



SUPREME COURT OF CANADA

CITATION: Wastech Services Ltd. v. Greater
Vancouver Sewerage and Drainage District,
2021 SCC 7

APPEAL HEARD: December 6, 2019
JUDGMENT RENDERED: February 5, 2021
DOCKET: 38601

BETWEEN:

Wastech Services Ltd.
Appellant

and

Greater Vancouver Sewerage and Drainage District
Respondent

- and -

Attorney General of British Columbia and Canadian Chamber of Commerce
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Abella, Moldaver, Karakatsanis
(paras. 1 to 114) and Martin JJ. concurring)

JOINT CONCURRING REASONS: Brown and Rowe JJ. (Côté J. concurring)
(paras. 115 to 141)

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

WASTECH v. G.V. SEWERAGE AND DRAINAGE

Wastech Services Ltd.

Appellant

v.

Greater Vancouver Sewerage and Drainage District

Respondent

and

**Attorney General of British Columbia and
Canadian Chamber of Commerce**

Interveners

**Indexed as: Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage
District**

2021 SCC 7

File No.: 38601.

2019: December 6; 2021: February 5.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts — Breach — Performance — Duty to exercise contractual discretion in good faith — Waste removal contract providing municipal district with absolute discretion to allocate waste to various disposal facilities — Municipal district's reallocation of waste resulting in reduction of waste company's profit — Waste company alleging breach of contract due to reallocation of waste depriving it of possibility of achieving target profit — Whether reallocation of waste constitutes breach of duty to exercise contractual discretion in good faith.

Wastech, a waste transportation and disposal company, and Metro, a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District, had a long-standing contractual relationship which contemplated the removal and transportation of waste by Wastech to three disposal facilities. Wastech was to be paid at a differing rate depending on which disposal facility the waste was directed to and how far away the facility was located. The contract did not guarantee that Wastech would achieve a certain profit in any given year and it gave Metro absolute discretion to allocate waste as it so chose.

In 2011, Metro reallocated waste from a disposal facility further away to one that was closer, resulting in Wastech recording an operating profit well shy of its target. Wastech alleged that Metro breached the contract by allocating waste among the facilities in a manner that deprived Wastech of the possibility of achieving the target profit for 2011. Wastech referred the dispute to arbitration and sought compensatory damages. The arbitrator found that a duty of good faith applied, that Metro had breached that duty, and that Wastech was therefore entitled to compensation. The

Supreme Court of British Columbia allowed Metro's appeal, and set aside the arbitrator's award on the basis that the imposition of a contractual duty to have appropriate regard for the interests of another contracting party must be based on the terms of the contract itself, and that in this case the parties had deliberately rejected a term constraining the exercise of discretionary power to allocate waste. The Court of Appeal dismissed Wastech's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and **Kasirer** JJ.: Where a party to a contract exercises its discretion unreasonably, that is, in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith. Metro's exercise of discretion was not unreasonable with regard to the purposes for which the discretion was granted and was therefore not a breach of the duty. Accordingly, the arbitrator's award cannot stand, whether the standard of review is correctness or reasonableness.

The duty to exercise contractual discretion in good faith is well-established in the common law. It was expressly recognized by the Court in its account of the organizing principle of good faith in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. However, it was not necessary in *Bhasin* to spell out the contours of this duty. In order to answer Wastech's claim then, the Court must determine what constraints the

duty to exercise contractual discretion in good faith imposes on the holder of that discretion.

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. The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, in a manner unconnected to the purposes underlying the discretion. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. But where the exercise stands outside the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and may be thought of as unfair and contrary to the requirements of good faith.

The measure of fairness is what is reasonable according to the parties' own bargain. It is not what a court sees as fair according to its own view of the proper exercise of the discretion. Where the exercise of discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can intervene where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties; however, their role is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. Courts must only ensure parties have not

exercised their discretion in ways unconnected to the purposes for which the parties themselves grant that power. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties.

What a court considers unreasonable is highly context-specific, and ultimately depends upon the intention of the parties as disclosed by their contract. Generally, however, for contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement, the range of reasonable outcomes will be relatively smaller. For contracts that grant discretionary power in which the matter to be decided or approved is not readily susceptible to objective measurement, the range of reasonable outcomes will be relatively larger. It is in properly interpreting the contract for the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

Requiring substantial nullification — that is, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith. The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract is not dispositive, in itself, as to whether the discretion was exercised in good faith. However, it could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

Finally, the duty to exercise discretion in good faith is a general doctrine of contract law. It need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties. Recognizing this general duty interferes very little with freedom of contract for two reasons. First, just as parties will rarely expect that their contract permits dishonest performance, contracting parties rarely if ever expect discretion granted by the contract to be exercised in a manner unconnected to the purposes for which it was conferred. Second, the content of the duty is guided by the will of the parties as expressed in their contract. Rather than interfering with the objectives of the contracting parties or imposing duties on them beyond their reasonable contemplation, this duty merely requires that parties operate within the scope of discretion defined by their own purposes for which they freely negotiated its grant. Parties who provide for discretionary power cannot contract out of the implied undertaking that the power will be exercised in good faith, in light of the purposes for which it was conferred.

Metro's exercise of discretion was not unreasonable with regard to the purposes for which the discretion was granted. Wastech's case does not rest on allegations that it fell prey to lies or deception or that Metro exercised its discretion capriciously or arbitrarily, and it does not point to any identifiable wrong committed by Metro beyond seeking its own best interest within the bounds set for the exercise of discretion by the contract. The contract gives Metro the absolute discretion to determine how the waste is to be allocated. There is no guaranteed minimum volume of waste allocated in a given year. Reading the contract as a whole, the purposes become clear: to allow Metro the flexibility necessary to maximize efficiency and minimize costs of

the operation. The fact that this discretion exists alongside a detailed framework to adjust payments towards the goal of a negotiated level of profitability, belies the idea that the parties intended this discretion be exercised so as to provide Wastech with a certain level of profit. Those incentives are already carefully created elsewhere in the contract.

Based on these purposes, Metro did not act unreasonably. Metro's exercise of discretion was guided by the objectives of maximizing efficiency, preserving remaining site capacity, and operating the system in the most cost-effective manner, and was made in furtherance of its own business objectives. Wastech is asking for an advantage for which it did not bargain: it asks that Metro confer a benefit upon it that was not contemplated, expressly or impliedly, under the contract. Although Wastech emphasized that the contract was a long-term relational agreement dependent upon an element of trust and cooperation between Wastech and Metro, this is not dispositive of the case in favour of Wastech. This is not an example of an unforeseen or unregulated matter that, by reason of the relational character of the contract, was left to the trust and cooperation said to be inherent in the long-term arrangement. The parties foresaw this risk — and chose to leave the discretion in place.

Wastech asks the Court to have Metro subvert its own interest in name of accommodating Wastech's interest. However, Metro is Wastech's contracting partner, not its fiduciary. The loyalty required of it in the exercise of this discretion was loyalty to the bargain, not loyalty to Wastech. Wastech cannot rely on an understanding of good faith that sits uncomfortably with the foundation of contractual justice. When the

contours of good faith performance in this context are properly identified, it is plain that Metro did not exercise its power to reallocate waste in breach of a good faith duty. An analogy to the standard of reasonable conduct in the law of abuse of contractual rights in Quebec does not assist Wastech in this case.

Per Côté, Brown and Rowe JJ.: There is agreement that the appeal should be dismissed. Answering the question posed is a matter of straightforwardly applying *Bhasin*, and confirming that, while *Bhasin* organized several established common law doctrines under the rubric of good faith, it did not represent an abandonment of commercial certainty by requiring contracting parties to place their counterparty's interests ahead of their own.

While the majority refrains from identifying the standard of review, clear guidance on this point ought to be provided. Although there are important differences between commercial arbitration and administrative decision-making, those differences do not affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. The appeal in this case was brought pursuant to s. 31 of British Columbia's *Arbitration Act*, which provides that, either by consent of the parties or with leave of the Supreme Court of British Columbia, a party to an arbitration may appeal to the court on a question of law arising out of the award. In light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, it follows that the standard of review to be applied by the Court in this case is correctness.

The purpose of good faith is to secure the performance and enforcement of the contract made by the parties. It cannot be used as a device to create new, unbargained-for rights and obligations or to alter the express terms of the contract. Where an agreement reflects a shared, reasonable expectation as to the manner in which a discretion may be exercised, that expectation will be enforced. While parties will usually expect that a discretion will be exercised in accordance with the purposes for which it was conferred, this is so only where the purpose of a discretionary power arises from the terms of the contract, construed objectively, and having regard to the factual matrix. The obligation to exercise discretion reasonably does not reflect the imposition of external standards on the exercise of discretion, but rather giving effect to the standards inherent in the parties' own bargain. Accordingly, there is disagreement with the majority that where a discretion is unfettered on its face, a court must form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power. The majority's invocation of loyalty to the venture suggests that parties must use their discretion, even where it is chosen by the parties to be unfettered, in a way that advances the objectives of the contract. Approaching the interpretive task from such a starting point risks, even invites, undermining freedom of contract and distorting the parties' bargain by imposing constraints to which they did not agree.

Additionally, the purpose of a discretion is always defined by the parties' intentions, as revealed by the contract. Therefore, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating

within their proper role, must give effect to that intention. With careful drafting, parties can largely immunize the exercise of discretion from review on this basis, or choose to specify the purpose for which a discretion has been granted in order to provide a clear standard against which the exercise of discretion is to be assessed. In either instance, their intention should be given effect and not subverted.

The duty of honest performance and the duty to exercise discretionary powers in good faith should remain distinct. Any suggestion that the duty of honest performance is a preliminary step in assessing whether there is a breach of the duty to exercise discretionary powers in good faith fails to comprehend or have regard for how the common law has distinguished between these duties. Further, rather than assisting in the development of the common law of good faith in contractual performance, the majority's digression into the civil law of Quebec gives rise to complication, uncertainty and confusion. It has no relevance in the present case, and it confuses matters for no useful purpose. The common law of British Columbia applies to the contract at issue and readily answers the questions of law posed in the appeal.

Cases Cited

By Kasirer J.

Applied: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494;
overruled: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180, aff'd (1992), 112 N.S.R. (2d) 180; **referred to:** *C.M. Callow Inc. v. Zollinger*, 2020

SCC 45; *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4; *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755; *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1; *Jack Wookey Hldg. Ltd. v. Tanizul Timber Ltd.* (1988), 27 B.C.L.R. (2d) 221; *Canadian National Railway Co. v. Inglis Ltd.* (1997), 36 O.R. (3d) 410; *Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *Filice v. Complex Services Inc.*, 2018 ONCA 625, 428 D.L.R. (4th) 548; *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (The "Product Star") (No. 2)*, [1993] 1 Lloyd's Rep. 397; *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1; *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105; *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187; *Klewchuk v. Switzer*, 2003 ABCA 187, 330 A.R. 40; *British Telecommunications plc v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All E.R. 907; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Ponce v. Montrusco & Associés inc.*, 2008 QCCA 329, [2008] R.J.D.T. 65; *Churchill*

Falls (Labrador) Corp. v. Hydro-Québec, 2018 SCC 46, [2018] 3 S.C.R. 101; *Dunkin' Brands Canada Ltd. v. Bertico inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1; *Gestion immobilière Bégin inc. v. 9156-6901 Québec inc.*, 2018 QCCA 1935.

By Brown and Rowe JJ.

Applied: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; **referred to:** *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516; *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106, 10 Alta. L.R. (7th) 178; *Allstate Insurance Co. v. Ontario (Minister of Finance)*, 2020 ONSC 830, 149 O.R. (3d) 761; *Buffalo Point First Nation v. Cottage Owners Association*, 2020 MBQB 20; *Clark v. Unterschultz*, 2020 ABQB 338, 41 R.F.L. (8th) 28; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45; *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457; *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214; *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187.

Statutes and Regulations Cited

Arbitration Act, R.S.B.C. 1996, c. 55 [rep. & sub. 2020, c. 2, s. 72], s. 31 [rep. & sub. 2020, c. 2, s. 59].

Civil Code of Québec, arts. 6, 7, 1375.

Greater Vancouver Sewerage and Drainage District Act, S.B.C. 1956, c. 59.

Authors Cited

Baudouin, Jean-Louis, Patrice Deslauriers, et Benoît Moore. *La responsabilité civile*, vol. 1, *Principes généraux*, 8^e éd. Cowansville, Que.: Yvons Blais, 2014.

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin, *Les obligations*, 7^e éd., par Pierre-Gabriel Jobin and Nathalie Vézina. Cowansville, Que.: Yvons Blais, 2013.

Burton, Steven J. “Breach of Contract and the Common Law Duty to Perform in Good Faith” (1980), 94 *Harv. L. Rev.* 369.

Collins, Hugh. “Discretionary Powers in Contracts”, in David Campbell, Hugh Collins and John Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*. Portland, Or.: Hart Publishing, 2003, 219.

Fleming’s The Law of Torts, 10th ed. by Carolyn Sappideen and Prue Vines, eds. Pyrmont, N.S.W.: Lawbook Co., 2011.

Fridman, Gerald Henry Louis. *The Law of Contract in Canada*, 6th ed. Toronto: Carswell, 2011.

Gray, Anthony. “Development of Good Faith in Canada, Australia and Great Britain” (2015), 57 *Can. Bus. L.J.* 84.

Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed. Toronto: LexisNexis, 2016.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 3^e éd. Montréal: Thémis, 2018.

Mason, Anthony. “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000), 116 *L.Q.R.* 66.

McCamus, John D. “Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance” (2005), 29 *Adv. Q.* 72.

McCamus, John D. *The Law of Contracts*, 3rd ed. Toronto: Irwin Law, 2020.

McCamus, John D. “The New General ‘Principle’ of Good Faith Performance and the New ‘Rule’ of Honesty in Performance in Canadian Contract Law” (2015), 32 *J.C.L.* 103.

Paterson, Jeannie Marie. “Good Faith Duties in Contract Performance” (2014), 14 *O.U.C.L.J.* 283.

Paterson, Jeannie Marie. “Implied Fetters on the Exercise of Discretionary Contractual Powers” (2009), 35 *Mon. L. R.* 45.

Robertson, Joseph T. “Good Faith as an Organizing Principle in Contract Law: *Bhasin v. Hrynew* — Two Steps Forward and One Look Back” (2015), 93 *Can. Bar Rev.* 809.

Sales, Philip. “Use of Powers for Proper Purposes in Private Law” (2020), 136 *L.Q.R.* 384.

Stack, David. “The Two Standards of Good Faith in Canadian Contract Law” (1999), 62 *Sask. L. Rev.* 201.

Steyn, Johan. “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997), 113 *L.Q.R.* 433.

Swan, Angela, Jakub Adamski, and Annie Y. Na. *Canadian Contract Law*, 4th ed. Toronto: LexisNexis, 2018.

Waddams, S. M. *The Law of Contracts*, 7th ed. Toronto: Thomson Reuters, 2017.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Stromberg-Stein and Fisher JJ.A.), 2019 BCCA 66, 19 B.C.L.R. (6th) 217, 431 D.L.R. (4th) 512, [2019] B.C.J. No. 236 (QL), 2019 CarswellBC 336 (WL Can.), affirming a decision of McEwan J., 2018 BCSC 605, [2018] B.C.J. No. 684 (QL), 2018 CarswellBC 910 (WL Can.). Appeal dismissed.

Geoffrey G. Cowper, Q.C., Mark D. Andrews, Q.C., and Stanley Martin,
for the appellant.

Irwin G. Nathanson, Q.C., and Julia K. Lockhart, for the respondent.

Jonathan Eades and Graham J. Underwood, for the intervener the
Attorney General of British Columbia.

Jeremy Opolsky and Winston Gee, for the intervener the Canadian
Chamber of Commerce.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer
JJ. was delivered by

KASIRER J. —

I. Overview

[1] This appeal raises the issue of whether a common law duty of good faith performance applies in a long-term contract for waste removal in the greater Vancouver region. More specifically, it bears on how principles of good faith might preclude what one scholar has called the “abuse of contractual discretionary powers” (J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at p. 938). In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 47 and 50, Cromwell J. observed that the

exercise of contractual discretion is one circumstance in which courts have found a duty of good faith performance exists in a manner consonant with the “organizing principle” from which this and other good faith duties derive: “parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily” (para. 63, see also *McCamus*, pp. 931-943). However, *Bhasin* does not explore the source or content of the specific duty to exercise discretion in good faith, which matters were not at issue in that appeal.

[2] The appellant here, a waste removal contractor, says the respondent exercised its contractual power to decide where the waste would be allocated in the region contrary to the requirements of good faith. The appellant argues that the courts below failed to understand the notion at the core of *Bhasin*, according to which a contracting party should have “appropriate regard to the legitimate contractual interests of [their] contracting partner” (*Bhasin*, at para. 65). It says that the respondent’s exercise of discretion made it impossible to earn the level of profit it had bargained for under what it depicts as a long-term relational contract, predicated on trust between the parties. In the result, the respondent exercised its discretionary power in a way the appellant has described as failing to meet the standard of honesty and reasonableness required by *Bhasin* in this context.

[3] The problem in this case is not so much whether the duty to exercise contractual discretion in good faith exists, but on what basis it exists and according to what standard its breach can be made out. To be sure, the appellant is right to say that the organizing principle of good faith recognized in *Bhasin* exemplifies the idea that a

contracting party should have appropriate regard to the legitimate contractual interests of their contracting partners. But in claiming compensation for its lost opportunity based on a supposedly dishonest or unreasonable exercise of the discretion to reallocate waste under the contract, the appellant misrepresents the organizing principle and overstates one of the specific duties of good faith derived therefrom.

[4] 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. This will be made out, for example, where the exercise of discretion is arbitrary or capricious, as Cromwell J. suggested in *Bhasin* in his formulation of the organizing principle of good faith performance. According to *Bhasin*, this duty is derived from the same requirement of corrective justice as the duty of honest performance, which requirement demands that parties exercise or perform their rights and obligations under the contract having appropriate regard for the legitimate contractual interests of the contracting partner. Like the duty of honest performance observed in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).

[5] Carefully considered, the appellant's case does not rest on allegations that it fell prey to lies or deception. There is no claim that the respondent exercised its discretion capriciously or arbitrarily. The appellant does not point to, under the guise of allegedly unreasonable conduct, any identifiable wrong committed by the

respondent beyond seeking its own best interest within the bounds set for the exercise of discretion by the agreement. The duty of good faith at issue here constrains the permissible exercise of discretionary powers in contract but, in so doing, it does not displace the detailed, negotiated bargain as the primary source of justice between the parties.

[6] Importantly, the good faith duty at issue does not require the respondent to subordinate its interests to those of the appellant, nor does it require that a benefit be conferred on the appellant that was not contemplated under the contract or one which stands beyond the purposes for which the discretion was agreed. Here, the appellant decries conduct that is self-interested, to be sure, and that, it says, made it impossible to achieve the fundamental benefit for which it had bargained. But in seeking damages for this loss, the appellant does not allege that the respondent committed any actionable wrong in exercising the discretion provided for under the contract. While it is true the arbitrator characterized the long-term contract here as a relational one, he found that the situation giving rise to this dispute, however unlikely it may have appeared to the parties, was a risk that the parties had specifically considered in drafting their detailed agreement. In that context, whatever trust and cooperation that the parties might owe one another arising out of the long-term relational character of the contract cannot resolve this case in favour of the appellant by requiring the respondent to act as a fiduciary.

[7] When the contours of good faith performance in this context are properly identified, it is plain that the respondent did not exercise its power to reallocate waste

in breach of a good faith duty. In point of fact, in its call to be paid damages on the basis of the contractual duty of good faith owed to it by the respondent, the appellant is asking the Court to award it an advantage not provided for in the agreement between the parties in the absence of any appreciable breach of contract or identifiable wrong. This seems to me to confuse the requirements of good faith performance with an injunction to act selflessly in a way that stands outside the ordinary compass of social ordering by contract, in service of a notional solidarity between the parties based on a different theory of justice. Accordingly, I would dismiss this appeal.

II. Background

A. *The Contract*

[8] The appellant, Wastech Services Ltd. (“Wastech”), is a British Columbia company engaged in waste transportation and disposal. The respondent, the Greater Vancouver Sewerage and Drainage District (“Metro”), is a statutory corporation constituted under the *Greater Vancouver Sewerage and Drainage District Act*, S.B.C. 1956, c. 59. One of its primary mandates is the administration of waste disposal from the Metro Vancouver Regional District.

[9] Wastech and Metro had a long-standing commercial relationship. They entered into contracts for the disposal of waste from the Greater Vancouver Regional District twice in 1986, once in 1988 and again in 1992. In 1996, after approximately 18 months of negotiations, Wastech and Metro entered into a new waste disposal

agreement (“Contract”), setting out what the parties described as “an integrated, comprehensive municipal solid waste transfer system . . . and sanitary landfill in a reliable, cost-effective and environmentally-sound manner” (A.R., vol. II, at p. 9, recital B). The Contract was complex, and included several recitals, numerous defined terms and schedules. It replaced the four existing agreements between Wastech and Metro and had a term of 20 years.

[10] The Contract contemplated the removal and transportation of waste by Wastech on behalf of the district represented by Metro to three disposal facilities: the Vancouver Landfill; the Burnaby Waste to Energy Facility; and the Cache Creek Landfill. Wastech was to be paid at a reduced rate, subject to a number of variables, for the short-haul transportation of waste to the Vancouver Landfill and the Burnaby Waste to Energy Facility as compared to the rate paid to transport to the Cache Creek Landfill, which is farther away.

[11] Wastech’s compensation was structured around a “Target Operating Ratio” (“Target OR”). Defined in s. 14.1(ag) of the Contract as a ratio of 0.890, the Target OR reflected a scenario where Wastech’s operating costs were 89 percent of its total revenues, resulting in an operating profit of 11 percent. It bears noting that the Contract did not guarantee that Wastech would achieve the Target OR in any given year.

[12] The Contract provided for various adjustments to allow for fluctuations in the actual operating ratio (“Actual OR”) achieved by Wastech. Section 14.19 of the

Contract provided that if the Actual OR deviated from the Target OR, the parties would share equally the financial consequences of the deviation. If the Actual OR were to *exceed* the Target OR, Metro would pay Wastech an additional sum equal to 50 percent of the difference between the Target OR and the Actual OR. Wastech would similarly compensate Metro if the Actual OR was *less* than the Target OR. Section 14.11 of the Contract also provided that the rates to be paid to Wastech and Metro's contribution to fix operating expenses would each be adjusted annually if the Actual OR achieved in the immediately preceding operating year was less than 0.860 or greater than 0.920.

[13] Section 12.7 of the Contract required Metro to provide Wastech, annually, with a detailed forecast of the allocation of all of the waste expected to be handled under the Contract for the following operating year. The arbitrator found that, “[o]ne purpose of this requirement [was] to give Wastech an opportunity to plan its future operations and manage its costs” (A.R., vol. I, p. 1 (“Award”), at para. 44). However, ss. 30.1, 30.2 and 30.4 gave Metro “absolute discretion” to determine and amend the minimum amount of waste to be transported to the Cache Creek Landfill for any given year.

[14] During negotiations, Wastech and Metro realized that waste transported to the long-haul Cache Creek Landfill might decrease and that one possible reason for such a decrease could be Metro's decision to reduce the waste transported to that site by redirecting it to the short-haul Vancouver Landfill. Moreover, both parties were aware that this could preclude Wastech from achieving the Target OR. Both parties believed that such a scenario was highly unlikely. Given their mutual desire to simplify

the Contract, Wastech and Metro agreed not to include an adjustment provision dealing with that scenario in the Contract.

B. *Circumstances of the Alleged Breach*

[15] In September 2010, Metro provided Wastech its annual waste allocation plan for 2011, according to which about 600,000 to 700,000 tonnes of waste would have to be disposed of in the operating year. Metro directed Wastech to reallocate waste transportation for 2011: the Vancouver Landfill was to receive 200,000 tonnes, up from the 138,380 it received in 2010; the Burnaby Waste to Energy Facility was to receive enough waste to operate at maximum capacity; and the Cache Creek Landfill was to receive the remaining waste.

[16] Ultimately, the total waste transported by Wastech during the 2011 operating year was 609,340 tonnes; approximately 8 percent less than in 2010. The Cache Creek Landfill received 273,018 tonnes; approximately 31 percent less than in 2010. The Vancouver Landfill received 187,428 tonnes; approximately 36 percent more than it received in 2010. These totals reflected a conscious decision by Metro to reallocate waste from the Cache Creek Landfill to the Vancouver Landfill.

[17] As a result of the waste reallocation, and before adjustment payments, Wastech operated at a loss, achieving an operating ratio of 1.045. However, after taking into account the adjustment payments under s. 14.19, Wastech operated at a profit, achieving an operating ratio of 0.960. As I noted above, this adjustment payment was

intended to ensure that the parties would share the financial consequences of a deviation from the Target OR equally. After taking into account this payment, Wastech therefore recorded an operating profit of 4 percent for the year, well shy of its target of 11 percent.

[18] Pursuant to s. 18.3 of the Contract, Wastech referred the dispute to arbitration, alleging that Metro breached the Contract by allocating waste among the facilities for 2011 in a manner that deprived Wastech of the possibility of achieving the Target OR that year. Wastech sought compensatory damages in the amount of \$2,888,162, which, it said, represented the additional amount the company would have earned in 2011 if Metro's allocation of waste had not deprived it of the opportunity to achieve the Target OR.

III. Decisions Below

A. *The Arbitral Award — BCICAC Case No. DCA-1560, February 13, 2015 (Gerald W. Ghikas, Q.C.)*

[19] The arbitrator ruled in favour of Wastech.

[20] Wastech advanced two submissions. First, it argued that Metro's reallocation of waste from the Cache Creek Landfill to the Vancouver Landfill in the 2011 operating year violated an implied term of the Contract based on the presumed intentions of the parties. The alleged implied term as formulated by Wastech before the arbitrator was complex. In substance, it would oblige the parties to reset retroactively

various rates and payments in the event that Metro reallocated waste in a manner that made it impossible for Wastech to achieve the Target OR in the immediately preceding operating year.

[21] In the alternative, Wastech submitted that Metro's discretionary power to allocate waste between the facilities was subject to a duty of good faith such that it could not be exercised in a way that would deprive Wastech of the opportunity to achieve the Target OR.

[22] The arbitrator declined to find that the term proposed by Wastech was implied because it was not obvious that the parties would have agreed to it. On the contrary, the arbitrator found that the parties made a decision not to include a term in the Contract "dealing with the subject-matter of the term" that Wastech submitted was implied (Award, at para. 74).

[23] Nevertheless, the arbitrator felt that this did not preclude him from considering whether Metro's discretionary power under the Contract was constrained by a duty of good faith. On this point, he agreed with Wastech that a duty of good faith applied, that Metro had breached that duty, and that Wastech was therefore entitled to compensation.

[24] The arbitrator began by reviewing this Court's judgment in *Bhasin*. He observed that where a contract expressly confers a discretionary power on a party, courts have held that the power must be exercised in good faith. Since the Contract was

a long-term, relational agreement dependent upon an element of trust and confidence between Wastech and Metro, the arbitrator held that the “existing doctrines” of good faith required Metro to have “‘appropriate regard’ for the legitimate contractual interests of Wastech when exercising its discretionary contractual power” to allocate waste (para. 85).

[25] Turning to the evidence before him, the arbitrator accepted that Metro’s reallocation of waste away from the Cache Creek Landfill for 2011 was “guided by the objectives of maximizing the [Burnaby Facility’s] efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner” (para. 87). In addition, prior to the reallocation of waste, Metro’s financial position had suffered as a result of declining volumes of waste. Based on this evidence, the arbitrator found that Metro’s reallocation decision “was made in furtherance of its own business objectives” and that, “[i]f viewed only from Metro’s perspective and without regard to the interests of Wastech, Metro’s conduct was both honest and reasonable” (para. 88).

[26] In the arbitrator’s view, it still remained to be determined whether Metro had “appropriate regard” to Wastech’s interests under the Contract. This was the key question because “[t]he focus of the organizing principle stated in *Bhasin* is on conduct that does not show ‘appropriate regard’ for the ‘legitimate expectations’ of the other party as to how the contract will be performed” (para. 90). He wrote that, according to *Bhasin*, the exercise of a “bargained-for contractual right [is] ‘dishonest’ where it is wholly at odds with the legitimate contractual expectations of the other party”, and that

no additional form of dishonesty, such as “half-truths, lies or deceit”, need be shown (para. 90).

[27] The arbitrator found that Metro’s exercise of its discretionary power made it “not possible” for Wastech to achieve the Target OR (para. 89). He also found that Wastech had a legitimate contractual expectation that Metro would not exercise its **power** in a way that would deprive Wastech of the opportunity to achieve the Target OR (para. 92). Furthermore, the arbitrator wrote that having the opportunity to achieve the Target OR in every year of the Contract was “the fundamental benefit for which Wastech bargained” (para. 94). Noting that courts have often required evidence that a party’s conduct “gutted” or eviscerated the contract, or deprived the other contracting party of all or substantially all of the benefit for which it bargained, the arbitrator said it was not necessary for Wastech to provide such evidence because “the over-arching principle stated in *Bhasin* does not include such a requirement” (para. 93).

[28] Based on this reasoning, the arbitrator held that “Metro’s conduct show[ed] a lack of appropriate regard for Wastech’s legitimate expectations” that was sufficient to justify finding a breach of a duty of good faith (para. 94). However, the arbitrator clarified that the breach occurred not in the reallocation decision itself, but rather in Metro’s failure to compensate Wastech for its lost opportunity to achieve the Target OR (para. 95).

B. *Supreme Court of British Columbia — Leave Decision, 2016 BCSC 68, 409 D.L.R. (4th) 9 (Fitzpatrick J.)*

[29] Metro petitioned for leave to appeal the arbitrator’s award under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 [rep. & sub. 2020, c. 2, s. 72], and was granted leave to appeal upon the following questions of law:

1. Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be “dishonest” and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?

2. Did the Arbitrator err in law by confusing the “organizing principle” stated in *Bhasin* with a free-standing obligation of contractual good faith, disregarding the applicable principles of good faith as found in the authorities? [para. 40]

C. *Court of Appeal for British Columbia — Leave Decision, 2016 BCCA 393, 409 D.L.R. (4th) 4 (Frankel, MacKenzie and Fenlon J.J.A.)*

[30] Wastech appealed the order granting Metro leave to appeal. In brief oral reasons, the Court of Appeal unanimously dismissed Wastech’s appeal.

D. *Supreme Court of British Columbia — Appeal Decision, 2018 BCSC 605 (McEwan J.)*

[31] The chambers judge hearing the merits of Metro’s appeal set aside the arbitrator’s award, awarded costs of the appeal to Metro, and remitted the issue of costs of the arbitration to the arbitrator.

[32] The chambers judge rejected Wastech’s argument that “objectively reasonable constraints on the exercise of Metro’s discretion must be imposed” based

on the requirement that Metro had to show “appropriate regard” for Wastech’s interests (paras. 23 and 41 (CanLII)).

[33] In the chambers judge’s view, the imposition of a duty to have appropriate regard for the interests of another contracting party must be based on the terms of the contract itself. In this case, the parties considered and deliberately rejected a term constraining the exercise of Metro’s discretionary power to allocate waste. He wrote: “This was a case of sophisticated parties leaving aside a term that might have addressed the problem”, rather than an instance of overlooking or failing to consider a provision. For the chambers judge, this alone “negate[d] the approach taken by the Arbitrator” (para. 57).

[34] Recalling that *Bhasin* explicitly recognized that a party may sometimes cause loss to another in the legitimate pursuit of economic self-interest, the chambers judge also held that the arbitrator had effectively ignored the terms of the Contract in finding that Metro’s conduct was “dishonest” only because it was “at odds” with Wastech’s legitimate contractual expectations (paras. 60-62). At the end of the day, he found it difficult to “see how the principle of good faith [could] be applied to [the Contract] in light of the actual circumstances in which the [Contract] was developed” (para. 61). He therefore allowed Metro’s appeal.

E. *Court of Appeal for British Columbia — Appeal Decision, 2019 BCCA 66, 19 B.C.L.R. (6th) 217 (Newbury, Stromberg-Stein and Fisher J.J.A.)*

[35] Wastech appealed the chambers judge's order. In reasons written by Newbury J.A., the Court of Appeal unanimously dismissed the appeal, with costs of the appeal awarded to Metro.

[36] Newbury J.A. began her analysis by noting that the chambers judge did not clearly answer the two questions of law before him. Accordingly, she considered the two questions afresh (paras. 63-65). In answering each of them affirmatively, the Court of Appeal identified four errors of law committed by the arbitrator.

[37] First, the Court of Appeal held that the arbitrator applied the wrong legal test for determining whether Metro's conduct nullified the benefits that Wastech reasonably expected to obtain from the Contract. Specifically, he failed to ascertain Wastech's legitimate contractual interests or expectations by reference to the terms of the Contract itself (para. 68).

[38] Second, the arbitrator erred in concluding that his rejection of Wastech's proposed implied term did not "add anything" to his good faith analysis when, as a matter of law, it "substantially took away from" Wastech's arguments in support of a breach of a duty of good faith (para. 69 (emphasis deleted); Award, at para. 91).

[39] Third, the Court of Appeal held that the arbitrator erred in deciding that it was unnecessary to determine whether Metro's conduct had nullified or eviscerated the Contract in order to conclude that Metro had breached a duty of good faith (para. 70). That conclusion effectively created, contrary to what this Court wrote in *Bhasin*, a

stand-alone duty not to show “disregard of [the other party’s] contractual interests” (para. 70). Relying on *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, the Court of Appeal held that such a conclusion would constitute a “radical extension of the law” (para. 70).

[40] Finally, Newbury J.A. wrote that the arbitrator was wrong to hold that “dishonesty” included the exercise of contractual rights in a manner that is wholly at odds with the legitimate contractual expectations of the other party. In *Bhasin*, Cromwell J. was “concerned substantially with conduct that has at least a subjective element of improper motive or dishonesty” (C.A. reasons, at para. 71). Some subjective element of dishonesty, untruthfulness, improper motive, or “bad faith” is therefore necessary to attribute dishonesty to a party and find a breach of a duty of good faith. This could include conduct so reckless that contractual performance is inexplicable and incomprehensible to the point that it can be regarded as an “abuse of power, having regard to the purposes for which it [was] meant to be exercised” (para. 71, quoting *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 39).

[41] In light of the arbitrator’s errors, the Court of Appeal dismissed Wastech’s appeal, concluding that the chambers judge was correct to allow Metro’s appeal. However, it also noted that its conclusions would have been the same had it applied a standard of reasonableness, rather than correctness, in reviewing the arbitrator’s award (para. 74).

IV. Analysis

A. *Standard of Review*

[42] The parties raise preliminary issues relating to the standard of review applicable on appeal from a commercial arbitration award and the proper character of the questions of law on appeal in this particular case.

[43] Wastech submits, first, that the Court of Appeal erred in reviewing the arbitrator's finding of a breach of the duty to exercise contractual discretionary powers in good faith. Relying on s. 31 of the *Arbitration Act* and the judgments of this Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, Wastech says that appeals from commercial arbitration awards are confined to extricable questions of law and that, here, Metro has failed to demonstrate a proper legal basis to set aside the award. Matters of contractual interpretation raise, both generally and in this case, questions of mixed fact and law, says Wastech and, as such, they are not reviewable on appeal. Second, Wastech submits that the questions of law relevant in this case, as decided by the arbitrator, are subject to review on the reasonableness standard. Nevertheless, Wastech also says the arbitrator committed no reviewable errors even on a correctness standard.

[44] Metro answers by noting that the Court of Appeal considered *Sattva* and *Teal Cedar* fully and was aware of the limited scope of appeals in commercial arbitration. The court rightly confirmed that the questions raised here are questions of law reviewable on the correctness standard. Here, says Metro, the questions upon which

leave was granted relate to the content of the duty to exercise contractual discretionary powers in good faith and the arbitrator's error in stating the legal test, which are plainly questions of law. Metro further submits that even if the applicable standard is reasonableness, the arbitrator's award was unreasonable and cannot stand.

[45] This Court has indeed held that the standard of review applicable in appeals under s. 31 of the *Arbitration Act* is reasonableness, unless the question is one that would attract the correctness standard, such as constitutional questions or those questions of law that are of central importance to the legal system as a whole and outside the adjudicator's expertise (*Sattva*, at paras. 102-6; *Teal Cedar*, at paras. 74-76). I am mindful, however, that this Court's judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which was released shortly after this appeal was heard, set out a revised framework for determining the standard of review a court should apply when reviewing the merits of an administrative decision. I note that *Vavilov* does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration (see *Sattva*, at para. 104; *Teal Cedar*, at paras. 81-83).

[46] In these circumstances, I would leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*. We have not had the benefit of submissions on that question, nor do we have the assistance of reasons on point from the courts below. Moreover, the parties here agree, rightly in my view, that the outcome of this appeal does not depend on the identification of the proper standard of review. Thus, although this Court would

ordinarily be called upon to determine whether the Court of Appeal identified the correct standard of review and applied it properly, in this case it is unnecessary to decide whether the standard is correctness or reasonableness (see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47). On either standard, the arbitrator's award cannot stand. Respectfully stated, the fact that I do not pursue discussion of this particular point raised in the opinion of my colleagues should not be understood as my agreeing with their view (see, similarly, *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 15).

[47] I also agree with Metro that Wastech cannot, at this stage, challenge the questions on which the award was granted. After all, it did not appeal the Court of Appeal's leave to appeal decision, where it had unsuccessfully argued that the order granting Metro leave to appeal should be overturned on the principal ground that the issues raised were questions of mixed fact and law. Nevertheless, I respectfully agree with the Attorney General of British Columbia's submission that, in granting leave to appeal, leave courts should ensure that the questions of law upon which leave is granted are simply and precisely stated to prosecute the appeal efficiently. In this case, the complicated formulation of the first question of law, in particular, made it difficult for the courts below to provide a direct and effective answer.

B. *Good Faith*

[48] Wastech submits that the courts below erred in overturning the arbitrator's determination that Metro breached a duty of good faith, specifically one that constrained the manner in which Metro could exercise its discretionary power to allocate waste amongst the various disposal facilities. The arbitrator was right, says Wastech, that Metro failed to show appropriate regard to Wastech's "legitimate contractual expectations", as understood in *Bhasin*, and therefore breached the Contract.

[49] To this end, Wastech invokes the organizing principle of good faith recognized by this Court in *Bhasin* — that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). This exemplifies, says Wastech, the notion that, "in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner" (*Bhasin*, at para. 65).

[50] Wastech disagrees with the Court of Appeal's conclusion that the arbitrator erred by effectively creating a free-standing obligation not to show "disregard of [the other party's] contractual interests", which the Court of Appeal considered to be a "radical extension of the law" (para. 70). Wastech acknowledges that the organizing principle is not a "stand alone" or "free-standing" obligation to have appropriate regard to the contracting party's interests when performing a contract. Wastech submits, however, that the arbitrator correctly held that a specific manifestation of the organizing principle of good faith applies in this case, and that Metro failed to abide by the constraints imposed on its exercise of discretion by that existing doctrine.

[51] Wastech is certainly not mistaken in saying that the organizing principle of good faith performance provides a standard from which more specific legal doctrines may be derived (*Bhasin*, at para. 64). Generally, claims of breach of good faith will not succeed if they do not fall within an “existing doctrin[e]” of good faith, although the existing doctrines “overlap to some extent” and all derive from the same organizing principle (*Bhasin*, at paras. 48 and 66). Furthermore, the list of existing doctrines is not closed and may be developed incrementally where the existing law is found wanting. But such developments should be consistent with the structure of the common law of contracts and give due weight to the importance of private ordering through agreements as well as certainty in commercial affairs (*Bhasin*, at para. 66).

[52] While Wastech is correct to observe that the organizing principle of good faith rests, in part, on the notion that contracting parties should have appropriate regard to the legitimate contractual interests of their contracting partner, the governing principles of the existing doctrines define the “highly context-specific” meaning of “appropriate consideration” and “legitimate interests” in the particular situations and relationships in which good faith obligations have heretofore been recognized (*Bhasin*, at para. 69). Careful reference to the specific doctrine at issue in each case is critical because, as Metro rightly notes, “it is no test for the content of the duty of good faith to say that one has to have appropriate regard for the legitimate contractual interests of the counterparty — because appropriate regard is a broad phrase that covers a variety of different levels of conduct depending on the circumstances” (R.F., at para. 47). Importantly, whatever variation may come with context, a contracting party — unlike

a fiduciary — typically is not required to serve the contractual interests of the other party by duties of good faith performance.

[53] In my view, it has not been shown that Metro performed its obligations or executed its rights under the Contract in a manner contrary to the applicable requirements of good faith. It breached neither the duty of honest performance nor the duty to exercise discretion in good faith. Respectfully stated, the arbitrator's conclusion that Wastech had made out a contractual breach of a duty of good faith performance must be set aside.

(1) The Duty of Honest Performance

[54] Wastech and Metro agree that for a contractual discretionary power to be exercised in good faith, it cannot, at a minimum, be exercised dishonestly. These submissions are consistent with the jurisprudence of this Court. As explained in *Bhasin*, at paras. 73-75, and reaffirmed in *Callow*, at para. 53, the duty of honest performance, a distinct manifestation of the organizing principle of good faith, constrains the manner in which all contractual rights and obligations are exercised or performed, as a matter of contractual doctrine. This necessarily includes the exercise of contractual discretionary powers. To exercise a contractual discretionary power dishonestly within the meaning of *Bhasin* is a breach of contract.

[55] I hasten to say that the duty of honest performance, as contemplated in *Bhasin*, is not at issue here. Wastech does not allege that Metro lied or otherwise

knowingly misled Wastech in respect of a matter directly linked to the performance of the Contract, including in the exercise of its discretionary power to allocate waste between the various disposal facilities. This brand of dishonesty is necessary to establish a breach of the duty of honest performance recognized in *Bhasin* and applied in *Callow*. Wastech expressly conceded before the arbitrator that the duty of honest performance in this precise sense is not at issue in this case (Award, at para. 82). Despite this concession, and despite his conclusion that, from its perspective, Metro's exercise of discretion was "honest", the arbitrator nevertheless held that evidence of "half-truths, lies or deceit" is not required to prove that a discretionary power has been exercised dishonestly (paras. 88 and 90). The exercise of a discretionary power can be "dishonest", he said, where it is "wholly at odds with the legitimate contractual expectations of the other party" (para. 90). The Court of Appeal held that the arbitrator erred on this point. In its view, some subjective element is required to establish dishonesty in the relevant sense (paras. 71-73).

[56] I agree generally with the Court of Appeal on this point. Here there is certainly no lie. There is not even an allegation of misrepresentation of the truth of any character. Given its concession that there is no issue of dishonesty on the facts of this case, Wastech does not contest the Court of Appeal's conclusion that dishonesty cannot be proven without some subjective element. The duty of honest performance set forth in *Bhasin* was not breached here. But that is not the end of Wastech's argument. Instead, Wastech submits that the arbitrator was correct in holding that a breach of good faith can still be proven even in the absence of a finding of dishonesty. In other words,

Wastech submits that honesty is not the only constraint that good faith imposed on Metro's exercise of discretion. I turn next to a consideration of this point.

(2) The Duty to Exercise Contractual Discretion in Good Faith

[57] Pursuant to the framework set out in *Bhasin*, the arbitrator concluded that an existing doctrine obliged Metro to exercise its discretion in good faith. While not dispositive, Wastech and Metro agree with the arbitrator that an existing doctrine of good faith applies in this case which constrained the manner in which Metro could exercise its discretionary power under the Contract.

[58] I agree with the parties that the duty to exercise contractual discretionary powers in good faith is well-established in the common law and note it was expressly recognized by Cromwell J. in his account of the organizing principle of good faith in *Bhasin* (paras. 47-48, 50 and 89, citing a number of authors including J. D. McCamus, *The Law of Contracts* (2nd 2012), at pp. 835-68; S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 494-508). As Cromwell J. observed, the duty was applied by this Court in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187 (*Bhasin*, at para. 50). It is not, therefore, a recent creation cut from whole cloth.

[59] It was not necessary in *Bhasin* to spell out the contours of this aspect of good faith performance of contracts. In this appeal, in order to answer Wastech's claim that the power to reallocate waste was used in a manner that failed to show appropriate

regard for its interests, one must determine what constraints the duty to exercise discretion in good faith imposes on the holder of that discretion. This Court must then ask whether Metro failed to abide by those constraints, thereby breaching the Contract.

[60] In their submissions before this Court, the parties have marshalled an array of arguments in their efforts to identify the proper limits imposed by the duty to exercise discretion in good faith. Wastech's primary submission is that, under pre-*Bhasin* jurisprudence, the "governing" and "proper" standard for assessing whether Metro exercised its discretionary power to allocate waste in good faith is "reasonableness". Wastech submits that it would be unreasonable for a party to exercise its discretion "in such a way as to deny the other contractual party substantial benefits flowing to it which represent fundamental aspects of the parties' legitimate contractual expectations" (Appellant's Condensed Book, at p. 1). By depriving Wastech of the "fundamental benefit for which [it] bargained" — the opportunity to achieve the Target OR in every year of the Contract — Wastech says Metro exercised its discretion unreasonably and therefore contrary to the requirements of the duty to exercise contractual discretionary powers in good faith (A.F., at para. 23).

[61] In my respectful view, Wastech's position contains two closely related flaws. First, it overstates the meaning of "reasonableness" in this context. Second, its submission rests on the further erroneous proposition that determining whether a party's exercise of discretion resulted in the "substantial nullification" or "evisceration" of the benefit or objective of the contract is a correct method of assessing whether that

party exercised its discretion in accordance with the requirements of the good faith duty at issue. I begin, however, with an explanation of that duty.

[62] One may well ask — as courts and scholars have on occasion — how the exercise of an apparently unfettered contractual discretion could ever constitute a breach of contract since one could argue that a party, in exercising such a discretionary power, even opportunistically, is merely doing what the other party agreed it could do in the contract (D. Stack, “The Two Standards of Good Faith in Canadian Contract Law” (1999), 62 *Sask. L. Rev.* 201, at p. 208). The answer can best be traced to the “standard” that underpins and is manifested in the specific legal doctrine requiring that where one party exercises a discretionary power, it must be done in good faith. Expressed as an organizing principle, this standard is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily (*Bhasin*, at paras. 63-64). Accordingly, a 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. Like the duty of honest performance considered in *Bhasin* and *Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights. When the good faith duty is violated, the contract has been breached. The question is what constraints this particular duty puts on the exercise of contractual discretion.

[63] 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.

(a) *Content of the Duty*

[64] I begin with an observation that, in *Bhasin*, this Court unanimously agreed that, in some circumstances, good faith may require “reasonable” contractual performance. For example, at para. 66, Cromwell J. wrote that the “organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance” (emphasis added). Indeed, this is consistent with the organizing principle itself, which expressly refers to reasonable contractual performance, and with Professor McCamus’ description of the cases applying the duty to exercise contractual discretionary powers in good faith: “A number of Canadian authorities applying this proposition have linked it to the concept of good faith. In each of them, the defendant was required to exercise the power in question in a reasonable fashion” ((2020), at p. 932; see also *Bhasin*, at para. 63).

[65] I also observe that many Canadian courts have held that reasonableness is required in the specific context of exercises of contractual discretionary powers. For example, in *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, a decision relied upon by both *Wastech* and *Metro*, the Court of Appeal for Ontario concluded: “the discretion

must be exercised in a reasonable way” (p. 763). More recently, in *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641, the same court wrote: “That a discretion given to a contracting party must be exercised reasonably is clear from the authorities” (para. 28). Additional Canadian examples abound (see, e.g., *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), at p. 7; *Jack Wookey Hldg. Ltd. v. Tanizul Timber Ltd.* (1988), 27 B.C.L.R. (2d) 221 (C.A.), at p. 225; *Canadian National Railway Co. v. Inglis Ltd.* (1997), 36 O.R. (3d) 410 (C.A.), at pp. 415-6; *Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (C.A.), at para. 26; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 96; *Filice v. Complex Services Inc.*, 2018 ONCA 625, 428 D.L.R. (4th) 548, at para. 38).

[66] Courts in the United Kingdom and Australia have ruled similarly (see, e.g., *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (The “Product Star”)* (No. 2), [1993] 1 Lloyd’s Rep. 397 (Eng. C.A.), at p. 404, per Leggatt L.J.; *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.), at p. 258, per Priestley J.A.).

[67] Finally, many jurists have expressed support for the proposition that contractual discretionary powers must be exercised reasonably in order to abide by the requirements of the good faith duty at issue, or have at least acknowledged that courts often apply such a constraint (see, e.g., A. Mason, “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000), 116 *L.Q.R.* 66, at p. 76; J. D. McCamus, “Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance” (2005), 29 *Adv. Q.* 72, at p. 80;

McCamus (2020), at p. 937; J. M. Paterson, “Good Faith Duties in Contract Performance” (2014), 14 *O.U.C.L.J.* 283, at pp. 284, 299 and 302; A. Gray, “Development of Good Faith in Canada, Australia and Great Britain” (2015), 57 *Can. Bus. L.J.* 84, at p. 113; S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 503).

[68] I think it best to note at the outset that I do not refer to reasonableness in an administrative law sense. Rather, I agree with Professor McCamus’ view that reasonableness for this good faith duty is understood by reference to purpose: “. . . where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred” ((2020), at p. 937).

[69] Thus, beyond the requirement of honest performance, to determine whether a party failed in its duty to exercise discretionary power in good faith, one must ask the following question: was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion? If so, the party has not exercised the contractual power in good faith.

[70] The touchstone for measuring whether a party has exercised a discretionary power in good faith is the purpose for which the discretion was created. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in

place. Perforce, the exercise of power consonant with purpose may be thought of as undertaken fairly and in good faith on the parties' own terms. As such, barring issues such as unconscionability not raised in this appeal, that exercise is best understood, as a general matter, to be insulated from judicial review as a matter of fairness.

[71] But where the exercise stands outside of the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and, as such, it may be thought of as unfair and contrary to the requirements of good faith. Scholars commenting on trends in common law jurisdictions have observed that “courts have repeatedly held that discretionary contractual powers should not be exercised for an ‘improper’ or ‘extraneous’ purpose” (J. M. Paterson, “Implied Fetters on the Exercise of Discretionary Contractual Powers” (2009), 35 *Mon. L. R.* 45, at p. 54). As Professor Collins has written, “[t]he good faith standard . . . enables a court to control discretionary decisions that are perceived to be based on improper purposes, that is where the power is used for a purpose not originally expected by the subject of the power” (H. Collins, “Discretionary Powers in Contracts”, in D. Campbell, H. Collins and J. Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003), 219, at p. 223). It is this principle that constrains contractual discretion and, accordingly, fixes the proper limits for judicial review of the exercise of the power. Importantly, it is not what a court sees as fair according to its view of what is the proper exercise of the discretion. Instead, drawing on the purpose set by the parties, the measure of fairness is what is reasonable according to the parties' own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for

which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can then intervene, for example, where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties.

[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.”

[73] I hasten to say that the role of the courts is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. The common law recognizes that “[c]ompetition between businesses regularly involves each business taking steps to promote itself at the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it” (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31, citing *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, at para. 142). As

a general matter, good faith should not be used as a pretext for scrutinizing motive (*Bhasin*, at para. 70).

[74] Not only does this deferential approach ensure “some elbow-room” for the “aggressive pursuit of self-interest” (C. Sappideen and P. Vines, eds., *Fleming’s The Law of Torts* (10th ed. 2011), at para. 30.120; see also *A.I. Enterprises*, at para. 31), but it also prevents good faith from veering into “a form of *ad hoc* judicial moralism or ‘palm tree’ justice” (*Bhasin*, at para. 70). 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.

[75] To this end, it is helpful to keep in mind that, generally speaking, a range of outcomes flows from the choices that may be considered a reasonable exercise of discretion when considered in light of the purposes identified by the contract. Some of these choices may properly be thought of as connected to the purposes of the discretion. Others will be demonstrably unconnected to the contemplated purposes. Wherever a party is granted discretion, there may be differing yet legitimate ways in which that party can exercise its power that is itself part of the bargain. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties. Good faith does not eliminate the discretion-exercising party’s power of choice. Rather, it simply limits the range of legitimate ways in which a discretionary power may be exercised in light of the relevant purposes (S. J. Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith” (1980), 94 *Harv. L. Rev.* 369, at pp. 385-86). Where discretion is exercised

for an improper purpose, as against that which was intended by the parties, one that is “ulterior or extraneous” to their intentions, it is exercised in bad faith (J. D. McCamus, “The New General ‘Principle’ of Good Faith Performance and the New ‘Rule’ of Honesty in Performance in Canadian Contract Law” (2015), 32 *J.C.L.* 103, at p. 115).

[76] With this approach in mind, I stress that what a court considers unreasonable is highly context-specific, and ultimately “depend[s] upon the intention of the parties as disclosed by their contract” (*Greenberg*, at p. 762; see also *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105, at paras. 63-65; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 312-13). Demonstrating a breach will necessarily centre on an exercise of contractual interpretation. It is in properly interpreting the contract and the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

[77] I add, however, the following comment as a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement — e.g., matters relating to “operative fitness, structural completion, mechanical utility or marketability” — the range of reasonable outcomes will be relatively smaller (*Greenberg*, at p. 762). For contracts that grant discretionary power “in which the matter to be decided or approved is not readily susceptible [to] objective measurement — [including] matters involving taste, sensibility, personal compatibility or judgment of the party” exercising the discretionary power — the range of reasonable outcomes will be relatively larger (*Greenberg*, at p. 761). I emphasize,

however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

[78] To understand the requirements of this duty it is helpful to consider the standards advanced by the parties, and the extent to which these concepts assist in determining whether the exercise of discretion is unreasonable, that is, not connected to the relevant purposes.

[79] I recall that Wastech argues that the good faith duty at issue prohibited Metro from exercising its discretion in a way that denied it benefits fundamental to its legitimate contractual expectations. For its part, Metro concedes that contractual discretionary powers “may not be exercised to nullify or eviscerate the fundamental benefit of the contract” (R.F., at para. 54).

[80] In support of its position, Wastech relies principally upon *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C. (T.D.)), aff’d (1992), 112 N.S.R. (2d) 180 (S.C. (App. Div.)), an influential decision regarding good faith in contract law, where Kelly J. wrote that “bad faith” includes conduct that is “contrary to community standards of honesty, reasonableness or fairness”, and can generally be said to occur where an exercise of discretion “substantially nullif[ies] the bargained objective or benefit contracted for by the other” (paras. 38, 58 and 60). This standard has subsequently been adopted and applied by a number of Canadian appellate courts, and endorsed by some scholars (see, e.g., *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), at para. 22; *Klewchuk v.*

Switzer, 2003 ABCA 187, 330 A.R. 40, at para. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 530).

[81] Wastech submits that the arbitrator’s conclusions as to the nature of the impact on Wastech of Metro’s exercise of discretion amount to a finding of “nullification” or “evisceration”. In particular, Wastech points to the arbitrator’s findings that Metro’s exercise of discretion made it “impossible” for Wastech to achieve the Target OR, and that having the opportunity to achieve the Target OR in every year of the Contract was “the fundamental benefit for which Wastech bargained” (Award, at para. 94). Metro answers that the arbitrator made no finding of “substantial nullification” or “evisceration”, nor was such a finding open to him on the facts (R.F., at paras. 73 and 75; Transcript, at p. 93).

[82] Respectfully stated, I am of the view that requiring “substantial nullification” — that is to say, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith.

[83] The fact that a party’s exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith (Burton, at pp. 384-85). As authors A. Swan, J. Adamski, and A. Y. Na explain, the mere fact that a party is deprived of substantially the whole benefit of a contract is not sufficient, absent proof of the discretion-exercising party’s fault or default, to make

out a claim for breach of the contract (see *Canadian Contract Law* (4th ed. 2018), at §7.73). In other words, absent some infringement of the non-exercising party's rights, there is no actionable wrong for the law to correct.

[84] For these reasons, I conclude that the “substantial nullification” or “evisceration” of the benefit of a contract is not a necessary prerequisite to finding that a party breached the duty to exercise contractual discretionary powers in good faith. However, the fact that an exercise of discretion substantially nullifies or eviscerates the benefit of the contract could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

[85] The parties also submit that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In support, *Wastech* and *Metro* both point to the organizing principle recognized in *Bhasin* — which states that parties generally must perform their contractual duties “honestly and reasonably and not capriciously or arbitrarily” (*Bhasin*, at para. 63) — and to a line of decided cases, which they say confirm the existence of such constraints on the exercise of contractual discretionary powers.

[86] I agree with the parties that the jurisprudence supports a conclusion that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In *Greenberg*, at p. 763, the Court of Appeal for Ontario noted that the discretionary provision in question had to be “exercised in a reasonable way, not arbitrarily or capriciously”. Similarly, the Supreme Court of the United Kingdom

affirmed the existence of these constraints in English law in *British Telecommunications plc v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All E.R. 907, at para. 37: “. . . it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously This will normally mean that it must be exercised consistently with its contractual purpose”.

[87] Although capriciousness and arbitrariness have sometimes been referred to independently of improper purpose, I agree with the Supreme Court in *Telefónica* that a capricious or arbitrary exercise of a discretionary power is an example of such a power being exercised contrary to that standard. When seeking to demonstrate that discretion was exercised capriciously or arbitrarily, one necessarily considers contractual purposes by showing that discretion was exercised in a manner unconnected to the underlying contractual purposes for which the power was conferred.

[88] In sum, then, the duty to exercise discretion in good faith will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted. This will notably be the case where the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties. The fact that the exercise substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary pre-requisite to establishing a breach.

(b) *Source of the Duty*

[89] Having determined the content of the duty, I turn now to consider its source so as to ascertain whether it arises on the facts of this case.

[90] I acknowledge that there is some debate as to the source of this duty. The arbitrator held that the requirements of the officious bystander test for implying a term in fact did not need to be met in order for the good faith duty at issue to apply. Similarly, Wastech submits that the good faith duty at issue “operates as a matter of law” and is not limited to circumstances where a term can be implied as a matter of fact (A.F., at para. 74). For its part, Metro concedes that the failure to imply a term does not necessarily preclude, as a matter of law, the imposition of a good faith duty. Cromwell J. observed in *Bhasin* that there is “a shadow of uncertainty over a good deal of the jurisprudence” regarding the source of many good faith obligations (para. 74; see also paras. 48 and 52). While Cromwell J. expressly addressed this uncertainty for the duty of honest performance, clarifying that it operates as a general doctrine of contract law, he did not resolve this uncertainty for all existing manifestations of the organizing principle (para. 74). It therefore falls to this Court to do so in respect of the duty to exercise contractual discretionary powers in good faith and in light of Wastech’s argument that good faith constrains the exercise of Metro’s power here.

[91] In my view, it is appropriate to recognize the duty to exercise discretion in good faith as a general doctrine of contract law. Like the duty of honest performance, it need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties (see *Bhasin*, at para. 74). This

brings conceptual clarity to the law of good faith by analyzing the duty to exercise discretion in good faith in line with the *Bhasin* duty.

[92] Further, recognizing this general duty interferes very little with freedom of contract for two reasons. First, just as parties will rarely expect that their contract permits dishonest performance (*Bhasin*, at para. 76), contracting parties rarely if ever expect discretion granted by the contract to be exercised in a manner unconnected to the purposes for which it was conferred. For example, on the facts of this case, a duty on Metro to exercise its discretion in good faith was necessary to give business efficacy to the Contract. As the arbitrator rightly observed, absent a duty of good faith constraining the exercise of Metro's discretion, "Metro theoretically ha[d] the discretion to reduce the volume of waste directed to the [Cache Creek Landfill] to zero" (para. 94). It is absurd to think the parties intended for Metro to have such untrammelled power given that it would have left Wastech subject to Metro's "uninhibited whim" (The "*Product Star*", at p. 404, per Leggatt L.J.). Indeed, it is difficult to imagine any party wishing to confer such untrammelled power on its contracting partner. For this reason, when contracting parties confer a discretionary power, even without any apparent constraining criteria or conditions, courts have long recognized that the "natural inference" is that they intend some minimum constraints on the exercise of the discretion (*Sales*, at p. 387; see also *Swan, Adamski and Na*, at § 8.304; *Bhasin*, at para. 45). In my view, those minimum constraints include the expectation that the parties will not exercise their discretion in a manner unconnected to the purposes for which it was granted, for example in a capricious or arbitrary manner. Given that parties will very often expect minimum constraints of this nature,

recognizing that these constraints apply to all contracts by virtue of the duty to exercise discretionary power in good faith interferes little with their freedom of contract.

[93] Second, as discussed above, the content of the duty is guided by the will of the parties as expressed in their contract. Rather than interfering with the objectives of the contracting parties or imposing duties on them beyond their reasonable contemplation, this duty merely requires that parties operate within the scope of discretion defined by their own purposes for which they freely negotiated its grant. Holding the parties to this standard will generally be consistent with, not an unanticipated departure from, their freely negotiated bargain. Recognizing a general duty of contract law here will therefore interfere very little with that freedom.

[94] Overall, then, like the duty of honest performance, the duty to exercise contractual discretion in good faith is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties (*Bhasin*, at para. 74). This places the two duties on the same footing, and conforms to the general assumption that parties do not intend discretion to be completely unconstrained (see *Bhasin*, at para. 45). Just like the duty of honest performance, the duty to exercise contractual discretion in good faith, as described herein, should be understood to be obligatory in all contracts. Parties who provide for discretionary power cannot contract out of the implied undertaking that the power will be exercised in good faith, i.e., in light of the purposes for which it was conferred. This holding will impinge on freedom of contract but only in those rare cases in which parties seek to authorize the exercise

of contractual discretion in a manner unconnected with its underlying purposes or otherwise immunize such conduct from judicial review.

[95] Accordingly, there is no question that the duty to exercise contractual discretionary powers in good faith applies in this case. The entire agreement clause in this Contract (s. 32.17) does not exclude the duty, although, in any particular case, the contract as a whole will guide the analysis of what the duty requires. This also means the fact that the arbitrator rejected the existence of an implied term did not preclude recognizing and applying the duty to exercise contractual discretion in good faith.

(c) Application to Metro's Exercise of Discretion

[96] Was Metro's exercise of discretion unreasonable with regard to the purposes for which the discretion was granted and thereby a breach of the duty? In my view, it was not.

[97] I recall that the Contract gives Metro the "absolute discretion" to determine the minimum amount of waste that will be transported to the Cache Creek Landfill as opposed to the other waste disposal sites in a given period. Unlike some previous agreements between the parties, there is no guaranteed minimum volume of waste allocated to this site in a given year (Award, at para. 84). This minimum amount ("Trailer Capacity Guarantee") is to be determined in reference to the seasonal variation of waste flows and "other factors which influence the volume of [w]aste being delivered to the Cache Creek Landfill during a calendar year" (A.R., vol. II, at p. 68,

s. 30.5). Beyond this general statement, there is no guidance as to the purposes underlying the grant of discretion to Metro to determine this amount.

[98] However, reading the clauses in the context of the Contract as a whole, the purposes become clearer. The recitals at the beginning of the Contract describe the parties' intention to, among other things, incentivize each other to "maximize efficiency and minimize costs", to provide for the "maximization of the municipal solid waste disposal capacity of the Cache Creek Landfill", and to be "sensitive to significant changes in operating standards, services or system configuration" (A.R., vol. II, at p. 9, recitals C(2) and (6) to (7)). This is consistent with the text of the overall Contract, which provides flexibility to account for variable factors foreseen by the parties such as waste volumes, operating costs and the capacity of the waste disposal sites (Award, at para. 43). As discussed above, the Contract adjusts for the impacts these factors will have on Wastech's profitability, not only by adjusting the rates payable by Metro, but also by requiring it to share in the consequences of failing to meet the target level of profitability (ss. 14.11 and 14.19). It was through this structure that the parties decided to manage the risk and rewards of the operation.

[99] In this context, the purposes of giving Metro discretion to determine waste allocation in its "absolute discretion" were clearly to allow it the flexibility necessary to maximize efficiency and minimize costs of the operation. Granting such discretion, as opposed to fixing certain waste volumes, serves the overall objective of allowing the parties to adapt to changing circumstances over the life of the Contract so as to ensure this operational efficiency. Further, the fact that this discretion exists alongside a

detailed framework to adjust payments towards the goal of a negotiated level of profitability, contradicts the idea that the parties intended this discretion be exercised so as to provide Wastech with a certain level of profit. Those incentives are already carefully created elsewhere in the Contract. Reading these clauses in context, then, the purposes for granting Metro “absolute discretion” was to allow it to structure the disposal of waste for which it had contracted Wastech in an efficient and cost-effective manner given the operational variability the parties foresaw.

[100] Based on these purposes, Metro did not act unreasonably. Metro’s exercise of discretion was “guided by the objectives of maximizing the [Burnaby Waste to Energy Facility’s] efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner” and “was made in furtherance of its own business objectives” (Award, at paras. 87-88). All this points to an exercise of discretion that cannot be said to be unconnected to the contractual purposes for which it was granted.

[101] Importantly, the duty did not require Metro to subordinate its interests to those of Wastech in exercising its discretionary power in the manner that Wastech claims. The Contract purposely included no guarantee that the Target OR would be achieved. The parties were aware of the risk that the exercise of discretion represented and chose, notwithstanding long negotiations and a detailed agreement, not to constrain the discretion in the way Wastech now requests. In point of fact, Wastech is asking for an advantage for which it did not bargain. It asks, in effect, that Metro confer a benefit upon it that was not contemplated, expressly or impliedly, under the Contract. On my

understanding, this stands outside of the “requirement of justice” identified by Cromwell J. in *Bhasin* (para. 64).

[102] Although, during the hearing of this appeal, Wastech repeatedly emphasized the arbitrator’s conclusion that the Contract was a long-term, relational agreement dependent upon an element of trust and cooperation between Wastech and Metro, this is not dispositive of the case in favour of Wastech. Despite the arbitrator’s conclusion, which I do not purport to disturb, the detailed nature of the Contract plainly demonstrates that the parties carefully structured their relationship, and precisely allocated the risks of their bargain between them by means of, among other things, the various adjustment mechanisms set out in the Contract. Assessing whether Metro exercised its discretion in good faith cannot ignore this context. This is not an example of an unforeseen or unregulated matter that, by reason of the relational character of the Contract, was left to the trust and cooperation said to be inherent in the long-term arrangement. The parties foresaw this risk — and chose to leave the discretion in place.

[103] It seems to me that the only questionable conduct raised here is that Metro’s exercise of discretion made it “impossible” for Wastech to achieve the Target OR in 2011. To be sure, given the spirit of trust and cooperation underlying the Contract — which, again, the arbitrator, in his review of the facts, described as being long-term and relational — the legitimate contractual interests of these parties were different than parties to, say, a more transactional agreement (see *Bhasin*, at para. 69). The fact remains that the Contract did not guarantee that Wastech would achieve the Target OR in any given year. Indeed, the various, complex adjustment mechanisms

provided in the Contract itself, which only apply where the Actual OR for a given year deviates from the Target OR, plainly demonstrate that the parties anticipated that the Target OR would not be achieved in some years (Award, at para. 84). Accordingly, the mere fact that Wastech did not have the opportunity to achieve the Target OR in one year of the 20-year Contract is not altogether surprising, notwithstanding the arbitrator's conclusion that the Contract was a long-term, relational agreement. Rather, it seems to me that the impact of Metro's exercise of discretion on Wastech simply reflects the allocation of risk set out in the Contract, for which Wastech negotiated and to which it agreed. Indeed, recital C(3) specifically notes that the Contract provided for the sharing of "risks and benefits". It is true that the eventuality at the origin of this dispute was thought by both parties to be unlikely. But together they saw the risk and, together, they turned away from it, leaving the discretion in place. In this sense, Metro cannot be said to have exercised its discretion in a manner demonstrably unconnected with the relevant purposes. Wastech itself may have expected that opportunity every year, but given the terms of the bargain to which it agreed, that expectation was not shared.

[104] The text of the discretionary clause in the case at bar did not spell out, in explicit terms, why the Contract provides Metro with "absolute discretion" to allocate waste from one year to the next. But when read in the context of the Contract as a whole, with an eye to what Lord Sales calls the parties' "loyalty to th[e] venture", the purpose that constrained Metro's exercise of discretion becomes plain.

[105] Reading the Contract as a whole, one understands that there was no guarantee that Wastech would achieve the Target OR in any given year. The risk that revenues could vary from one year to the next was in the contemplation of the parties, and this variance could well be based on factors such as the exercise of Metro's discretion to reallocate waste. This risk was addressed in the Contract, notably through the adjustment clauses. The risk that the exercise of discretion would affect profitability of either party in a given year was thus a considered one and, that risk notwithstanding, the discretionary power was left in place. In these circumstances, the purpose of the clause was plainly to give Metro the leeway, based on its judgment as to what was best for itself, to adjust the proportions of the allocations of waste amongst the three sites as it required to ensure the efficiency of the operation. The ability to make that allocation was not only permitted, but it could be said to reflect the purpose of the clause.

[106] While Metro's choice, from the point of view of its contracting partner, Wastech, was disadvantageous, that choice was within the range permitted by the purpose of the clause. In that sense it was in good faith even if the exercise meant that Wastech's own interest suffered as a consequence. Because the exercise of discretion was within the range of conduct contemplated by the purpose of the clause, it cannot be said, according to the standards of contractual justice, to be in bad faith or unfair.

[107] By asking for what amounts to a guarantee of the Target OR in every year of the Contract, Wastech is asking for an outcome that stands outside of the Contract. It complains that the outcome is unfair because, in the result, it would not be in a

position to earn the revenue to which it felt entitled. In point of fact, Wastech is asking for Metro's discretion to be constrained so that it can achieve a result — an advantage — for which it did not bargain and, in fact, that it might have been said to have bargained away. It asks the Court to have Metro subvert its own interest in name of accommodating Wastech's interest. But Metro is Wastech's contracting partner, not its fiduciary. The loyalty required of it in the exercise of this discretion was loyalty to the bargain, not loyalty to Wastech. Wastech cannot rely on an understanding of good faith that sits uncomfortably with the foundation of contractual justice.

(d) *Quebec Civil Law Would Not Assist Wastech*

[108] Lastly, I allow myself to observe that Metro argues, after noting Cromwell J.'s allusions to the abuse of rights in civil law in *Bhasin*, that Wastech's position would not be treated more favourably under Quebec law. It is true, as is acknowledged in *Bhasin*, at para. 83, that art. 7 of the *Civil Code of Québec* (“C.C.Q.”) provides in part that good faith requires parties to refrain from exercising their rights, including contractual rights, in an unreasonable manner.¹ Indeed, even prior to the enactment of this rule, this Court held in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, that the doctrine of abuse of rights requires that contractual rights be exercised reasonably in the Quebec law of obligations (pp. 154-55). In *Houle*, this Court characterized the defendant bank's conduct as “sudden, impulsive, and harmful”, and that it constituted, for the Court, “a flagrant abuse of the bank's contractual right”

¹ Article 7 C.C.Q.: “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith”. Cromwell J. also referred expressly to art. 6 and 1375 C.C.Q. (*Bhasin*, at para. 83).

(p. 176). I recall that in *Callow* this Court drew on the Quebec abuse of rights framework to clarify that the direct link to contractual performance required to make out a breach of the duty of honest performance was met where an obligation was performed, or a right exercised, dishonestly and therefore in bad faith. In this case, there is no reason to draw on this framework, as the bad faith exercise of the contractual discretion is an uncontroversial definitional feature of this duty. Instead it is the *content* of the duty that is at issue here. There is, of course, no question of applying Quebec law to this dispute but, says Metro, even by analogy or comparison, the standard of reasonable conduct in the law of abuse of contractual rights in Quebec would not provide Wastech with the redress it seeks here.

[109] I agree with Metro that invoking the substantive content of what constitutes an abuse in the exercise of a discretionary contractual clause in Quebec law is of no help to Wastech in this case. In arguing that the denial of the opportunity to earn its target revenue reflects an unreasonable exercise of Metro's discretion to reallocate waste, Wastech does not allege that Metro acted imprudently or negligently, in an intemperate manner or with an intention to harm, factors often considered to be relevant to the measure of abuse of right in *Houle* and in the cases decided under art. 6, 7 and 1375 C.C.Q. (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, Nos. 156 and 157). Moreover, Quebec scholars and courts have pointed out that the standard as to what constitutes an abusive exercise of a discretionary right is an especially exacting one: typically it is said to repose on [TRANSLATION] "bad faith or a blatant fault causing abnormal injury" (J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 1, *Principes généraux* (8th

ed. 2014), at para. 1-232, citing *Ponce v. Montrusco & Associés inc.*, 2008 QCCA 329, [2008] R.J.D.T. 65). None of this kind of conduct is alleged by Wastech in support of its claim based on the supposedly unreasonable exercise of the power in the Contract in this case. It is true that some authorities in Quebec support the view that a contractual right should not be exercised capriciously or arbitrarily (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), No. 1987). But, as we have seen, even allowing for these measures as relevant to what is the reasonable exercise of a discretionary power in the common law, Wastech has not staked its claim against Metro on this basis.

[110] More importantly still, Wastech's argument that Metro's discretionary power should have been exercised in the spirit of cooperation — a principle that has been recognized on occasion in Quebec — would be of no assistance to Wastech here. Ultimately, Wastech asks, under the guise of good faith performance of Metro's discretionary power, that it be provided with a benefit not contemplated by the parties in the Contract. Whatever the extent to which a duty of cooperation with one's contracting party is required by the law of good faith in Quebec, it would stop short of requiring Metro, in the absence of any wrongful conduct, to confer a guarantee of profit that is not provided for in the Contract. In this sense, this Court has compared Quebec law to a similar notion sketched for the common law in *Bhasin* in the case of *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 128: "The duty to cooperate with the other contracting party does not mean that one's own interests must be sacrificed". Whatever cooperation is required of contracting parties by good faith, in ordinary commercial contracts or even in long-term relational agreements, the law does not require, as a general rule, the parties to act

as the law would require of a fiduciary, or to redistribute advantages under the agreement in a manner that stands outside the ordinary purview of contractual justice (see, e.g., *Dunkin' Brands Canada Ltd. v. Bertico inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at para. 74, and *Gestion immobilière Bégin inc. v. 9156-6901 Québec inc.*, 2018 QCCA 1935, at para. 28 (CanLII)). Decidedly, an analogy to Quebec law does not assist Wastech in this case.

(3) Conclusion on Good Faith

[111] Where a party to a contract exercises its discretion unreasonably, which in this context means in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith — a wrongful exercise of the discretionary power — and thus a contractual breach that must be corrected. Requiring a party to pay damages to repair such a wrong accords with the theory of corrective justice and does not amount to a reallocation of the benefits under the contract as determined by the parties or a gift from one party to another.

[112] This same theory of corrective justice anchors the organizing principle of good faith and the specific duties derived therefrom as reflected in Cromwell J.'s statements in *Bhasin* that the organizing principle is a “requirement of justice”. That does not require a party to subordinate its interests to those of the other party (para. 86). Like the distinct duty of honest performance, the duty to exercise contractual discretionary powers in good faith is not a fiduciary duty. In exercising a contractual

discretionary power, “a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest” (para. 70). Doing so is not necessarily exercising discretion wrongfully or in “bad faith”.

[113] I note once again that the duty to exercise discretionary powers in good faith does not require a party to confer a benefit on the other party that was not a part of their original agreement, nor does it require a party to subordinate its interests to those of the other party. Respectfully stated, the arbitrator failed to abide by these tenets and the arbitral award extends the good faith duty at issue beyond its proper bounds. In these circumstances, Wastech’s argument that Metro could not deprive it of the fundamental benefit for which it bargained fails to take into account the terms of the agreement itself and the purpose for which Metro was extended the discretionary power in question. The parties saw the risk that Wastech could fail to meet the Target OR in a given year. They chose to leave that risk in the bargain and refrained from guaranteeing Wastech’s profit margin. In light of this, Wastech cannot say the exercise of the discretion was unreasonable. In essence, it argues that good faith required Metro to subordinate its interests to Wastech, and to guarantee to Wastech something which the Contract they painstakingly negotiated over approximately 18 months did not. Generally speaking, this is not the role of good faith in the common law of contract in light of the requirement of justice spoken to in *Bhasin* and the arbitrator erred in law by giving effect to these arguments. For these reasons, I agree with the courts below that Wastech’s claim must fail: the arbitrator’s award cannot stand whether the standard of review is correctness or reasonableness.

V. Disposition

[114] I would dismiss the appeal with costs.

The reasons of Côté, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. —

I. Introduction

[115] We are in accord with our colleague Kasirer J. to dismiss the appeal. Notwithstanding our agreement in the result, we write separately for four reasons. First, this Court should clarify the applicable standard of review. Secondly, while we agree that the purpose of a discretion is the proper focus of the good faith analysis, in assessing that purpose, courts must give effect to the parties' bargain. Thirdly, we do not agree with our colleague's treatment of the duty of honest performance insofar as he suggests that it is a preliminary step in addressing the duty to exercise discretion in good faith. Finally, our colleague's reliance on the civil law of Quebec is unnecessary, ill-advised and wholly misplaced. Rather than assisting in the development of the common law of good faith in contractual performance, as stated by this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the digression into the civil law gives rise to complication, uncertainty and confusion.

[116] At root, answering the question posed by this appeal is a matter of straightforwardly applying *Bhasin* and confirming that, while *Bhasin* organized several established common law doctrines under the rubric of “good faith”, it did not represent an abandonment of commercial certainty by requiring contracting parties to place their counterparty’s interests ahead of their own. Inasmuch as the effect of the arbitrator’s decision in this case was to require that the respondent protect the appellant’s interests at the expense of its own, it is not consistent with *Bhasin* or the jurisprudence that preceded it. We would therefore dismiss the appeal.

II. Standard of Review

[117] Our colleague refrains from identifying the standard of review, since on either standard he would overturn the arbitrator’s conclusions. In our view, however, this Court ought to provide clear guidance on this point. Conflicting lines of authority have arisen concerning the application of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, to arbitration appeals (*Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1, at paras. 21-44 (CanLII); *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516, at paras. 62-75 (CanLII); *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106, 10 Alta. L.R. (7th) 178, at paras. 3-12; *Allstate Insurance Co. v. Ontario (Minister of Finance)*, 2020 ONSC 830, 149 O.R. (3d) 761, at paras. 12-19; *Buffalo Point First Nation v. Cottage Owners Association*, 2020 MBQB 20, at paras. 46-48 (CanLII); *Clark v.*

Unterschultz, 2020 ABQB 338, 41 R.F.L. (8th) 28, at paras. 55-56). This question ought to be resolved.

[118] In *Vavilov*, this Court concluded that the appellate standards of review identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, apply to statutory rights of appeal from administrative decisions (para. 37). Certain trial courts have, however, resisted applying this principle to appeals from arbitral awards. Two reasons are offered for this. First, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, do not support the application of appellate standards of review to arbitration appeals, and *Vavilov* did not expressly overrule those decisions (*Ontario First Nations*, at para. 71; *Cove Contracting Ltd.*, at paras. 10-12). Secondly, *Vavilov* was driven by “constitutional considerations that justify deference by the judiciary to the legislature” (*Ontario First Nations*, at para. 72). In contrast, the standard of review that applies to appeals from private arbitration awards is “guided by commercial considerations about respect for the decision-makers chosen by the parties. As a result, deference is justified by the parties’ contractual intent” (*Ontario First Nations*, at para. 72).

[119] There are important differences between commercial arbitration and administrative decision-making (*Sattva*, at para. 104). Those differences do not, however, affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov*, “a legislative choice to enact a

statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts” (para. 39). This interpretive principle applies in similar manner to statutory rights of appeal from arbitral awards:

More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word “appeal” in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word “appeal” refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217.

(*Vavilov*, at para. 44)

[120] Factors that justify deference to the arbitrator, notably respect for the parties’ decision in favour of alternative dispute resolution and selection of an appropriate decision-maker, are not relevant to this interpretive exercise. What matters are the words chosen by the legislature, and giving effect to the intention incorporated within those words. Thus, where a statute provides for an “appeal” from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*. Concluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein.

[121] The appeal in this case was brought pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55,² which provides that, either by consent of the parties or with leave

² Since repealed, and replaced by the appeal clause in the *Arbitration Act*, S.B.C. 2020, c. 2, s. 59.

of the Supreme Court of British Columbia, a party to an arbitration “may appeal to the court on any question of law arising out of the award”. In light of *Vavilov*, it follows that the standard of review to be applied by this Court in this case is correctness (*Housen*, at para. 8). Our conclusion on this point is limited to the specific statutory provision at issue. In every case, the question is one of legislative intention, as reflected in the language of the statute.

[122] Instead of responding substantively, our colleague invokes an unfortunate passage from the majority judgment in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 15, explicitly dismissing opposing views of colleagues as unworthy of answer. Of no less concern are the implications of his refusal to decide the appropriate standard of review, which risks undermining this Court’s decision in *Vavilov* as it relates to statutory appeals. To leave this undecided is to invite conflict and confusion.

III. Background

[123] This appeal arises from a 20-year comprehensive agreement (“Agreement”) between the Greater Vancouver Sewerage and Drainage District (“Metro”) and Wastech Services Inc. (“Wastech”) to deal with the management of municipal solid waste. Specifically, the Agreement contemplated that Wastech or its subcontractors would deliver solid waste to transfer stations in Cache Creek, Vancouver and Burnaby. Wastech operated the Cache Creek transfer station. Metro had discretion under the Agreement to determine the allocation of waste each year

among these stations. The volume of waste distributed to each facility would impact the costs, revenues, and, accordingly, Wastech's ability to earn a profit. In particular, Wastech received a higher rate of pay for disposals at Cache Creek. Wastech's total compensation under the Agreement was structured around a target operating ratio of 0.890 ("Target OR"), meaning that, in any given year, operating costs should comprise 89 percent of revenue so that Wastech would receive the remaining 11 percent of revenue as profit.

[124] Significantly, the Agreement did not guarantee that Wastech would achieve its Target OR; rather, it addressed what would happen if the Target OR was not achieved. If the actual operating ratio ("Actual OR") fell between 0.860 and 0.920 at year end, the Agreement provided for a retroactive payment by or to Wastech of 50 percent of the difference between the Target OR and the Actual OR. Effectively, the parties would share the financial consequences of any deviation of 0.300 or less from the Target OR. In addition, the Agreement contained a prospective adjustment, which was applied if the Actual OR fell outside of the "target band" between 0.860 and 0.920 ("Outside Band Adjustment"). The Outside Band Adjustment was intended to be sufficient to return the operating ratio to just outside the target band. Further, if Wastech's Actual OR fell outside of the target band for three consecutive years, the rates were subject to re-calculation.

[125] The total waste hauled by Wastech under the Agreement had declined steadily since 2007. Metro therefore decided to redirect flows of waste from Cache Creek to Vancouver for the 2011 year to "maximize the remaining life of the Cache

Creek Landfill” (Arbitrator’s decision, A.R., vol. I, p. 1 (“Award”), at para. 52) and because of Metro’s own budget concerns. Metro was aware that Wastech might not be able to reduce its costs to account for the change in allocation, which ultimately caused delivery volumes at Cache Creek to drop by 31 percent in 2011, relative to 2010. Because of Metro’s decision, Wastech had no possibility of achieving the Target OR in 2011.

[126] The arbitrator expressly declined to imply a term in the Agreement guaranteeing the Target OR, finding that the parties had considered such a term and rejected it. He also concluded, however, that Metro was bound by its duty of good faith to have appropriate regard for Wastech’s legitimate interests. While the 2011 allocation decision was honest and reasonable when considered from Metro’s perspective, it also “had significant financial implications [for Wastech] beyond those addressed by the [Agreement’s] adjustment mechanisms” (para. 86). The arbitrator concluded that Metro’s decision was “dishonest” because it inappropriately negated Wastech’s legitimate expectation of at least having the opportunity to earn the Target OR in each year of the Agreement.

IV. Issues

[127] Metro was granted leave to appeal the arbitrator’s decision on two questions of law:

1. Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be “dishonest”

and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?

2. Did the Arbitrator err in law by confusing the “organizing principle” stated in *Bhasin* with a free-standing obligation of contractual good faith, disregarding the applicable principles of good faith as found in the authorities?

(2016 BCSC 68, 409 D.L.R. (4th) 9, at para. 40)

Ultimately, these questions both raise one straightforward issue: what is the standard applicable when determining whether a contractual discretion has been exercised in good faith?

V. Analysis

A. *The Duty to Exercise Discretionary Powers in Good Faith*

[128] The first step in deciding a common law good faith claim is to consider whether any established good faith doctrines apply (*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, at para. 129). In *Bhasin*, this Court recognized in the common law four distinct doctrines, each with corresponding duties, that manifest a “general organizing principle” of good faith: (1) a duty of cooperation between the parties to achieve the objects of the contract (para. 49); (2) a duty to exercise contractual discretion in good faith (para. 50); (3) a duty not to evade contractual obligations in bad faith (para. 51); and (4) a duty of honest performance (para. 73). This appeal draws from one of them — the duty to exercise contractual discretion in good faith.

[129] While this Court has recognized the existence of this good faith doctrine, it has never opined on the applicable standard (see *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Bhasin*, at paras. 47 and 50). We agree with our colleague that the appellate jurisprudence supports the notion that discretion must be exercised reasonably, and that this standard simply requires that a party exercise discretion in accordance with the purpose for which it was granted. We would, however, emphasize two points to bear in mind in applying it.

[130] First, the purpose of good faith is to “secur[e] the performance and enforcement of the contract made by the parties” (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 53). It cannot be used as a device to “create new, unbargained-for rights and obligations”, or “to alter the express terms of the contract reached by the parties” (*Transamerica*, at para. 53). Contracting parties cannot be held to a standard that is “contrary to the plain wording of the contract, or that involve[s] the imposition of subjective expectations” (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, at para. 45).

[131] Where an agreement reflects a shared, reasonable expectation as to the manner in which a discretion may be exercised, that expectation will be enforced (*Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), at para. 19; J. T. Robertson, “Good Faith as an Organizing Principle in Contract Law: *Bhasin v. Hrynew* — Two Steps Forward and One Look Back” (2015), 93 *Can. Bar Rev.* 809, at p. 839; J. Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997), 113 *L.Q.R.* 433, at p. 434). This, in our view, is

what it means to exercise discretion reasonably. As our colleague states, parties will usually expect that a discretion will be exercised in accordance with the purposes for which it was conferred. However, this is so only where the purpose of a discretionary power arises from the terms of the contract, construed objectively, and having regard to the factual matrix. In this way, the obligation to exercise discretion reasonably does not reflect the imposition of external standards on the exercise of discretion, but rather giving effect to the standards inherent in the parties' own bargain.

[132] Accordingly, we do not share our colleague's view that, where a discretion is unfettered on its face, a court must "form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power" (Kasirer J.'s reasons, at para. 72, quoting P. Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 *L.Q.R.* 384, at p. 393). Our colleague's invocation of "loyalty to th[e] venture" suggests that parties must use their discretion, even where it is chosen by the parties to be unfettered, in a way that (from the view of the judge) advances the objectives of the contract. This is not an exercise in interpretation. Rather, it is the imposition, *post facto*, of a judicial view. Approaching the interpretive task from such a starting point risks, even invites, undermining freedom of contract and distorting the parties' bargain by imposing constraints to which they did not agree.

[133] Secondly, our colleague says that the duty to exercise discretion in good faith is a general doctrine of contract law. Consequently, "it need not find its source in

an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties” (Kasirer J.’s reasons, at para. 91). Whether or not such judge-made rules operate irrespective of the intentions of the parties, we are steadfast in our view that the purpose of a discretion is *always* defined by the parties’ intentions, as revealed by the contract. It follows that, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, *must* give effect to that intention. With careful drafting, parties can largely immunize the exercise of discretion from review on this basis. Conversely, they may choose to specify the purpose for which a discretion has been granted in order to provide a clear standard against which the exercise of discretion is to be assessed. In either instance, their intention should be given effect and not subverted.

[134] In this case, the Award was predicated on the view that Metro was to have “appropriate regard” for Wastech’s interest in achieving the Target OR every year. But the structure of the Agreement makes it clear that Metro’s discretion was subject to no such constraint. Indeed, through the Outside Band Adjustment and the adjustment that applies if Wastech’s compensation falls outside of the Target OR for three consecutive years, the Agreement expressly contemplated that there might well be years in which Wastech would be unable to achieve the Target OR. The parties managed this risk by agreeing to formulae that adjusted the total compensation towards the Target OR. Finding that the discretion was constrained in the manner Wastech suggests would ignore these features of the Agreement.

[135] It is for this reason that we say this matter really is quite straightforward. In the bargain struck by the parties, Metro was given wide discretion, and Wastech's interests in the exercise of Metro's discretion were protected by the formulae that adjusted the total compensation towards the Target OR. In effect, the parties contemplated that Metro could exercise the discretion so as to advance its own interests, just as they contemplated protecting Wastech's interests by the adjustment formulae. While good faith requires a party to exercise its contractual discretion for the purpose for which it was given, the arbitrator erred by concluding that Metro was obligated to exercise its discretion in a way that protected Wastech's subjective expectations. To the contrary, Wastech had bargained for the inclusion of the adjustment formulae to protect its interests, while accepting that Metro could exercise its discretion solely in its interests.

B. *Other Issues*

[136] Two other matters arising from our colleague's reasons require comment.

[137] First, our colleague addresses the duty of honest performance in his reasons. The issue of honesty arose here because the arbitrator described Metro's conduct as "dishonest", by which he meant that it was "wholly at odds" with Wastech's "legitimate contractual expectations" (Award, at para. 90). We agree with our colleague that the arbitrator erred. The difficulty, however, is that our colleague goes further in his elaborations regarding honest performance, and risks blurring the boundaries between that duty, and the duty to exercise discretionary powers in good

faith. This is a particular concern in his suggestion that the duty of honest performance is a preliminary step in assessing whether there is a breach of the duty to exercise discretionary powers in good faith (at para. 69: “. . . beyond the requirement of honest performance . . .”). This misreads and distorts settled law. The two doctrines are, and should remain, distinct; connecting them in this way fails to comprehend or have regard for how the common law, as set out in *Bhasin*, has distinguished between them. Indeed, the arbitrator’s description of Metro’s conduct as “dishonest” was a product of the same error as that of our colleague, since it flowed from the arbitrator’s failure to appreciate that dishonesty is distinct from good faith, and that the organizing principle is distinct from both of these doctrines. Our colleague’s response to this should have been to achieve *greater* clarity with respect to each duty; instead, he has engendered confusion in this aspect of the common law.

[138] Secondly, our colleague takes up the unfortunate invitation presented by the parties in their submissions to discuss the result that would follow by applying the *Civil Code of Québec*. But this case is from British Columbia. The *Civil Code of Québec* has no relevance here, and our colleague (yet further) confuses matters for no useful purpose by incorporating an analysis thereunder. This is particularly undesirable where the common law of British Columbia, which is the law that applies to the Agreement, readily answers the questions of law posed by this appeal.

[139] Furthermore, even if the civil law of Quebec were remotely relevant (which it is not), Wastech did *not* rely on civilian concepts to expand the common law. Rather, it observed in passing that the approach to good faith which it espoused would be

consistent with the civilian approach. Having concluded that Wastech’s understanding of the common law of good faith was flawed, there is no reason to address the way its claim would be handled under the civil law. And in any event, as our colleague stresses, Wastech’s claim would not be treated more favourably under the civil law (para. 108). This leaves us asking why he finds it appropriate to address the requirement of good faith and the doctrine of abuse of right under the civil law of Quebec at great length, or at all. As one of us stated in *Callow*, at para. 170, “unnecessary digression into external legal concepts [creates] practical difficulties on the ground by making the common law governing contractual relationships less comprehensible and therefore less accessible to those who need to know it, thereby increasing costs for all concerned”. Respectfully, our colleague’s extensive *obiter dicta* here, as in *Callow*, will surely achieve just that.

[140] Our colleague’s digressions concerning honest performance and Quebec civil law do not reflect, to our mind, appropriate common law methodology. The common law develops best by increments, one brick at a time — as it did in *Bhasin* — carefully, and in response to the matters presented, and not by expositions on matters that are not. Instead, we say, again respectfully, that our colleague builds an edifice of unknown and untested stability. This is unwise.

VI. Conclusion

[141] We would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

*Solicitors for the respondent: Nathanson, Schachter & Thompson,
Vancouver.*

*Solicitor for the intervener the Attorney General of British Columbia:
Attorney General of British Columbia, Victoria.*

*Solicitors for the intervener the Canadian Chamber of Commerce: Torys,
Toronto.*