basic problem this containment strategy must surmount in those situations where good faith appears to be not disclaimable—terms implied by law, statutory duties, or contractual duties like that in Bhasin. If the goal of good faith is to effect parties' expectations, why can they not disclaim it? Enforcing some kind of good faith obligation against parties who have attempted to disclaim it would seem a subversion of their aims.

The most interesting response to this difficulty, raised by the containers, reflects and flips this paradox through what is sometimes called "the nature of contract".\(^54\) It might be shown that whenever people contract to do something they are contracting to do it in good faith—that is just what contract means. To include a term saying "we disclaim good faith" would be to fail to understand good faith or contract, or probably both.\(^55\) To really intend such a term would be to fail to intend to make a contract. Thus responsibility for the apparent paradox of a good faith norm that is at once found in parties' agreements and non-disclaimable by those parties is smoothly shifted from the contract theorists to the contractors. The good faith found in contract can range from stricter business efficacy notions to an expansive business morality, the normative background against which businesspersons deal. In general "moral" norms are seen as more expansive, uncertain, and dangerous and less likely to form a background assumption

\(^{54}\) Campbell, note 7 above at 485: "the relational nature of contract"; Leggatt, note 37 above at 24: good faith relates to "the nature of commerce and commercial law"; Feinman, note 7 above at 536: "some norms arise from the nature of exchange itself"; Swan & Adamski, note 2 above at paras 8.133-8.134. Distinct from this is the view that good faith attends to the "nature" of a particular contract, a view which Collins traces to "scholastic Aristotelian philosophy": Hugh Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing" (2014) 67 Current Legal Problems 297 at 299. Collins treats this as a method of implying terms separate from good faith. Compare Steyn, note 7 above at 133.

\(^{55}\) Swan & Adamski, note 2 at para 8.134.1 compare such a contract to "one in which a party disclaimed any intention to adopt the usual meaning of the words used in the agreement. A court would have no difficulty and no hesitation in denying a party this latter freedom—communication is only possible because words have at least a settled core of meaning—and it should have no more difficulty or hesitation in recognizing the existence of obligations of good faith in all agreements". See also ibid at para 8.145 for a similar argument.
common to every pair of commercial parties. The moral/amoral business norms dichotomy is one of many raised by good faith that is difficult to maintain.

There is a parallel USA line of thought. This has arisen to contain the good faith obligations described in the Uniform Commercial Code and the Restatement (Second) of Contract. The American containment strategy has a distinctly libertarian flavour. While it shares the general form of finding good faith in the parties' agreement (and does gymnastics around the paradoxical identity of an interpretive standard and an imposed obligation) it is more skeptical that moral norms are ever a part of the interpretive background of a contract. For some, "good faith" reduces to almost nothing. It is just another word for performing one's contract. As one writer put it, "[g]ood faith in performance just is the attitude of taking contractual obligation appropriately seriously."

This containment strategy raises three problems. First, it seems to rely on a view of what it means to contract that, like the avoidance strategy purporting the adversarial ethic of contracting discussed above, is in question. If good faith is to have any content beyond that of the contractual terms themselves, can this not be disclaimed? At some level such a view of the nature of contract must always be external to the parties, proposed by the theorist and perhaps implicit in the law or in our social order. And so there will always be people, perhaps odd people, who do not think that the word contract means what you think it does. Now they might misunderstand contract, but this will not stop them from creating one through offer and acceptance. This relates to the second problem.

---

56 For instance Steyn, note 7 above at 140, warns against giving good faith "too abstract a moral content. ... [T]he law ought not to set its sights too high. These notions ought to reflect not the response of a moral philosopher but the responses and usages of ordinary right thinking people."

57 Alan D Miller & Ronen Perry, "Good Faith Performance" (2013) 98 Iowa L Rev 689, finding "community standards" at the root of various good faiths.


59 See Bridge reading Burton, note 7 above at 402; and Burton & Andersen, note 48 above.

60 Markovits, ibid at 284.

61 Text at notes 37-42 above.

62 See Enman-Beech, note 15 above at 365-368.
Recall the hypothetical contract disclaiming good faith.\(^{63}\) The argument is that because good faith is a necessary element of what it means to contract, this term cannot be enforced. Why, in this example, is the term disclaiming good faith ignored when it seems we could equally conclude no contract had been formed? If it seems obvious that a contract has been formed, does that not undermine the claim that good faith is of essence to contract? A clause disclaiming good faith, if taken seriously on this model, could perhaps result in only reliance rather than expectation damages being available.

The third problem with finding good faith in the nature of contract lies in a mismatch between what good faith proponents seem to wish it to accomplish and the pedestrian nature of "protecting reasonable expectations" and "the nature of contract". Good faith \textit{sounds} like more than that; it sounds moral.\(^{64}\) And indeed some proponents of good faith, those who embrace it, seem to believe that good faith will lead to something more, even a culture shift toward a more moral market (discussed in the next section). But perhaps for some this is a feature rather than a bug in that it allows good faith to develop organically, beginning with a small but fertile seed.

A better approach might be to forswear any intimacy with "the nature of contract" and instead make a pragmatic point: if parties almost always mean to commit themselves in good faith but might sometimes not, there is little point in admitting a legal exception. It will only allow deceitful parties to claim they did not mean it after the fact when really they did all along, wasting time and resulting in the occasional judicial error. The only problem with not allowing the exception is that the very few people who would have correctly benefitted by it will miss out. Better not to allow the argument at all and face the occasional false positive than to have to argue about false negatives in every case.

Another containment strategy deserves mention. Sometimes it is suggested that good faith can be confined to particular classes of contract. While this is already often the position on e.g. employment, franchise or insurance contracts, some have suggested that good faith should be extended to something called "relational contracts" more broadly. This is a fuzzily-drawn group of contracts that

---

\(^{63}\) See note 55 above and accompanying text.

\(^{64}\) Powell saw this: note 1 above at 17: "Certainly only foolhardiness or presumptuousness would permit a lawyer to trespass into the field of morals which is suggested by the title of this lecture [Good Faith in Contracts]".
are longer term, with more interdependence and trust between the parties and perhaps more normative baggage built up between the parties over time. A difficulty here is that, as Ian Macneil told us long ago, all contracts are to some extent relational. So again this containment strategy will have trouble containing good faith. In Bhasin, the court recognized this:

The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties.

Hugh Collins has recently demonstrated both containment strategies. He argues that good faith is "the true ground for implying terms into contracts", implying that good faith has lurked in the English common law for at least century. He also argues for "a class of contracts that require more intense obligations of co-operation and loyalty, which nevertheless fall short of fiduciary obligations". Properly contained, good faith is nothing to worry about.


68 Ibid at 301.

69 Ibid at 324. Collins does not however define this class with reference to whether a contract is "relational". Instead he draws on the theory of the firm as providing a guide on when contracts are more or less incomplete (incomplete in the economic sense). "The crucial variable that determines the incidence of obligations of loyalty and co-operation is the point at which the contract falls on the spectrum between market and organization": 326. And at 328:

The reason why these contracts require as normal incidents greater duties of loyalty and co-operation is not because they are long-term and not because the parties may have invested substantially in the project, though both of these features are likely to be present, but because the contract establishes a quasi-integrated system of relations of production with intensified contradictory pressures simultaneously both to co-operate and to compete. The economic logic of networks is that both parties will be better off if they co-operate to maximize the size of the pie, such as sales in a franchise or distribution network, but simultaneously they need to compete to obtain a greater slice of the profits arising from their labours. Each party needs to be co-operative and loyal to the general
Containment is treated with skepticism on both sides. The embracers see it as an attempt to stifle common law progress by minimizing good faith's potential. The avoiders worry that containment will be unsuccessful and good faith will grow monstrous. They are of course right to worry because there is no clear line to be drawn around good faith obligations. Where does business efficacy end and morality begin? They seem to inform each other. Morality will often be part of reasonable expectations and businesses often must trust each other. This inability to draw a clear line is reflected in the eternal swaying of the common law between more and less textual approaches to interpretation. This connexion was made explicit in one of the knock-downs of Leggatt J’s reaching at the Court of Appeal, when Moore-Bick LJ wrote,

There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton*.

The avoiders are right to be skeptical of the motivation behind the containment approach. If good faith is just a name for part of objective interpretation, why all the hullabaloo about whether or not the common law includes it? Why belabour a label? We are left wondering whether some of those who have advanced a containment strategy are using it as a rhetorical device to smuggle in a more aim of the networked business enterprise, whilst ensuring that it obtains the maximum share of the rewards. These obligations of loyalty and co-operation within networks must fall short of those applicable to organizations, however, for both parties remain residual profit-takers with antagonistic interests. Loyalty is owed, not to each other, but rather to the network as an independent business operation.

Collins has probably found a ground for good faith duties that better accords with both the needs of the market and parties' expectations. Questions remain as to whether his approach is any better at drawing clear lines than the relationality approach. All contracts have elements of organizations: Mark Granovetter, "Economic Action and Social Structure: the Problem of Embeddedness" (1985) 91:3 American Journal of Sociology 481, responding to the distinctions drawn by Oliver E Williamson on which Collins relies.

70 McMeel, note 3 above.

substantial good faith. Thus both practically and, perhaps, in motive, the containment strategy bleeds into embrace.

**Embrace**

Now we enter the Age of Aquarius. Raphael Powell, like others discussed above, sought to ground good faith in "the common usages of the common man".72

The common man, however much he may pray for miracles, does not really expect them to happen. If the judge gives him more than he expects, he can do so only by taking away more from the other party. To justify that action he is driven to exaggerate the standards of conduct which can be expected from the parties.73

Powell of course could not have accounted for the great spiritual awakening that was to follow his lecture. What standards of conduct can we expect from each other now? Perhaps people trust each other more than they used to? And perhaps the law should reflect, or enhance, or even initiate this change? Embrace strategies see good faith as part of a social shift to a more trusting market. If businesspersons can rely on each other more, more productive deals are possible. As it happens we do not really have good reason to believe that people across the Commonwealth are more trusting now than they were in 1956.74 But perhaps they should be and perhaps good faith in contracts could be a part of that. Roger Brownsword advocates a "good faith regime" that "systematically endeavours to encourage a disposition to co-operate and to shield contractors who are so disposed against exploitation and opportunism".75 Good faith makes "a useful background contribution"76 to contract law. Bhasin wrote good faith in this form. Good faith might then be part of a culture shift toward a friendlier market by gradually massaging contract rules into that mould.

72 Powell, note 1 above at 38.
73 Ibid at 37-38.
74 This is a bit of an impossible question, poorly defined, difficult to evaluate, and wildly varying across jurisdictions. That said some people conduct surveys to try to get a handle on these issues and the outlook is cloudy: Esteban Ortiz-Ospina & Max Roser, "Trust" in *Our World in Data* (2017), on-line: <https://ourworldindata.org/trust> (produced by the Oxford Martin Programme in Global Development and therefore hopefully a trustworthy source).
75 Brownsword Revisited, note 8 above at 139.
76 Bridge, note 7 above at 426.
We see in the Powell quotation the notion that contract disputes are a zero-sum game. Giving one party more means taking away from the other. This returns us to a previous theme: some people look at the market and see largely positive-sum co-operative behaviour rather than adversarial divisions of surplus—even though these may be the same thing. All contracts include elements of both co-operative and adversarial behaviour and this limits the use of these categories. All contracts involve parties co-operating to make a pie and then competing over how to divide it. In the simplest transaction, say I pay a dollar for a chocolate bar, the pie can be seen as the net utility gain of the parties. Presumably I value the chocolate bar at over a dollar (say $1.10) and the shop values it at less (say €0.90). By making this trade we've made a (twenty cent) pie and divided it (equally). This example is meant to show the minimal co-operative content of every contract, but many contracts will involve much more extensive co-operation in the pursuit of potentially incommensurable gains that cannot be competed over. An example is the satisfaction or fulfilment that a career can provide, or that running a business can provide. Employees and employers regularly co-operate to produce these kinds of "contractual surplus".

Once a dispute erupts, we might suppose that what was once a partly co-operative venture becomes zero sum. This is not obvious, particularly in situations where negotiation or even a court can salvage a relationship. But to the extent it is true, it is not clear that contract disputes should be decided by reference to the adversarial norms of the dispute stage rather than the co-operative norms of the earlier stage. In so far as contracts are defined at the moment of formation, or perhaps at later moments of quasi-formation, the final moment of break-down seems the least important. In any case, the arguments of the embracers go well beyond an attempt to fit contemporary market behaviour.

There are both economic and moral arguments for a good faith culture shift. On the economic side, it is suggested that more good faith means more trust means more deals become possible. People will be able to share more information and rely on each other's promises ever more. More will be invested into valuable but

77 At notes 37-42 above.
78 Mitchell, note 30 above at 96-97. For an attempt to separate these elements, see Collins discussed in note 69 above.
80 Mitchell, note 30 above at 137.
risky future projects with the comfort of knowing one will not be taken advantage of. Bigger pies for everyone. But perhaps good faith would also allow a different kind of pie—tastier, more filling, or more nutritious. In the employment example just given, I suggested that a substantial part of what economists obliquely call the contractual surplus lies in the sense of satisfaction that lucky employees and employers get out of their careers and businesses. It seems clear that mutual trust and fellow-feeling between the players in one’s working life are essential to this satisfaction.

The chief difficulty with the economic argument is that it is drastically uncertain. To give one example, good faith is supposed to encourage information sharing because parties will be able to trust that counterparties will not take the information and run. Information sharing can allow parties to come to more productive deals. Good information is essential to optimal contracting because only when properly informed will a party’s deals reflect their preferences. However there is another question about how much is invested into producing information in the first place. Consider the classic issue: if I wish to buy your property must I disclose my secret knowledge that your property is unusually valuable? If I need not disclose it, you will get bilked. If I need disclose it (without some additional compensatory mechanism) I will have lost the value of the information and an underproduction of that sort of information might result. Or, I might fail to disclose it despite the requirement and hope you never notice, exploiting the very trust that good faith was to create. Where does the efficient answer lie?

On the moral side, one person’s utopia of fellow feeling is another’s totalitarian nightmare. Let us imagine a science fictional market of the future where everyone trusts each other and shares information and lives happily together. There is much that is attractive in this model. It might even, in some sense, be a fuller ethical community than what we have now. But not everyone agrees. Some business people no doubt get satisfaction from competing and besting the competition. Putting the grasper aside, does this market vision not ask too much of its participants? There is something invasive about having to put so much of yourself into your public life. No one can be at arm’s length, and perhaps

82 Trebilcock, ibid, ch 5 and Brownsword Revised, note 8 above at 141-143.
the bourgeois virtues of tolerance, prudence, enterprise, and justice would suffer.\textsuperscript{83} The stereotypical dark-side of communitarian sf is after all an oppressive and lack-lustre homogeneity.

There is some irony in the contrast between the zeal of some good faith proponents and the pedestrian nature of the doctrinal proposals at issue. Containers often advance similar notions of good faith with wildly different expectations of what will result. Avoiders say doom though again similar notions of good faith might be at play. All this seems to argue nothing but that the far-flung consequences of good faith are totally unclear. The avoiders, containers, and embracers cannot agree whether good faith will enervate or exalt the market, or simply leave it as it is. Perhaps each response is in touch with a different part of the elephant.\textsuperscript{84} Or perhaps there is no elephant.

**Conclusion**

The long-standing, flip-flopping nature of good faith debates make them ripe for a dialectical approach.\textsuperscript{85} Perhaps the reason we have so many theorists arguing for deeply opposed positions is that they are responding to an underlying tension that will always pervade the law. Perhaps "good faith" is just the stage for debates about communitarianism against individualism, rational self-interest against altruism, private against public, contract’s facilitative against its regulative aspects, and on. In some sense this must be right. My review of the rhetorical strategies brought to bear on this subject unearthed some of the deep values at play, notions about how markets are and how they should be. These are perhaps most evident in the strategies' weaknesses. And so as long as there are people who think that contract law is too individualist or too communitarian, there will be people arguing about good faith’s place within it. We can also posit a dialectic dialectic. In the past describing things in terms of underlying irreconcilable


\textsuperscript{84} I refer to the story in which three blind people come into contact with an elephant's trunk, leg, or ear, and conclude that an elephant is like a snake, a tree, or a blanket. This is usually used as a metaphor for humans’ incomplete perception of truth.

\textsuperscript{85} Enman-Beech, note 15 above; McMeel, note 3 above; and see generally Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94:5 Yale LJ 997.
tensions has been cool, and it might be coming back into vogue now.\textsuperscript{86} The pendulum is ever swinging.

For years Commonwealth contract law has moved between avoidance and containment strategies. With \textit{Bhasin} avoidance is no longer an option in Canada.\textsuperscript{87} In a global market where many jurisdictions recognize some kind of good faith, avoidance is becoming less attractive in general. As such we should expect an influx of containment strategies. In my own view, containment fails to engage with the substance of good faith in some way. It seems to be missing the good question. Serious embrace is not incremental. It thus raises rule-of-law concerns about the reckonability of court outcomes and a lack of fit with commercial expectations that may be based on present law. We probably need some admixture of both embrace and containment of good faith.

According to the Supreme Court of Canada in \textit{Bhasin}, good faith is already an organizing principle of the common law of contract, just waiting to be acknowledged.\textsuperscript{88} On top of everything else, good faith is an opportunity for us to reflect on our views on the common law; it is important not only for what it might do in court but for what we say about it. It is a subject of constant controversy not because the ship of commerce is ever at risk of running up on its rocks, but because we have bulked it up with the all the conflicting values that contract should express.

\begin{center}
\begin{itemize}
\item \textsuperscript{87}
\item \textsuperscript{88} \textit{Bhasin} at para 33.
\end{itemize}
\end{center}