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"GOOD FAITH AND THE TORT OF NEGLIGENT NEGOTIATION"

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INTRODUCTION: PLAYING FAIR IN NEGOTIATIONS

It would be extremely foolish to enter into business dealings today without thinking about the concepts of "good faith" and "fairness" and the fact that they hover over transactions as a form of "conscience". In the United States, the Uniform Commercial Code imports a requirement into all commercial contracts that its parties conduct themselves in good faith and in a manner that reflects fair dealing. In Canada, the Province of Quebec imposes a similar obligation by statute. Quebec's *Civil Code* requires parties to a contract to conduct themselves in good faith "both at the time the obligation is created and at the time it is performed or extinguished". No other Canadian province provides similar legislation, however, litigation between contracting parties in Canada is more and more frequently turning on issues of good *vs.* bad faith. It appears that there are many parties engaged in contract disputes where the central issues are the behaviour and expectations of the parties to the dispute. And , interestingly, the litigation is coming from the "common law" provinces (outside of Quebec, where the *Civil Code* mandates good faith). The common law Courts are increasingly being asked to interpret the terms of contracts within a framework of good faith principles, despite the absence of any legislated good faith rule. And they have proven themselves to be willing to use general common law principles of good faith as a basis for their decisions.

It is also interesting to note that while "there is a judicial willingness to enforce a duty to negotiate and perform contracts in good faith"[1] , there is also resistance in promoting

[1] S.K. O'Bryne, "Good Faith in Contractual Performance: Recent Developments" (1995) *74 Canadian Bar Review*, 71.

this method of judicial decision making. This conflict exists due to an inherent tension in contract theory - the tension between the notions that:

a) people in our free market capitalistic society should be able to freely agree on and live by terms and conditions of a transaction and that certainty and predictability in enforcing these contracts is of paramount importance (i.e. there should be no uncertainty in the law); and

b) society should always strive for order and justice, even in contractual arrangements. As one commentator so aptly stated, "...contract law is not only about maximizing individual freedom, but is also about constraining unfettered freedom in order to co-ordinate economic activity, prevent abuses of power, secure a degree of uniformity, consistency and predictability and enforce social norms."[2]

Although many lawyers think that "fairness" or "good faith" principles are a new set of principles that have recently been used to affect the negotiation and interpretation of contracts, an argument can be made to suggest that these principles have always been at work within our legal system. The foundation of many of our legal remedies is a desire to do justice for a party wronged by the offensive behavior of the other(s). Consider the following:

- Remedies are available in favour of parties who have been misinformed during negotiations. Courts look to see whether statements made can be said to be "warranties", "innocent or negligent misrepresentations", or "fraudulent".

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[2] J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993) *15 Advocates Quarterly*, 58.

- As is set out in my colleague, Wolfgang Kaufmann's paper on Dealing With Rent Disputes which is found in these materials, the principles of "estoppel" and "waiver" are used by courts to enforce promises where the reasonable expectations of a party would require that this be done; where it would be unfair for one party to rely on the strict interpretation of a particular contract if that party had conducted him or herself over a period of time in a way that was inconsistent with the terms of that contract and the other party had relied on that inconsistent conduct.

- In certain cases, courts will imply terms into a contract to grant relief to a party who has been unjustly treated. Normally, in deference to the principle that parties should be able to freely contract with each other, courts will not interfere with the express written terms of a contract. The "parole evidence rule" is an exception to this general principle. It entails the hearing of oral evidence about the entering into of a contract and then implying terms into the contract based on the evidence in order to grant relief to a party where the contract is unclear and/or does not truly reflect a party's intentions. This relief is often granted in the context of parties' entering into contracts with differing bargaining power and therefore the possible difficulty of not being able to negotiate various terms and conditions as they would have liked.

- The doctrine of "unconscionability" has been used to prevent people from acting with such self-interest so as to abuse the power they have over others. Where one party knows or ought to have known of the vulnerability of the other and acts so as to exploit that vulnerability for it's own interests, courts will act to remedy the situation.

The above are all examples of ways in which our courts have seen fit to modify or overturn contracts when they feel that injustices have occurred such that the parties'

reasonable expectations have not been met. And this has all occurred without the benefit of an express statutory covenant requiring parties to negotiate and perform their agreements in good faith.

The impact of implying the covenant of good faith in commercial transactions has been quite pronounced in the area of commercial landlord and tenant relationships. There have been several cases over the last number of years where the courts have held that, in making decisions to exercise rights contained in commercial leases, the leases contained "implied terms" that the decisions had to be made "in good faith" or "for legitimate reasons".

WHAT IS GOOD FAITH?

There is no express statutory definition of "good faith" in Canadian law, however, one can look to a number of sources to come up with strong guidelines.

Black's Law Dictionary, 4th Edition defines "good faith" as follows:

> "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is a concept of his own mind and inner spirit and, therefore may not conclusively by determined by his protestations alone."

Robert Summers, one of the architects of the *1979 Restatement of Contracts* good faith provisions commented as follows:

"Good faith is an excluder. It is without general meaning or meanings of its own and serves to exclude the wide range of heterogeneous forms of bad faith."[3]

Edward Belobaba, in his 1985 article, *Good Faith in Canadian Contract Law*, states:

"Good faith cannot be defined with any meaningful precision. The only definitional guidance that can be provided is via modern examples of bad faith behavior.....The first hurdle (in understanding good faith) that has to be cleared, then, is one that requires a recognition at the outset that a doctrine of contractual good faith is really a doctrine about bad faith.[4]

Belobaba also states that:

" viewed in terms of bad faith policing, one can then agree that there is indeed no positive duty of good faith and fair-dealing. Nonetheless, although there is no positive duty of good faith (just as there is no duty of due influence or conscionability or equal bargaining), still there is and always has been judicial policing of contractual bad faith."[5]

GOOD FAITH IN THE COMMERCIAL LEASING CONTEXT

One of the most extended and careful reviews of the application of the principle of good faith in Canada happens to have come out of a commercial leasing case. In *Gateway*

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[3] R. Summers, "Good Faith in General Contract Law and the Sales Provision of the Uniform Commercial Code, (1968) *54 Virginia Law Review*, 200-201

[4] E. Belobaba, "Good Faith in Canadian Contract Law" [1985] *Law Society of Upper Canada Special Lectures, 79.*

[5] *Ibid* at p. 80.

Realty Ltd. v. *Arton Holdings Ltd.*[6], the court enunciated the principle that there was an obligation on parties to a contract to act in good faith, and that this duty limits the exercise of discretion conferred on parties by an agreement. A copy of both the Trial and Appellate Court decisions can be found at the end of this paper.

The plaintiff in *Gateway* was the owner of a shopping mall (Gateway), and had leased space to a department store (Zellers) which was to become its anchor tenant of slightly less than 50% of the total square footage of the mall. The defendant (Arton) enticed Zellers to relocate to Arton's shopping mall, and to assign the unexpired balance of its lease with Gateway to Arton, as Zellers was entitled to do unilaterally, without Gateway's consent. Gateway and Arton also entered into a direct contract with each other that provided that Arton would use its "best efforts" to lease the former Zellers space in return for Gateway withdrawing its appeal of a Municipal Board decision allowing for the expansion of Arton's competing shopping centre. Arton then proceeded to make minimal efforts to re-lease the empty space in the Gateway shopping mall, thereby injuring business by reducing the volume of customers at the mall. In an action by Gateway against Arton for breach of contract, the Nova Scotia Supreme Court ruled that Arton, as assignee of the original tenant's obligations under the lease, had breached an obligation of good faith which entitled Gateway to terminate the Zeller's lease and recapture the space. The court concluded that Arton's attempts to fulfil its obligations under the assigned lease were so insignificant as to constitute a clear inference that it intended to act in bad faith. Mr. Justice Kelly also held that Arton breached the separate contractual arrangement with Gateway in that Arton did not use its "best efforts" to re-lease the Zeller's space. At pages 191 and 192 of his reasons, Mr. Justice

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[6] (1991) 106 N.S.R. (2d) 180 (S.C.); aff'd (1992) 112 N.S.R. (2d) 180 (C.A.)

Kelly made the following general observation with respect to the good faith requirement in commercial contracts:

> "The law requires that parties to a contract exercise their rights under that contract honestly, fairly and in good faith. The standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their neutral contractual objectives. Such conduct is breached when a party acts in "bad faith" - a conduct that is contrary to community standards of honesty, reasonableness or fairness. The insistence on a good faith requirement in discretionary conduct in contractual formation, performance, and enforcement is only the fulfilment of the obligation of the courts to do justice in the resolution of disputes between contending parties."[1]

At page 198, Mr. Justice Kelly concluded with the further observation that:

> "They [Arton and Zellers] both had a right under the lease to sublease or assign the premises, but their exercise of this right and other discretionary rights under the lease should not be arbitrarily exercised in an unreasonable manner nor one that would "change the destination of the

[1] *Ibid* at p. 191-192

> thing". In other words, these discretionary rights should be exercised in a reasonable manner and not in a "bad faith" manner."[2]

The judgement is significant for practitioners of commercial landlord and tenant law because Mr. Justice Kelly implies that commercial leases are very well suited to the implication of good faith principles and notes that courts are now more often requiring parties to a lease to act reasonably with each other.[3] The Trial Decision was upheld on appeal.

In 1994, in the case of *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd,.*[4] the Ontario Court of Justice again superimposed an implied covenant to act in good faith in a leasing context. A tenant obtained an exclusive covenant in its lease of premises in a medical building, allowing it to be the sole provider of medical laboratory services in the building. The landlord attempted to extract an increased rent from the tenant and when the tenant agreed to only a small increase, the landlord leased other premises in the building to a group of doctors for a general use described as " the practice of medicine". The doctors took their broadly-worded use clause to mean that they were permitted to collect medical samples and send them out to a third party for laboratory work, and when they did so, the landlord was sued by the medical laboratory tenant for breach of the exclusive covenant. The Court held that the landlord's lease of the suite to the doctors was a breach "of the good faith required of the law of parties to a contract"[5] . It stated:

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[2] *Ibid* at p. 198

[3] *Ibid* at p. 196

[4] (1994) 12 B.L.R. (2d) 209

[5] *Ibid* at p. 209

"whether out of pique to MDS or in an effort to pressure it into paying more rent have knowingly allowed [the Landlord] to enter into the lease for.....[the Physicians lab] to create competition with MDS and to nullify the restrictive covenant on which MDS was entitled to rely when it entered into its own lease with King Street. They have done so in bad faith"[6].

The *Gateway* case was relied upon.

Athough it is very clear that there is a desire to imply good faith principles into business dealings, it should be noted that at least one commentator has suggested that the *Gateway* case is not as seminal as some suggest in demonstrating the there is now definitely a common law doctrine of good faith in Canada.[7] In fact, the Court of Appeal decision in *Gateway* did not expressly comment on Kelly J's. conclusion on the existence of a "good faith" doctrine. It focused on the express "best efforts" agreement and concluded that Arton breached the agreement because it did not use it best efforts to re-lease the space. Similarly, in the *MDS* decision, it can be argued that the Court based its decision on fundamental breach principles in that it stated the the new laboratory "destroys the whole premise upon which MDS's original participation in the building was based."[8] There was therefore no need to imply the good faith principle into these cases as they turned on established legal doctrines.

Notwithstanding the above view, the *Gateway* case and others are often cited in articles and judicial decisions which affirms a willingness to recognize a doctrine of good faith in the performance and enforcement of contracts in Canada.

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[6] *Ibid* at p. 223

[7] R.B. Potter, Annotation to *MDS Health Group v. King Street Medical Arts Centre* decision, see ? 10, p. 211-214

[8] *Supra* note 11, p. 222-223

ACTING IN SOLE DISCRETION, REASONABLY, EQUITABLY, IN GOOD FAITH

Exercising Discretion

Many of us think that if an agreement does not provide otherwise, discretion in making decisions, allocations, judgments and the like, no matter how it is exercised , will always be upheld. The "many of us" are wrong. Under the umbrella of the requirement to negotiate and perform contracts in good faith so that the reasonable expectations of the parties' are met, discretion must be exercised "properly". This means that in many cases, courts will limit the exercise of discretion.

If a party is given the "sole discretion" to decide a matter, courts have implied a term into the contract providing that this right must be exercised honestly and in good faith and not in an unfettered way. The *Gateway* case quotes a U.S. decision related to a clause that allowed a landlord to withhold consent to an assignment. In that case, the court stated:

> "When the lease gives the landlord the right to exercise discretion, the discretion should be exercised in good faith, and in accordance with fair dealing: if the lease does not spell out any standard for withholding consent then the implied covenant of good faith and fair dealing should imply a reasonableness standard.[9] "

The judge in *Gateway* agreed:

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[9] *Julian v. Christopher* 575 A. (2d) 735 (Md. 1990)

> "When the landlord or tenant are authorized by the lease document to exercise a discretion, it should be exercised in a reasonable way in accordance with an obligation to act in good faith"[10]

A key decision on the manner of exercising discretion is *Greenberg* v. *Meffert*[11]. A copy of this decision is found at the end of this paper. In this case, the plaintiff, a real estate agent, obtained a listing, and arranged a sale that did not close until after his employment had been terminated. Under the terms of his employment contract, commissions to listing agents for sales that closed after the termination of their employment were to be "at the sole discretion" of the defendant. In fact, the defendant (another agent of the same employer) located a purchaser, and arranged to be paid both the listing and the selling agent's commissions, in consideration of which he paid a secret commission to the employer's manager. The plaintiff then commenced an action against the agent and his former employer for recovery of the commission.

The judge, in his reasons, stated:

> "In my opinion, the company's discretion in this matter is not unbridled, firstly, because the nature of this contract and the subject matter of the discretion are such that the company's decision should be construed as being controlled by objective standards; and secondly, because the exercise of the discretion, whether measured by subjective or objective standards, is subject to a requirement of honesty and good faith..... If this provision is to have purpose and substance, the discretion must be exercised in a reasonable way, not arbitrarily or capriciously but for good reason."[12]

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[10] *Supra* note

[11] (1985) 37 R.P.R. 74 (C.A.)

[12] *Ibid* p. ____

He goes on to say:

> "Simple fairness dictates that construction, and particularly so where the exercise of the discretion can result in a windfall to the company..... In this employment relationship, based as it is upon the splitting of commissions, I think it is only fair and just, and not too onerous, to require the employer company to show that in the circumstances relevant to the transaction its discretion was not unreasonable.....Apart altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith. That proposition is so fundamental as to require no elaboration. The collusive conduct here clearly deprived the discretion of those qualities and contaminated the decisional process. That patently improper conduct vitiated not only the reasonableness required in the objective criteria but the good faith and honesty required whether the discretion is objective or subjective."[13]

Not only are the above-mentioned comments from Robins J. A. helpful in understanding how discretion is to be exercised but he also guides us as by suggesting that courts should use:

1. a subjective standard when analyzing discretion if the matter in issue cannot easily be measured objectively, such as those that relate to the "taste, sensibility or personal compatibility or judgment of the party for whose benefit the authority was given", such as, for example, approving the sign specifications for a particular tenant in terms of size, colour, and design; and

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[13] Ibid

2. an objective standard of *reasonableness* if the matter in issue "can properly be assessed by a third party"[14]. Matters such as "operative fitness, structural completion, mechanical utility, or marketability" fall into this latter category. For example, a court would have no real trouble in deciding if someone had used his/her discretion "properly" if a landlord had the right to perform a repair on behalf of the tenant and charge the cost back to the tenant when the tenant had not performed the repair to the landlord's satisfaction, *in its sole discretion.* In this case, as long as the court could be persuaded that the landlord had reasonably exercised the contractual right of performance and charge-back, (objective evidence could be provided to demonstrate that the repair had not been dealt with well) and that there was no improper motive for taking the action, it is assumed that the landlord's actions would be upheld.

Generally, however, the court noted that the "tendency of the cases is to require the discretion or the dissatisfaction to be reasonable" and that it would be "preferable that provisions of this kind be construed as implying the less arbitrary standards of the objective test". One commentator has advanced the suggestion that even in the face of "*absolute* discretion" wording which could justify the use of the subjective standard of analysis, that "good faith should in any event remain an implied requirement of the exercise of discretion, at least in the absence of the clearest and most unequivocal of terms used in a context of equal bargaining power between the parties."[15]

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[14] *Supra* note 1 p. 78

[15] W.H.O. Mueller, "Duties of Good Faith Bargaining, Disclosure and Performance in the Real Estate Contest", *Law Society of Upper Canada Seminar, Real Estate: Remedies, Rent Control & other Relevant Topics*, p. 89

Acting Reasonably v. Acting in Good Faith

It is clear that the obligation to "act in good faith" is not the same as the obligation to "act reasonably". The case of *Cadillac Fairview Corp.* v. *Canstar Sports Inc.*[16] draws a distinction between these concepts. A copy of this decision is found at the end of this paper. The lease that was the subject matter of this decision contained an option in favour of the tenant to purchase the leased premises. The option was subject to the following condition:

> "It is understood and agreed that the tenant may only exercise the option....upon entering into an agreement satisfactory to the Landlord with respect to the development of the Lands."

When the tenant decided to exercise the option, the parties were unable to come to terms on the development agreement and this action followed as the tenant attempted to enforce its option.

The court was of the view that the condition requiring a development agreement "satisfactory to the Landlord" did not mean that the landlord had an absolute and unfettered discretion to include whatever provisions it desired in the development agreement. The tenant argued that the discretion must be exercised reasonably and that the court ought to imply this term into the agreement in order to avoid the unfairness that would result if the tenant was not entitled to the exercise of the option to purchase.

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[16] [1991] O.J. No. 1560

The court held that the landlord's discretion was not absolute. But it did not imply a term of "reasonableness". It stated that:

> "the implied term is to be narrower than "such approval not to be unreasonably withheld", because the latter formulation would have the potential of conferring upon the court,....a power to impose the terms which they felt to be most reasonable. That would not give sufficient weight to the wording of the condition that the development agreement be subject to Cadillac's approval."

A narrower implied term was required - the implied term was that the party whose approval is required not act "in a capricious or colourable....or unfairly harsh way". What this means will be governed by the nature of the obligation in each case and by the circumstances affecting performance. In the *Cadillac Fairview* case, the Tenant's ability to exercise an option to purchase was dependent on it "entering into an agreement satisfactory to the Landlord". The court clarified that although this did not mean that the landlord had to be reasonable, it did mean that it had to base its decision concerning whether or not to approve the terms of the proposed development agreement having regard to bona fide development considerations and not extraneous matters. The court explained what it meant by "colourable" in the following statement:

> "By colourable, I mean in these circumstances, a withholding of approval whether the withholding is found to persist in the absence of legitimate project development reasons (as to which reasons Cadillac must on the wording of paragraph 11(a) be allowed considerable latitude), so that the sole, or overwhelming predominant, reasons for the withholding by Cadillac of its approval is seen to be some other consideration, such as,

> for example, that the option price was far less than the market value of the land but, of course, colourability is not to be presumed from the mere fact that the option price may be less than the market value."

In determining what constitutes good faith, the party granting or refusing its consent is entitled to consider bona fide issues and to impose terms which the other party may or may not consider acceptable so long as the basic underlying motives for withholding consent are based on real concerns and not arbitrary or extraneous issues that have the effect of destroying the business efficacy of the contract. In any given situation it will be difficult to draw the line precisely but, it is suggested that with respect to the classic case of "green mail", for example, in most instances, the party acting in bad faith will be found out.

The Levels of Behaviour Responsibility

Take for example a provision in a lease that requires a party to provide its consent to a certain matter. What is that party's behaviour responsibility in coming to its decision as to whether or not to consent ? – (subject to any express provision in the lease or to statutory obligation to act reasonably in consenting, such as, for example, in relation to a landlord being asked for its consent to an assignment which cannot be unreasonably withheld under the Ontario Commercial Landlord and Tenant Act). Should the party, in coming to its decision, act in "good faith", "reasonably", or "fairly and equitably"? All of these terms have, most likely, at one time or another been used interchangeably. Are there differences among them? Do they require people to behave in different ways in coming to decisions?

According to Black's Law Dictionary, 4th edition:

"Equitable" means:

> (a) just; conformable to the principles of justice and right; and (b) just, fair and right, in consideration of the facts and circumstances of the individual case.

"Fair" means:

> just, equitable, even-handed, equal, as between conflicting interests;

"Reasonable" means:

> (a) just, proper, ordinary or usual; fit and appropriate to the end in view; and (b) thinking, speaking or acting according to the dictates of reason, not immediate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate: tolerable;

"Good Faith" means:

> that definition as set out on page 4 of this paper.

Given these definitions, the decision in *Cadillac Fairview v. Canstar* and the lack of case law on the precise meanings of "equitable", "fair" and "reasonable", a tiered behaviour responsibility standard such as the one below is suggested.

- the "good faith" standard appears to be the lowest responsibility standard. At the very least, people must act in good faith in making decisions;

- the "acting reasonably " standard appears to exact something more than acting in "good faith" but less than acting "fairly" or "equitably" since 'reasonable' speaks to being rational and moderate, suitable and tolerable as well as being fit

and appropriate without stressing the circumstances of an individual case or even handedness;

- the "acting fairly" or "equitably" standard exacts something even more than being reasonable in that one must consider the facts and circumstances of the individual case.

Admittedly, there is a very fine line between each of these standards and the characteristics of each can easily blend into the others, blurring that line. What we know for sure , however, is the following:

1. One does not necessarily need to act reasonably (absent statutory or express provisions to do so).

2. Acting in good faith will suffice.

3. Discretion has limits.

THE TORT OF NEGLIGENT (BAD FAITH) NEGOTIATIONS

There has been a new development in the area of business dealings between parties that must be discussed in tandem with "good faith" principles. A previously unrecognized duty to exercise care and good faith in dealings between parties to leases has been put forward by recent decisions of the Appellate Court of Newfoundland and the Federal Court of Appeal. The cases, *Atlantic Leasing Ltd. v. Her Majesty the Queen, in Right of the Province of Newfoundland (1997), 153 Nfld.* (the "Atlantic Decision") and *Marte Building Ltd. v. Her Majesty the Queen [1998] 4 F.C. 300* (the "Martel Decision") appear to have expanded the tort of negligence into the area of business dealings between landlords and tenants. The concept is closely related to the notion of good faith in dealings between parties. Copies of both of these cases are found at the end of this paper.

The Martel Decision

The Martel Decision is being appealed to the Supreme Court of Canada. Depending on the outcome at the Supreme Court of Canada level, the door may be shut on this new area of liability but in the meantime, it is worth considering the facts of the case if one finds oneself in a similar situation and able to make similar arguments.

In the Martel Decision, the Government of Canada was the primary tenant in the landlord's office building. The lease was for an initial term of ten years with one ten year option to renew. The tenant began discussions with the landlord regarding a

renewal of the lease. The landlord planned to retrofit the building in conjunction with the renewal. The tenant knew about this but, despite numerous meetings no renewal was signed. Instead the tenant proceeded by way of tender call to acquire space for what would have been the renewal period. Throughout the negotiations, the tenant conducted itself badly vis-a-vis the landlord. It failed to advise the landlord that the representative of the tenant with whom the landlord had been carrying out the negotiation did not have the authority to commit the tenant to a renewal. Often during the negotiation process it set time deadlines for information, plans, reports, etc. that were not realistic. The landlord had great difficulty in providing information required by the tenant. The tenant also failed to communicate to the landlord the requirements that needed to be satisfied in order for the tenant to avoid going through the tender process. The tenant made the decision to proceed on the tender based upon information which, due to its unfair deadlines, was incomplete and inaccurate. The landlord participated in the tender and even though it was the lowest bidder it was not awarded the tender. In evaluating the various bids the tenant added to the landlord's bid unspecified costs to carry out a fit-up to the leased premises prior to the renewal. The landlord commenced an action against the tenant for damages on the basis of the loss of the ten year renewal lease. The Court of Appeal noted that the landlord and the tenant had a long standing relationship; that the lease contemplated the possibility of a renewal by the tenant; that the tenant was essentially the only tenant in the building and had been so since the building was first constructed, and that the tenant was the "dominant player in the leasing of rental space in the area" and held that the parties enjoyed a sufficiently close relationship to give rise to a duty of care in the negotiation process.

The court concluded that the parties owed each other a duty of care in negotiating the renewal. It found that the tenant had breached that duty of care by:

(a) failing to pursue negotiations in a timely fashion;

(b) failing to make the landlord aware of who had authority to commit the tenant to renewal of the lease and who did not;

(c) failing to make its bottom line negotiating position clear to the landlord;

(d) failing to make it clear to the landlord at an early enough time to give the landlord a realistic opportunity to comply that further retrofit details were required before the tenant would recommend the lease renewal, as opposed to proceeding to the tender process;

(e) failing to set a realistic schedule as it continued to impose false deadlines and failing to make the landlord aware of the realistic schedule; and

(f) failing to ensure that timely and relevant information was supplied to the landlord to avoid creating time constraints for "the internal department decision making process".

The Court of Appeal held the tenant liable for the landlord's lost opportunity to negotiate the lease renewal.

The Atlantic Decision

In this case, the tenant was the Government of Newfoundland. It was the principal tenant in a historical building. The lease was for a five year term with three five year options to renew. The landlord and a representative of the tenant negotiated a renewal but, some two and one-half years later, the Cabinet which was required to approve the renewal had still not done so. There was no negligence on the part of the persons negotiating. In this case, the negligence was that of the senior, upper levels having regard to their failure to approve the deal in a timely manner. As the result of these delays, the landlord suffered major losses due to its inability to refinance and, it sued the tenant.

The Court found that the parties owed each other a duty of care and that it was breached by the tenant. The duty of care was based on its conclusion that:

(a) the parties were in a ten year lease arrangement as landlord and tenant;

(b) the relationship of the landlord to the tenant is not a general relationship, but is a specific defined relationship;

(c) the details of the lease and the renewal of the lease were known by the tenant, and

(d) the tenant knew of the urgency on the part of the landlord to conclude the lease renewal so that the landlord could arrange new financing.

The principle endorsed by these judgments is still in a formative stage. The limits and ambit of the principle are still uncertain. On February 18, 1999, leave to appeal the Martel Decision was granted by the Supreme Court of Canada. In the meantime, it is clear that landlords and tenants must be aware of this duty of care and be prudent where the tenant is the principal tenant and there is a long-standing relationship between them. In these kinds of cases, parties are required to trust and treat each other reasonably in negotiating a renewal in light of all the circumstances.