IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

EXPERT REPORT OF PROFESSOR JOHN D. McCAMUS, F.R.S.C.

EXPERT REPORT OF

PROFESSOR JOHN D. McCAMUS, F.R.S.C.

TABLE OF CONTENTS

PART 1 – INTRODUCTION

1. I have been retained by Bilcon of Delaware ("Bilcon") to provide an expert report that addresses those doctrines of domestic private law and, more particularly of the common law of contract and tort, that may provide principles for calculation of compensation for loss that may be of assistance to this Arbitral Tribunal by way of analogy as it calculates appropriate compensation for the losses suffered by Bilcon under principles of international law.

2. I am a Professor of Law at Osgoode Hall Law School of York University located at 4700 Keele Street in Toronto, Ontario, Canada. I joined the full-time Osgoode faculty in July of 1971 and currently hold the status of Emeritus Professor of Law and University Professor. I am a barrister and solicitor, qualified to practice law in the Province of Ontario. I was called to the Ontario Bar in October, 1973. During my academic career, I have provided consulting services to members of the legal profession both within Ontario and outside the province. In July, 2007, I was appointed Chair of the Board of Legal Aid Ontario, an Ontario Crown Corporation which has a statutory mandate to administer the legal aid system within the Province.

3. In my academic work, my principal area of teaching and research has been in private law, and more particularly, the law of contracts, the law of restitution,

commercial law and the law of remedies. My published legal scholarship includes two textbooks; *The Law of Contracts, 2d ed.*, (2012), and *The Law of Restitution, 2d ed.*, (2004). The latter volume was co-authored with the late Peter D. Maddaugh and is maintained in a loose-leaf edition with annual supplements. My current resume is annexed as Exhibit 1 to this report.

PART II – SCOPE OF THIS REPORT

4. In preparing this report, I have been asked to assume that since the question of the Respondent's liability has been determined by this Tribunal, it is unnecessary for me to provide a definitive opinion as to whether the Respondent, in light of its misconduct, would be held liable in Canadian domestic common law, either in a claim for damages for breach of contract or in a claim for compensation for injuries caused by conduct which would be considered tortious. Rather, I have been asked to provide guidance as to the principles that a domestic court would apply in a tort or contract claim in determining the compensable loss that a plaintiff suffered as a result of a defendant's breach of contract or tortious misconduct. More particularly, I have been asked to consider whether the concepts of compensable loss in domestic contract and tort law may include the loss of future profits suffered by a plaintiff as a result of the defendant's breach of contract or tortious misconduct.

5. As noted, this report focuses on claims for compensation for breach of contract and tortious wrongdoing in Canadian domestic private law. This report does not

provide an analysis of restitutionary or unjust enrichment doctrines since the remedies available in this branch of private common law doctrine provide only for the recovery of benefits wrongfully withheld by a defendant.

6. In preparing this Expert Report, I have reviewed this Tribunal's Award on Jurisdiction and Liability in this matter dated March 17, 2015.

PART III – SUMMARY OF CONCLUSIONS

7. The Respondent gave a series of commitments in NAFTA which it expected to be legally binding. Each of the Parties to NAFTA, including the Respondent, expected investors to rely on these commitments in making and attempting to make investments in Canada. The body of law that compensates for injuries resulting from the breach of binding commitments is the law of contract. Accordingly, a number of specific contractual doctrines may relate to the present context.

8. In the law pertaining to formation of contracts, for example, the explicit subjective intent of the parties to contract is not required. Contractual relations can be inferred from their conduct.

9. In appropriate circumstances, the law of contracts imposes implied obligations upon contracting parties that are similar to the duties imposed on the Respondent by NAFTA. Thus, the implied duty imposed on those who issue invitations to tender to treat all bidders "fairly and equally" bears some similarity to the duty imposed on the Respondent by NAFTA article 1102.

10. Further, the types of obligations imposed by the newly recognized "duty of good faith" contract performance bear some similarity to the obligations imposed by NAFTA article 1102. In particular, the well-recognized duty not to abuse contractual discretionary powers appears to be similar in nature. So too does the newly recognized "duty of honest performance".

11. The implied duty not to abuse contractual discretionary powers is similar to the public law duty imposed on public authorities to the effect that discretionary powers conferred by statute must not be exercised for an unintended and improper purpose.

12. Additionally, there is a well-established line of English and Canadian authority that holds that "a party shall not take advantage of his own wrong, or of an event brought about by his own act or omission."

13. The basic principle for calculating damages for breach of contract is the expectancy principle. This principle entitles the plaintiff to monetary damages from the defendant which will, so far as money can do so, place the plaintiff in the position the plaintiff would have been in if the contract had been performed.

14. In circumstances where a plaintiff invested assets in the acquisition of profit-making venture and the opportunity to earn profits was lost as a result of the defendant's breach of contract, the expectancy principle would require that the plaintiff receive monetary compensation for its lost investment or out-of-pocket

expenses incurred in pursuing the venture in question, as well as the future income stream it would have enjoyed from conducting the venture.

15. The basic principle for calculating damages in a tort claim is different from the basic principle for calculating damages in a contract claim. In contract, the expectancy principle requires one to consider what the plaintiff's position would be if the contract were performed. The tort principle requires one to consider what the plaintiff's position would be if the tort had not occurred.

16. In the context of numerous tort claims, however, it is clearly established that one can recover future business losses, including future profits. In such situations, the calculations for damages arising under tort and contract may be said to converge. This report examines a number of such situations.

17. It follows from the basic principle underlying tort damages that the plaintiff in any tort claim would be able to recover its investment or out-of-pocket loss. Accordingly, this point is not further explored here. Rather, this report focuses on the question as to whether business losses, including future profits, constitute a compensable loss in the context of tort claims.

18. More particularly, this Report examines the principles for calculating recoverable loss in the context of claims for economic injuries resulting from negligence, in the context of the so-called economic torts. These include inducing breach of contract and intimidation, in the context of the tort of misfeasance in a public office and in the context of claims for defamation and deceit.

19. In tort law, as in contract law, the plaintiff must establish that the defendant's breach of duty caused the loss and that the loss was reasonably foreseeable. The plaintiff in a tort case, as in a contract case, cannot recover for losses to the extent that they could have been reduced or precluded in circumstances where the taking of steps in mitigation of the loss by the plaintiff can reasonably be required of the plaintiff.

20. Damages for consequential economic losses, including future economic losses, have traditionally been awarded in tort claims involving personal injury or property damage.

21. Damages for economic losses, including future economic losses, have traditionally been awarded in the context of the "economic" torts such as inducing breach of contract, intimidation, conspiracy and intentional cause of economic loss by unlawful means.

22. Damages for economic losses, including lost profits, have also been awarded in the context of claims for pure economic loss caused by the defendant's negligence.

23. In the context of claims for pure economic loss caused by negligent misstatement, it is well established that the plaintiff can recover the profits that could have been made in respect of opportunities for profit-making that have been foregone as a result of the plaintiff's dealings with the defendants.

24. In the context of the negligent supply of products, it is well established that the plaintiff can recover profits lost due to the defective nature of the products supplied by the defendant.

25. In the context of the negligent exercise of powers by a public body that causes pure economic loss to an individual, damages for that loss, including lost profits, are recoverable.

26. In the context of the tort of misfeasance in a public office, the defendant official is liable for pure economic loss, including lost profits. It is not a precondition of seeking such relief that the plaintiff has pursued any potentially available remedies for judicial review of administrative action.

27. From the foregoing illustrations, it may be concluded that the concept of "compensable loss" in tort can encompass, in appropriate cases, economic or business losses, including lost profits. The critical factor in such cases is that the victim of the tort has been tortiously deprived of an opportunity to gain such profits.

28. In both contract and tort claims, the plaintiff must be able to demonstrate that the defendant's wrongful conduct caused the losses sustained by the plaintiff. The test for determining whether the contract breach or tort caused the injury is a "but for" test, that is, one asks whether "but for" the breach, the injury would not have occurred.

29. Application of the "but for" test becomes a subtle matter where the initial breach of contract or tort is followed by what may be considered an intervening event or circumstance that may be considered to be, in some sense, the direct cause of the loss. The causal link between the initial breach of contract or tort and the subsequent injury will be maintained in circumstances where the intervening event was a foreseeable one.

30. Contract and tort damages are limited by the mitigation principle, which holds that the victim of a breach of contract must take reasonable steps to reduce the loss sustained or to prevent further loss. In contract claims there are situations where the plaintiff could reasonably be required to accept an offer from the defendant of further dealings on different terms with the defendant in an attempt to mitigate its losses. However, there are also cases where a requirement to accept an offer of such further dealings would be considered unreasonable in light of the conduct of the defendant and, if so, no duty to take such steps to mitigate the loss arises.

31. It is well-established that the burden of proof in establishing that the plaintiff has failed to take reasonable steps to mitigate the loss falls upon the defendant.

32. Expectancy damages are recoverable in a claim for damages for breach of contract only if the plaintiff can establish that the losses were reasonably foreseeable at the time of contracting, in the sense that they were consequences

that a reasonable person would consider to be something "liable to occur" in the event of breach.

33. A claim for tort damages is also subject to a limitation that the consequences of the tortious misconduct must have been reasonably foreseeable. The degree of likelihood of the consequences required for them to be reasonably foreseen in a tort claim may be less than the standard under contract law.

PART IV – ANALYSIS OF SUBSTANTIVE CONTRACT AND TORT DOCTRINE

A. Introduction

i. Introduction to Contract Doctrine

34. It is my view that the most appropriate analogy to the facts as found by the Tribunal would be a claim for damages for breach of contract. There would be wide agreement that the underlying purpose of contract law is to encourage reliance on the contractual undertakings of others. It achieves this objective by providing compensation for losses occasioned by a promisee who detrimentally relies on an undertaking by a promisor, in the sense that the promisee assumes that the undertaking will be performed.

35. Given this underlying purpose, it is evident that contract law is at the heart of dispute resolution in the commercial context. Much, if not most, commercial litigation involves the application of contract law.

36. As noted above, it is no part of this report to speculate on whether or not the relationship between the parties in this matter is, as a matter of law, contractual in nature. Nonetheless, it may be useful to identify a number of features of contractual doctrine.

37. As a matter of general principle, contract law requires that the promisor, when giving the undertaking at issue, have intended that the undertaking be legally binding. As is evident on the face of the Treaty, the Respondent gave a number of undertakings in NAFTA which it intended to be legally binding and upon which it expected foreign investors to rely in making investments in and attempting to make investments in Canada. It is also apparent from the provisions of NAFTA that the Respondent intended that if it breached these binding undertakings, it would be liable to make compensation to an investor, as stated in NAFTA article 1131, "to the extent that the investor has incurred loss or damage by reason of, or arising out of that breach".

38. In both commercial and public sector settings, the formation of a contractual relationship will typically involve the explicit exchange of terms and conditions and an unambiguous statement on the part of both parties of their agreement with them. It is often the case, however, that contractual relationships may arise by virtue of the conduct of the parties in circumstances where it is not as clear that the parties have shared a subjective intention to enter into a contractual

relationship. In these situations, a contract may be said to be inferred or implied from the circumstances.

39. By way of illustration, the decision of the Supreme Court of Canada in *Saint John Tugboat Co. Ltd.* v. *Irving Refining Ltd.*[1] found a contract to exist in circumstances where the parties had not clearly expressed their mutual consent to a contractual relationship. The Plaintiff shipping company had made one of its tugboats available to the Defendant on a specific *per diem* rate to employ the services of the tug for an agreed period at that rate. After the period had expired, the Defendant continued to use the tugboat for some months, without expressly agreeing to terms. On these facts, the Supreme Court of Canada held that the Defendant's conduct amounted to a continuing acceptance of the Plaintiff's standing offer to provide the tug's services at the specified rate. The Defendant's conduct, in effect, was held to communicate an acceptance of the offer.

40. Similarly, there is now a significant body of Canadian jurisprudence holding that an invitation to submit tenders or bids constitutes an offer of a contract to conduct the bidding process in compliance with the terms set out in the invitation. The submission of a tender by a bidder has been characterized by the courts as amounting to the communication of an acceptance of that offer. The leading case is the decision of the Supreme Court of Canada in *Ontario* v. *Ron*

---

[1] (1964) S.C.R. 614 (S.C.C.)

Engineering & Construction (Eastern) Ltd.[2] Under prior law, the exchange of these documents was not considered to create a binding contractual relationship.

41. Similarly, in the decision of the English Court of Appeal in *Blackpool and Fylde Aero Club Ltd.* v. *Blackpool Borough Council*,[3] it was held that an implied contract arose when the Defendant municipality invited tenders to be submitted by a specified time and date for a concession to operate pleasure flights from a municipal airport. A timely tender was submitted by the Plaintiff. By inadvertence, the Defendant failed to consider the tender submitted by the Plaintiff. The Court of Appeal held that the invitation implicitly offered a narrowly limited contractual obligation to at least consider timely tenders, an offer accepted by the Plaintiff when it submitted a timely tender.

42. Subsequent Canadian jurisprudence establishes that a more elaborate bidding contract is created in Canadian law by the invitation to bid and the submission of a bid. This imposes implied obligations on the issuer of the invitation to accept only bids that are compliant with the terms of the competition[4] and, further, to treat all bidders fairly and equally.[5] The latter implied term imposes obligations

---

[2] [1981] 1 S.C.R. 111.
[3] [1990] 1 W.L.R. 1195 (C.A.), a decision from which the Supreme Court of Canada drew support in reaching a similar conclusion in *MJB Enterprises Ltd.* v. *Defence Construction (1951) Ltd.* [1999] 1 S.C.R. 619 (S.C.C.) at para. 20.
[4] *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, *supra*, note 3.
[5] *Martel Building Ltd.* v. *Canada*, [2000] 2 S.C.R. 860.

that appear to be somewhat similar to those imposed on the Respondent by NAFTA article 1102.

43. The justification for this change in the law imposing a contractual relationship appears to rest on the fact that the preparation of bids can be a very expensive matter and that the creation of a binding contractual relationship can provide an appropriate incentive or protection for the parties, so as to encourage them to engage in bidding processes, especially those that are complex in nature where the preparation of a bid imposes heavy financial burdens on the bidders.[6]

44. It follows from the general principles for calculating damages for breach of contract, to be further considered below, that if the plaintiff can establish that if, "but for" the defendant's breach, it would have been the successful bidder, the plaintiff would be entitled to recover the profits it would have made if it had been awarded the contract.

45. In cases such as *Ron Engineering* and *Blackpool*, it is relevant to observe that contract formation occurs by the mere act of submitting a bid. The invitation to tender is construed as an offer by its issuer to anyone who submits a bid in response that the offeror will comply with the terms of the invitation with respect

---

[6] Thus, in *M.J.B. Enterprises Ltd., supra,* note 3, Iacobucci J. observed as follows: "I find it difficult to accept that the applicant or any of the other contractors would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted." At para. 30. See also, para. 23. *See also Blackpool and Fylde Aero Club Ltd., supra*, note 3, here a similar justification for implying a contractual obligation to consider timely offers was suggested.

to the conduct of the bidding. The submission of a bid is considered to be the acceptance of that offer. The submission of a bid, without more, is considered to be an act, on the part of the bidder, that communicates an acceptance of the offer to the offeror.

46. In previous cases, the fact that the act of submitting the bid constitutes the acceptance led the Supreme Court of Canada to conclude that the contract that was thereby created is unilateral in nature as it is an offer of a promise in return for an act.[7] Such contracts are said to be unilateral in the sense that only one party gives a promise. The promisee responds with the requested act. The offer of a reward for finding something – a lost cat, for example – is a classic illustration. "If you find my cat, I will pay you $100.00" would be an offer of a unilateral contract. The better view, however, is that the contract formed by the act of submitting a bid in the tendering context, though it is accepted by the act of submitting a bid, is bilateral in nature, in that it imposes promissory obligations on both parties.[8] Typically, for example, in return for the issuer's promise to comply with the bidding rules, the bidder promises that, if selected by the issuer, it will enter into the ultimate agreement with the issuer to perform the work that is described in the invitation.

---

[7] *Ron Engineering, supra*, note 2, p.122.
[8] This view appears to be accepted by the Court in *MJB Enterprises Ltd., supra*, note 3, para. 18.

47. A further feature of the law of contracts is the fact that courts are willing to imply terms in agreements. Such terms are normally implied, as a matter of fact, on the basis of one or both of two tests. First, a term will be implied where it is necessary to give "business efficacy" to the agreement or, second, in circumstances where it would be obvious to a third party that such a tacit provision is obviously intended from the circumstances of the particular transaction.

48. Thus, by way of illustration, in the context of the *Ron Engineering* line of authority, it has been held that the invitation to tender contains an implied term to treat all bidders "fairly and equally".

49. Further, it is interesting to note that the Supreme Court of Canada in the recent and leading decision in *Bhasin* v. *Hrynew*[9] has recognized a new general "underlying principle" requiring the performance of contracts in good faith. This newly recognized principle provides an explanation for three existing lines of authority that articulate detailed rules that imply terms in contracts requiring specific types of good faith performance. Further, the principle provides a basis for the Court's recognition, in *Bhasin* itself, of a new detailed rule requiring honesty in performance that applies to virtually all contractual relationships. It

---

[9] [2014] 3 S.C.R. 494.

will be useful to briefly explore each of the three existing lines of authority and the new duty of honesty in performance in Canadian contract law.

50. The underlying principle of good faith performance was described by Cromwell J. on behalf of the Supreme Court in the following terms:

> "The organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."[10]
> ....
> "The organizing principle of good faith exemplifies 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."[11]

51. The first of the existing lines of authority that the Court said could be now explained on the basis of the underlying principle of good faith performance is a line of cases implying a term that requires the parties to cooperate in order to achieve the objectives of the contract. By way of illustration, the court mentioned its own prior decision in *Dynamic Property Ltd.* v. *O.K. Detailing Ltd.*[12] in which a real estate transaction between the parties failed to stipulate which party was to be responsible for obtaining planning permission for a subdivision to be constructed on the property by the purchaser. The vendor was, by law, the only party capable of obtaining permission. The court held that the "vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale".[13]

---

[10] *Ibid.*, para. 63.
[11] *Ibid.*, para. 65.
[12] [1978] 2 S.C.R. 1072.
[13] *Ibid.*, p. 1084.

As part of that implied duty, the vendor was required to seek the appropriate planning permission.

52. A second line of existing authority now explained on the basis of the underlying good faith principle may also be of interest. This second doctrine relates to the exercise of contractual discretionary powers. It holds that discretionary powers conferred by an agreement upon one of the parties must be exercised reasonably and for the purpose for which the particular discretionary power was conferred. An abuse of such a discretionary power is thus a breach of the implied term of the agreement in question.

53. This principle was colourfully stated in the 18th century by Lord Northington in *Aleyn* v. *Belchier*[14] in the following terms:

> "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise, it is corrupt and void."

54. This principle bears evident similarity to the public law principle that a statutory discretionary power conferred upon a public authority must be exercised for the intended purpose and not for an improper purpose.

55. The application of this principle in a contractual context may be illustrated by reference to a decision of the Alberta Court of Appeal in *Mesa Operating Ltd.*

---

[14] (1758), 1 Eden 132, 28 E.R. 634

Partnership v. *Amico Canada Resources Ltd.*[15] In an agreement for the purchase and sale of oil and gas properties, the seller reserved a royalty to be paid by the buyer. The agreement further provided that the buyer could "pool properties for the purpose of making related payments". The buyer, in exercising this discretionary power, pooled one of the seller's properties with one of its own properties in a manner that had the effect of reducing the royalty payable to the seller by half. The Court of Appeal agreed with the trial judge that the buyer was in breach of contract by exercising a discretionary power in a manner that "substantially nullifies a contractual objective or causes significant harm to the other party contrary to the original purposes or expectations of the parties".[16]

56. It is also well-established that contractual discretionary powers must be exercised reasonably. In *Mitsui & Co. (Canada) Ltd.* v. *Royal Bank of Canada*[17], a helicopter lease included an option to purchase the helicopter at the "reasonable fair market value of the helicopter as established by Lessor". The Supreme Court held that "[c]learly, the lessor is not in a position by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the

---

[15] (1994), 19 Alta. L.R. (3d) 38 (C.A.)
[16] *Ibid.*, at p. 45
[17] [1995] 2 S.C.R. 187

helicopters, which is the price that the parties had initially agreed would be the exercise price of the option".[18]

57. A third existing line of authority deals with situations in which a party in breach has evaded a contractual duty. Such evasion may arise, for example, through the misuse of a contractual power. In *Bhasin*, Cromwell, J. illustrated this point by making reference to the decision of the Supreme Court of Canada in *Mason* v. *Freedman*[19]. In that case, a vendor who regretted having entered a transaction of sale, attempted to repudiate the agreement by asserting that his wife refused to bar her dower. On this basis, he relied on a provision of the agreement that permitted him to repudiate in the event that he was "unable or unwilling" to remove a defect in title. In fact, he had made no efforts to obtain a bar of dower. The Court held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation". On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner".[20]

58. In *Bhasin*, the court was of the view that none of the three existing lines of authority, now to be explained on the basis of the underlying principle of good

---

[18] *Ibid.*, at para. 34
[19] [1958] S.C.R. 483.
[20] *Ibid.*, at p. 487.

faith performance, actually applied to the facts at hand. Nonetheless, the Court held the Defendant liable on the basis that he was in breach of a fourth and newly-recognized good faith duty, namely, a general duty of honesty in contractual performance. Cromwell, J. explained that this means simply, "the parties must not allow or otherwise knowingly mislead each other about matters directly linked to the performance of their contract".[21]

59. In addition to the doctrines now considered in Canadian law to rest on a foundational principle requiring good faith performance of contracts, there exists a substantial line of English and Canadian authority that establishes the principle that "a party shall not take advantage of his own wrong, or of an event brought about by his own act or omission".[22]

60. Thus, by way of illustration, where the closing of a real estate transaction is subject to an unfulfilled condition precedent, the vendor who is subject to and in breach of an implied duty to have made best efforts to obtain its fulfillment, cannot rely on the failure of the condition precedent as a basis for terminating the agreement.[23] Permitting termination by the vendor in such circumstances would be inconsistent with this basic principle.

---

[21] (2014), 3 S.C.R. 494 at para. 73.
[22] *Metropolitan Trust Co. of Canada* v. *Pressure Concrete Services Ltd.*, [1973] 2 O.R. 629 (Ont. H.C.J. affd (1976), 9 O.R. (2d) 375 (Ont. C.A.)
[23] *Ibid.*

61. Similarly, where a lease provides that a lease will be "void" in the event of non-payment of rent, the tenant cannot refuse to pay the rent and then rely on a literal interpretation of the provision in order to escape his obligations under the now "void" lease.[24] Permitting the tenant to do so would be inconsistent with the principle that "a party shall not take advantage of his own wrong".[25]

62. Against this background, I will turn to consider the basic principles for calculating damages for breach of contract. Before doing so, however, a brief introduction to tort doctrine is offered.

ii. Introduction to Tort Doctrine

63. As noted in Part II of this report, I have not been asked to determine whether the misconduct of the Respondent actually amounts to the commission of a tort in domestic Canadian common law. Rather, I have been asked to examine the principles for calculating recoverable or compensable loss in a domestic tort claim and, more particularly, whether the concept of compensable loss in domestic tort law includes recovery for economic losses, including lost business profits.

---

[24] *New Zealand Shipping Co.* v. *Société Des Ateliers et Chantiers de France*, [1919] A.C. 1 (H.L.) at p.8.
[25] *Ibid.*

64. Although it is not necessary for present purposes to consider all conceivable tort claims in which recovery of economic loss (including future business profits) may be recovered, this Report will consider a broad range of tort claims in which such losses are recoverable.

65. More particularly, this Report examines the principles for calculating recoverable loss in the context of claims for economic injuries resulting from negligence, in the context of the so-called economic torts. These include inducing breach of contract, civil conspiracy, intentional cause of economic harm by unlawful means and intimidation, and in the context of the tort of misfeasance in a public office.

B. Measurement of Damages

i. Contract

a. The Expectancy Principle

66. The basic principle for calculating the amount of damages in contract claims – the expectancy principle – has the objective of providing the Plaintiff with a monetary equivalent of performance. The expectancy principle is forward-looking in the sense that it attempts to secure for the Plaintiff the benefits of performance rather than merely restoring the Plaintiff to the position he or she was in before the contract was created.

67. A classic exposition of the principle is that of Baron Parke in *Robinson* v. *Harman*[26] in the following terms:

> "The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[27]

68. In the leading decision of the Privy Council in *Sally Wertheim* v. *Chicoutimi Pulp Company*[28] the principle was articulated in similar terms and was coupled with the following observation":

> "That is a ruling principle. It is a just principle."[29]

b. Application of the Expectancy Principle to Claims for Future Lost Profits

69. In commercial settings, application of the expectancy principle will often involve the recovery by the plaintiff who is the victim of the breach of contract of his or her business losses, including loss of future profits, which have been caused by the defendant's breach. Thus, in circumstances where a plaintiff invests assets in acquiring a profit-making venture and the opportunity is lost because of the defendant's breach of contract, the plaintiff is entitled to recover the expense it incurred in pursuing the opportunity in question, as well as the profits it would have made by conducting the projected venture. Recovery of both heads of loss

---

[26] (1848), Exch. 850, 154 E.R. 363.
[27] *Ibid.*, at 855 (Exch.).
[28] [1911] A.C. 301 (P.C.).
[29] *Ibid.*, at 307.

is necessary in order to place the plaintiff in the same position it would have been in if the contract had been performed. If the venture had proceeded, the plaintiff would have recovered its investment and enjoyed future profits.

70. In the context of loss of profit claims, there are, as a general matter, two different methods to calculate the profits that would have been enjoyed by a Plaintiff if the contract had been performed. The first may be referred to as a "net profit" claim. This calculation would include an estimate of the net profits that would have been earned by a plaintiff, after deducting all related expenses that would have been incurred by the plaintiff in generating those profits. In the context of a net profit claim, the plaintiff would also be entitled to recovery of the actual expenses incurred to date, since compensation for those expenses would be necessary to place the plaintiff monetarily in the same position the plaintiff would have been in if the contract had been performed. Accordingly, in the context of this approach to the calculation of expectancy damages, the plaintiff would be entitled to recover lost expenses in addition to the net profits foregone.

71. An alternative approach to the calculation of expectancy damages would include a calculation of gross revenue or gross profits that would have been enjoyed by the Plaintiff if the contract had been performed, and then deducting the avoided costs from that amount. The avoided costs are costs that would have been incurred in order to generate the profit, but which have not been incurred because of the termination of the contract. The plaintiff would not be entitled to also

recover the out-of-pocket expenses incurred to date because allowing such recovery would result in an improper "double recovery". In the context of this approach to calculating expectancy damages, then, the plaintiff would not enjoy separate and additional recovery for its lost expenses. The lost expenses incurred would be included in the award, however, inasmuch as they would not be deducted as "avoided costs".

72. Two points of general principle may be expressed about these two different approaches to the calculation of expectancy damages involving loss of profit. First, as a matter of general principle, each calculation should lead to the same numerical result. They are merely different ways of performing a lost profits calculation. Second, both calculations have the effect of compensating the plaintiff for lost profits, in the sense of lost net profits, and, as well, all out-of-pocket expenses incurred to date.

73. The probable loss of future business profits is awarded in a variety of contexts. Thus, for example, in *Lister (Ronald Elwyn) Ltd.* v. *Dunlop Canada Ltd.*[30] the Supreme Court of Canada confirmed the availability of a claim for a loss of future profits in circumstances where a wrongful seizure of assets resulted in the closing down of the Plaintiff's business.

---

[30] [1982] 1 S.C.R. 726.

74. Another illustration is provided by the decision of the Ontario Court of Appeal in *Canlin* v. *Thiokol Fibres Canada Ltd.*[31] There the Defendant seller delivered defective material to the Plaintiff, which the Plaintiff would have used as a component of the product it manufactured. The Plaintiff successfully claimed for the profits it would have made selling its product if the component supplied by the Defendant had been satisfactory.

75. In such cases, the lost profits would be calculated on the basis of the present value of the profits likely to be enjoyed in the future by the plaintiff.

76. As an alternative to the lost profits calculation, courts may apply a capital loss calculation as a means of placing the plaintiff in the position the plaintiff would have been in if the contract had been performed. Compensation for loss of capital value of the plaintiff's business should reflect or be roughly equivalent to compensation for the estimated loss of future profits resulting from the breach of contract.

77. The choice between the lost profits measure and the lost capital measure is said to be a matter of convenience,[32] though some authority suggests a judicial

---

[31] (1983), 40 O.R. (2d) 687 (C.A.).
[32] *Silver* v. *Co-operators General Insurance Co.* (1998), 169 N.S.R. (2d) 303 (C.A.) at p. 308 citing this paragraph, leave to appeal to the S.C.C. refused 169 N.S.R. (2d) 303.

preference for a lost profits calculation in circumstances where such a calculation is possible.[33]

78. As is normally the case, the plaintiff has a burden to establish that the future loss of profits would have occurred on the balance of probabilities. However, courts have accepted that the calculation of future profits must, to some extent, be a matter of speculation or estimate. As Lord Watson observed of the calculation of lost profits in *The United Horse-Shoe and Nail Co. Ltd.* v. *Stewart*[34]:

> "That must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the [plaintiff's] sales and profits"[35]

79. On the other hand, the plaintiff must bring forward the best possible evidence concerning the nature and extent of the lost profits. If the plaintiff has done so, courts will attempt to make an assessment of the lost profits on the basis of that evidence.

80. The basic approach was described by Cory, J.A. in *Canlin* v. *Thiokol Fibres Canada Ltd.*[36] in the following terms:

> "The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate .... The task will always be difficult but not insurmountable.

---

[33] *MMP GmbH* v. *Antal International Network Ltd.*, [2011] EWHC 1120 (Comm.) at para. 83.
[34] (1888) 13 App. Cas. 401 (H.L.)
[35] *Ibid.*, at p. 413.
[36] (1983), 40 O.R. (2d) 687 (C.A.).

> It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.[37]

81. Similarly, in *Houweling Nurseries Ltd.* v. *Fisons Western Corp.*,[38] McLachlin, J.A. as she then was, rejected the Defendant's objection that the future profits claimed by the plaintiff were too speculative and observed as follows:

> "In my view, the law may be summarized as follows. The basic rule is that damages for lost profits, like all damages for breach of contract, must be proven on a balance of probabilities. Where is it shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profits, that sum should be awarded."[39]

ii. Tort

a) The Basic Principle for Calculating Damages in Tort

82. The general principle underlying a calculation of damages in tort law is generally considered to be different in an important respect from the general principle for calculating damages in contract law. As we have seen, the basic principle in contract law provides for the awarding of expectancy damages, which attempt to place the plaintiff in the position the plaintiff would have been in if the contract had been performed. In tort law, on the other hand, the goal of compensation is to restore the plaintiff to the position the plaintiff would have been in had the tort not occurred. This distinction has been confirmed on the level of general

---

[37] *Ibid.*, at 691. See also *Robert McAlpine Limited* v. *Byrne Glass Enterprises Limited* [2001] O.J. No 403 (C.A.); *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.* (2004), 357 A.R. 139 (C.A.), leave to appeal to SCC refused, [2004] S.C.C.A. No. 543.
[38] 1988, 49 D.L.R. (4th) 205, (B.C.C.A.).
[39] *Ibid.*, at pp. 210 -11.

principle by the Supreme Court of Canada in *BG Checo International Ltd.* v. *BC Hydro Authority.*[40]

83. As we shall see, however, the fact that tort damages are calculated on the basis of a different basic principle than are contract damages does not mean that tort damages may never include lost future benefits including lost profits. On the contrary, such losses are fully compensable in various tort contexts. A leading Canadian text on recovery for economic loss in Canadian tort law makes this point in the following terms:

> "The fundamental difference between the assessment of damages in tort and in contract lies in the difference between a contract duty and a tort duty. In contract, the defendant's duty is to perform the obligations undertaken. In tort, the duty is not to injure. The question of what the plaintiff's position would have been if the defendant had not broken the duty therefore becomes, in contract: "What would the plaintiff's position have been if the defendant had performed the contract?" In tort, however, the question is: "What would the plaintiff's position have been if the defendant had not committed the tort?"
>
> From this flows the difference between the two measures of damages. Contract damages, in principle, compensate the plaintiff for the loss of an expected gain, namely, the profit that would have been made if the defendant had performed the contract. Tort damages compensate the plaintiff for the actual harm done by the defendant's tortious act or omission. This generalization does not always hold true. Sometimes, contract damages are based on actual loss and tort damages are based on lost expected gains. But these anomalies are apparent, not real. They are consistent with the ground rules that contract damages give the plaintiff the benefit that would have been obtained from performance, whereas tort damages make good the detriment caused by the tort. Giving the

---

[40] [1993] 1 S.C.R. 12 at p. 37.

> plaintiff the benefit of performance often requires that losses actually incurred be made good and compensating the plaintiff for the injury caused by the tort sometimes requires that the award include profits that the tort prevented the plaintiff from earning."[41]

84. In cases where tort principles allow for the recovery of future losses, including lost profits, the two different measures of relief in contract and tort may be said to converge or coincide.

85. The basic principle for calculating tort law damages -- that the plaintiff should be restored to the position the plaintiff would have been in if the tort had not been committed -- has the effect that any calculation of tort damages would involve a restoration of the investment loss or out-of-pocket loss sustained by a plaintiff in pursuing an economic opportunity of which the plaintiff was deprived as a result of the defendant's tortious wrongdoing. In what follows, then, attention will be focused on the question of whether, in addition to compensation for lost investment or out-of-pocket expenses, compensation for business or economic losses, including lost profits, may also be recoverable in tort claims under domestic law.

b) Physical Injury or Property Damage and Consequential Economic Loss

---

[41] P.T. Burns and J. Blom, *Economic Interests in Canadian Tort Law*, (Markham, LexisNexis, 2009) at p. 398.

86. Compensation for economic or business losses has long been a feature of tort claims for injuries sustained in the context of claims for damages arising from tortiously caused physical injuries or property damage and, as well, in the context of the so-called economic torts.

87. Thus, in a personal injury case, it is well-established that a claimant can recover consequential economic loss such as a loss of potential future earnings resulting from the injury.

88. Where an individual, as a result of tortiously caused disablement, has suffered a loss of earning capacity that will endure on into future years, the normal method of calculating the value attributable to that loss is to estimate the plaintiff's probable annual lost earnings or income, the number of years during which the loss is likely to extend, and to multiply one figure by the other.

89. In making such calculations in personal injury cases, a number of difficulties may arise in making such estimates, especially where the disabled individual is a young person at the time of the physical injury. Nonetheless, estimating such matters as probable earning capacity, probable annual income in the future, probable life-expectancy and so on must be undertaken. A calculation is then made of the present value of the projected income stream. Presumably, it is for this reason that Cory, J.A. observed in the *Canlin* case,[42] as quoted above, that

---

[42] *Supra*, note 31.

an assessment of future lost profits in a contracts case may be difficult but that it "poses no greater obstacle than the assessment of general damages in a serious personal injury claim."[43]

90. Similarly, in a claim for damages resulting from tortiously-caused property damage, claims for consequential economic loss may be coupled with the claim for compensation for the property damage itself. Thus, for example, where the property damage is occasioned to a chattel that is used for earning profits, a claim for the lost profits suffered by the victim is permitted.

91. In *Pacific Elevators Ltd.* v. *Canadian Pacific Railways Co.*,[44] for example, the Plaintiff's unloading facilities at its grain elevators were damaged by the negligent act of the Defendant's employees. The Plaintiff successfully claimed for the profits lost as a result of the reduced unloading capacity that arose during the repairs to the facilities.

c) Pure Economic Loss

92. Compensation in tort for "pure" economic losses, that is to say, economic losses sustained in the absence of physical injury or property damage, was available historically in the context of the so-called "economic torts", such as the tort of inducing breach of contract.

---

[43] *Ibid.*, at 691.
[44] [1974] S.C.R. 803.

93. More recently, compensation for pure economic loss caused by negligent conduct has likewise been recognized. Such losses first became recoverable in claims for negligent misstatement in the latter half of the past century.[45] More recently, and as noted above, further types of claims for pure economic loss resulting from negligent conduct have been recognized in Canada, some of which will be considered further below.

94. Two different types of compensable economic injuries that may arise in the context of claims for pure economic loss were described in a leading Canadian text on the subject in the following terms:

> "Pure economic loss is an adverse impact on the plaintiff's financial position. That position, to the extent that it does not depend on the health of the plaintiff or the possession or physical integrity of the plaintiff's tangible property, can depend on only two things – the value of the assets (in the broadest sense) the plaintiff has and the expected profitability of the plaintiff's economic transactions (working, operating a business, investing in something, receiving a gift).
>
> Pure economic loss from simply a change in value of the plaintiff's asset is an everyday occurrence. It can happen simply by changes in the market from shifts in supply and demand. It can happen also because of the impact that somebody's activity has on the value of the plaintiff's asset ...
>
> In other words, this source of pure economic loss lies in changes in the market conditions for the plaintiff's asset, however those changes are brought about.
>
> Reduced profitability of the plaintiff's economic activities, the other source of pure economic loss, has to do with alterations in the

---

[45] *Hedley Byrne & Co.* v. *Heller & Partners Ltd.,* [1964] A.C. 465 (H.L.).

> conditions for those activities including the plaintiff's own ability to engage in the activity or understand it properly. Had conditions not be altered, the plaintiff would have realized a gain of X; because conditions were altered, the plaintiff realized a gain less than X, or an actual loss."[46]

95. To apply the tort principle of compensation requires a court to ask what the plaintiff's economic position would have been if the tort had not occurred. This will often lead to a different calculation than if the contract principle were applied, namely, to ask what position the plaintiff would have been in if the contract had been performed. However, it remains the case that where the economic injury sustained from the tort involves the loss of future earning capacity, the two measures may be seen to converge.

d) The Economic Torts

96. The so-called "economic torts" include inducing breach of contract, civil conspiracy, intimidation and intentional cause of economic harm by unlawful means.[47] Loss of future profits can be included in calculations of tort damages in this context.

97. For example, in the context of the tort of inducing breach of contract, it is well established in Canadian law that "the quantum of damages recoverable for the tort of inducing breach of contract is [at least] equal to the contractual damage

---

[46] P.T. Burns and J. Blom, *supra,* note 41, pp. 2-3.
[47] *Ibid.*, c. 6.

flowing from the breach".[48] Where the defendant has tortiously brought about or induced a breach of the plaintiff's contract with a third party, thus depriving the plaintiff of the profits that would have been made on that contract, the tort claim compensates for the loss of profits on that transaction.

98. Briefly stated, the tort of inducing a breach of contract involves a willful interference by the defendant in a contractual relationship between the plaintiff and a third party. In the typical case, the interference leads to the termination of the contractual relationship between the plaintiff and the third party.

99. It is well-established that the damages recoverable in the tort claim for inducing the third party's breach of contract include the plaintiff's economic loss, *i.e.*, the expectancy on the contract with the third party.

100. In *Kepic* v. *Techumseh Road Builders et al,*[49] for example, the Defendant induced a third party to improperly terminate the Plaintiff's contract with that third party. The agreement provided that the Plaintiff was entitled to a fifty percent share of the revenues earned by the Defendant on the project in question. The Plaintiff was held entitled to a full accounting of the profits that it would have made under the agreement with the third party.

---

[48] *Kepic* v. *Tecumseh Road Builders* (1987), 18 C.C.E.L. 218 at 222 (Ont. C.A.).
[49] *Ibid.*

101. In *Goldsoll* v. *Goldman*,[50] the Defendant induced the seller of a business to the Plaintiff to breach the restraint of trade provisions given by the seller in the sale agreement and to set up a business competitive with the business that was purchased by the Plaintiff. The Plaintiff recovered the profits lost as a result of the competition.

102. Similarly, in *The Kaliningrad,* [51] the Defendant induced a breach of the Plaintiff's sub-charter of a vessel from the Charterer. The loss of the vessel resulted in the Plaintiff suffering a loss of business. The resulting lost profits were recoverable.

103. In this context, claims for lost profits may include profits that, but for the tortious interference, could have been enjoyed in dealings with others. Thus, in *Jones* v. *Fabbi*,[52] the Plaintiff successfully claimed for the profits it would have enjoyed on contracts with third parties, the breach of which was induced by the Defendant. The Plaintiff also recovered the profits it could otherwise have made with yet other third parties. The court accepted the Plaintiff's submission that if the original agreements had not been disturbed by the Defendant, the Plaintiff could have used them as a base of operation for extending his business to a further and identifiable set of customers.

---

[50] [1914] 2 Ch. 603 (Ch), affd [1915] 1 Ch. 292 (C.A.).
[51] [1997] 2 Lloyd's Rep. 35.
[52] (1973), 37 D.L.R. (3d) 27 (B.C.C.A.)

104. Similarly, in the context of the tort of intimidation, the plaintiff's lost future profits would be compensable. The tort typically arises in circumstances where the defendant has threatened a third person and thereby interfered with that third person's contractual relations with the plaintiff. The plaintiff's lost income or future profits resulting from the interference would form the subject-matter of the damages claim.

105. In *Morgan* v. *Fry*,[53] for example, the Plaintiff was dismissed from his position of employment by his employer as a result of the employer being intimidated by the Defendant. The Plaintiff recovered at trial the difference between his former wages and his current (reduced) wages. The Court took into account the likelihood that he would probably not have remained in his former position for a period of more than five years. Although the Court of Appeal reversed on the liability issue, it agreed with the damages question.[54]

106. In *Mintuck* v. *Valley River Band et al.*[55], the Plaintiff farmer had entered into a lease with the Crown of farmland located on a reserve of the Defendant Band. Shortly after signing the lease, leadership of the Band changed, and the Plaintiff began to experience harassment and intimidation by Band members in which the Band was complicit. The Plaintiff was forced, in effect, to abandon the farming

---

[53] [1968] 1 Q.B. 521 (Q.B.) 521 (Q.B.) reversed only as to liability [1968] 2 Q.B. 710 (C.A.)
[54] [1968] 2 Q.B. 710 (C.A.).
[55] [1976] 4 W.W.R. 543 (Man. Q.B.), aff'd (1977), 75 D.L.R. (3d) 589 (Man. C.A.)

operation only a few years into the ten year lease. The trial judge held that the Band had committed the tort of intimidation and awarded damages, including an amount that represented the profits the Plaintiff would have enjoyed during the unexpired portion of the term.

107. A similar award was made against a public authority in *Gershman* v. *Manitoba Vegetable Producers' Marketing Board.*[56] There, the Defendant Board improperly "black-listed" the Plaintiff, resulting in his forced dismissal from employment by a wholesaler dealing with fruits and vegetables. The trial judge conceded that it was "difficult to accurately assess the amount of damages the Plaintiff has and will suffer as a result of this interference by the Board"[57], which could be "incalculable or it could be limited, depending on his ability to re-establish himself."[58] In the face of this uncertainty, the court made an award of $35,000.00 in general and punitive damages. The award was affirmed on appeal.[59]

108. Claims for business loss including lost profits may also arise in the context of the tort of civil conspiracy.

---

[56] [1976] 2 W.W.R. 432 (Man. Q.B.) aff'd [1976] 4 W.W.R. 406, (Man. C.A.)
[57] [1976] 2 W.W.R. 432 (Man. Q.B.) at p. 444.
[58] *Ibid.*
[59] [1976] 4 W.W.R. 406 (Man. C.A.)

109. In *Trim Trends Canada* v. *Diomatic Metal Products Ltd. et al,*[60] for example, a senior and trusted employee of the Plaintiff secretly conspired with others to establish a business competitive with that of the Plaintiff. The Plaintiff was awarded damages in an amount intended to represent the Plaintiff's loss of business resulting from the tortious misconduct.

110. In *Dusessoy's Supermarkets* v. *Retail Clerk's Union, Local 832, et al,*[61] the tortious conspiracy consisted of the secondary picketing of the Plaintiff retailer, which was a customer of the Defendants' employer. The objective was to inflict a loss of revenue on the Plaintiff in order to bring pressure to bear on their employer. The Plaintiff was held entitled to recover the revenues lost as a result of the secondary picketing.

111. In *British Midland Tool Ltd.* v. *Midland International Tooling Ltd.*,[62] a conspiracy was undertaken by a group of directors and employees of the Plaintiff's company who set up a business competitive to that of the Plaintiff. As a result, the Plaintiff's business failed. The Plaintiff successfully claimed for the loss of the business, trading losses and closure costs. With respect to the first item, the court held that the correct method of determining an appropriate quantum for the

---

[60] (1967) 53 C.P.R. 245 (Ont. H.C.J.)
[61] [1961] M.J. No. 46, 30 D.L.R. (2d) 51 (Man. Q.B.).
[62] [2003] EWHC 466, [2003] 2 B.C.L.C. 523 (C.A.)

valuation of the business was to determine the "ongoing maintainable earnings"[63] of the business and to apply to that amount an appropriate multiplier.

112. Lost wages resulting from a civil conspiracy are also recoverable. In *Evaskow* v. *International Brotherhood of Boilermakers et al,*[64] the Defendants conspired to remove the Plaintiff from a union office. The Plaintiff was awarded the difference between his wages as a mechanic and the amount he would have received as secretary-treasurer and business manager of the union.

113. The fourth of the economic torts is usually referred to as "causing loss by unlawful means" or "unlawful interference with economic relations" or, more simply as the "unlawful means tort." Historically, the correct formulation and scope of the tort – in particular, the test for the element of "unlawfulness" and the precise nature of the intention of the defendant that is necessary to establish liability – have been the subject of much contention. Indeed, the very existence of the tort has been the subject of contention in several common law jurisdictions.[65]

114. In its recent and important decision in *A.I. Enterprises Ltd.* v. *Bram Enterprises Ltd.*[66], however, the Supreme Court of Canada both confirmed the existence of the tort and clarified the nature of its essential elements. The tort is engaged by the "intentional infliction of economic injury on C (the Plaintiff) by A (the

---

[63] *Ibid*, paras. 202 and 211.
[64] (1969), 9 D.L.R. (3d) 715 (Man. C.A.).
[65] See, generally, Burns and Blom, *supra* note 41, c.6.
[66] [2014] 1 S.C.R. 177 (S.C.C.).

Defendant)'s use of unlawful means against B (the third party)."[67] The tort is thus parasitic upon the defendant's unlawful act against a third party and, in effect, stretches liability of the Defendant for that unlawful activity beyond the third party to the Plaintiff who was intended by the Defendant to be harmed or targeted by the unlawful act.[68]

115. As far as the elements of the tort are concerned, the Supreme Court resolved longstanding controversies in two respects. First, the Court held that the unlawful means is established only where the acts of the Defendant "would give rise to civil liability to the third party (or would do so if the third party suffered loss from them)."[69] This test thus excludes from the definition of unlawful means both criminal offences and other breaches of statute that, in either case, do not subject the perpetrator to civil liability to the third party. As far as the element of intention is concerned, the Court held that the Defendant must be found to have either intended to cause economic harm to the Plaintiff as an end in itself, or must have intended such harm as a necessary means to an end that serves an ulterior motive (such as enriching himself).[70]

---

[67] *Ibid*, at para. 23.
[68] *Ibid*, at para. 37.
[69] *Ibid*, para. 74.
[70] *Ibid*, paras. 95-96.

116. Claims for business loss, including lost profits, may also be successful on the basis of this economic tort. In *Alleslev-Krofchak* v. *Valcom Ltd.*[71], for example, the Plaintiff claimed for profits lost as a result of the termination of her employment contract with a third party as a result of the unlawful conduct of the Defendant. The third party had contracted to supply certain services to the Defendant on a particular project. Under a contract between the third party and the Plaintiff, the services were to be performed by the Plaintiff. The Plaintiff not only suffered the economic losses resulting from her removal from that particular project but, as well, economic losses flowing from the fact that if she had not been terminated by the third party, she would have worked on other projects for that third party. Compensation for both types of losses was awarded. In circumstances where future economic losses are foreseeable but difficult to determine, it is well accepted that an award of general damages is permissible.[72] Such damages are awarded for "other than pecuniary loss and generally include compensation for loss of reputation, injured feelings, bad or good conduct by either party or punishment."[73]

---

[71] 2010 ONCA 557.

[72] *Grand Financial Management Inc.* v. *Solemio Transportation Inc.* 2016 ONCA 175 (395), D.L.R. (4th) 529 (Ont. C.A. at para. 87 *per* Blair J.A. ("Generally speaking, they are compensatory for loss which can be foreseen, but not easily quantified.")

[73] *Howard* v. *Madill* 2010 BCSC 525 (CanLII) (B.C.S.C.) at para. 89.

117. The question of liability for tortiously caused economic loss was not dealt with directly by the Supreme Court of Canada in its decision in *A.I. Enterprises Ltd.* v. *Bram Enterprises Ltd.*[74] since the Court held that the unlawful means tort had not been committed on the facts of that case. In the decisions below, however, the courts found that the tort had indeed been committed and awards were made for profits that were lost as a result of the Defendant's tortious interference with a proposed sale of a building by the Plaintiffs to a third party. The trial judge awarded the Plaintiffs the profits they would have made on the proposed sale. This holding was affirmed by the New Brunswick Court of Appeal. In the decision of the Supreme Court of Canada, the Court grounded liability on the trial judge's alternative holding that the Defendant (who ultimately acquired the building at a price much less than the proposed sale price), had engaged in a breach of fiduciary duty owed to the Plaintiffs and was, for this reason as well, liable for the same amount. On appeal to the Supreme Court, it appears to have been accepted that the same amount could be awarded "[w]hether the compensation is viewed as being aimed at restoring the Respondent's loss or requiring the Appellants to disgorge the gain obtained by [the Defendant's] breach of fiduciary duty."[75]

---

[74] *Supra*, footnote 66.
[75] *Ibid.*, at para. 105.

118. Liability for economic loss, including lost profits, thus appears to be treated in the context of the unlawful means tort in the same manner as it is in the context of the other economic torts. Such losses are recoverable. This is not surprising as the torts are inter-related and will often overlap in their application to particular fact situations.[76]

e) Pure Economic Loss Caused by Negligence

119. Compensation for lost opportunities to make a profit may also arise in the context of claims for pure economic losses in the context of the tort of negligence.

120. Such a claim was allowed, for example, in the context of a claim for damages for negligent misrepresentation by the Supreme Court of Canada in *V.K. Mason Construction Ltd.* v. *Bank of Nova Scotia.*[77] In this case, the Plaintiff construction company had relied on what proved to be negligent misrepresentations made with respect to the credit-worthiness of a third party developer by the Defendant bank. The Plaintiff had relied on the misrepresentations when entering into what proved to be an unprofitable construction contract with the third party. The Plaintiff brought a claim in tort seeking both its out-of-pocket loss on the

---

[76] See, e.g. *Alleslev-Krofchak* v. *Valcom Ltd. supra*, note 71. And see two of the cases awarding such losses in the context of the tort of intimidation discussed above which express, in *dicta*, support for the existence of the unlawful means tort: *Mintuck* v. *Valley River Band, supra,* note 55, at p. 600 *per* Matas J.A.; *Gershman* v. *Manitoba Vegetable Producers' Marketing Board, supra*, note 56, at p. 409 *per* O'Sullivan J.A.

[77] [1985] 1 S.C.R. 271.

construction contract to date and the profits it would have made if it had successfully completed the contract.

121. On the eventual appeal to the Supreme Court of Canada, the Court allowed both claims. Wilson J. reasoned as follows:

> "The Bank concedes that in principle the proper aim of a damage award is to restore the plaintiff to the position in which he would have been if the negligent misrepresentation had never been made (....) What we have to assume, I believe, is that but for the misrepresentation Mason would have ceased work for [the third party], recovered its expenses for work already done and found another construction project to work on.
>
> The learned trial judge awarded damages for misrepresentation on the basis that they were equal to contract damages minus Mason's anticipated profit. Counsel for Mason submits that the trial judge was wrong in subtracting the anticipated profit because damages in contract and tort are the same (....) While I tend to the view that there is a conceptual difference between damages in contract and in tort, I believe that in many instances the same quantum will be arrived at, albeit by a somewhat different route.
>
> I agree with the submission of counsel for Mason that the trial judge was wrong in subtracting profit. I believe that in principle one is entitled to assume that Mason would have found a profitable means of employing itself had it not been induced to work on the [third party] project by the Bank's misrepresentation. This, in my view, is a reasonably foreseeable head of damage .... In equating Mason's lost profit with the profit estimated on the [third party] project we are simply saying that this is a reasonable estimate of what Mason would have been likely to have made if it had decided to abandon the [third party] project and find other work. This is to say, the lost profit on this contract represents the lost opportunity for profit on any contract."

122. In the *Mason* case, then, the premise underlying the tort calculation of damages was that the Plaintiff suffered an injury in the form of a foregone opportunity to

make a similar profit in dealings with other parties. The profits lost on the existing contract with the third party were considered to be the best evidence of the profits foregone on substitute work. The tort damages awarded in this case thus comprised both the out-of-pocket losses on the work done on the current contract and the profits that would have been made on that agreement.

123. A similar claim was allowed by the Ontario Court of Appeal in *Orr* v. *Metropolitan Toronto Condominium Corp. No. 1056*.[78] There, the Plaintiff had purchased a condominium in reliance on the Defendant's negligent representation that the unit contained three floors. The Plaintiff invested in renovations in the expectation of reselling it as a three-storey unit. The representation was negligently false as the third storey was illegally constructed. Relying on *Mason*, the Court of Appeal awarded damages reflecting the loss the Plaintiff suffered by not having the opportunity to profit from the sale of the unit as a three-storey unit.

124. One of the categories of claims for pure economic loss recognized in the modern Canadian jurisprudence, as noted above, relates to the negligent supply of defective products and structures. Compensation for lost opportunity to make future profits has also arisen in this context. In *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*,[79] the defective products manufactured by the

---

[78] 2014 ONCA 855 (CanLII) (Ont. C.A.)
[79] (2004), 245 D.L.R. (4th) 650 (Alta. C.A.) at paras. 140-45, leave to appeal refused (2005), 1 S.C.R. ix (note) (S.C.C.).

Defendant and sold to the Plaintiff resulted in the Plaintiff being forced out of business. Damages were awarded on the basis of expert evidence as to the opportunities that would otherwise have been available to the Plaintiffs over the next five years of an anticipated oil and gas boom in Alberta and as to the profits the Plaintiffs would likely have enjoyed during that period.

125. A third category of claim in which modern Canadian jurisprudence allows the recovery of pure economic loss caused by negligence relates to what is often referred to as the "independent liability of statutory public bodies." It is well established that, depending on the circumstances, a public body that negligently exercises its powers with the result that it causes pure economic loss to a party may be liable in a tort claim to compensate for the loss caused.

126. The recent decision of the Federal Court of Appeal in *Paradis Honey Ltd., Honey Bee Enterprises Ltd., and Rock Lake Apiaries Ltd.* v. *Her Majesty the Queen (Minister of Agriculture and Agri-Food and the Canadian Food Inspection Agency)*[80] concerned a motion to strike a proposed class action by a group of commercial bee keepers who rely on the importation of honey bees from the United States to replace colonies lost because of winter weather and for other reasons. The gravamen of the bee keepers' complaint was that since 2007 the

---

[80] 2015 FCA 89 (Fed. C.A.).

Respondents had improperly adopted a blanket guideline excluding the importation of American honey bees.

127. On the merits of the claim asserted in *Paradis Honey,* the Federal Court of Appeal held that the claim for the economic or business loss that resulted from the regulatory negligence of the Defendant could proceed, and that if the claim succeeded damages would be calculated on the basis of "a but for world where the blanket guideline did not exist."[81]

128. The Court of Appeal did not discuss in detail the nature of the appropriate calculation of damages, but it seems apparent that it would necessarily involve an estimate of the cost savings that would otherwise have been enjoyed by the farmers importing bees from the United States, or what would appear to be an equivalent calculation, the increased profits that would have been enjoyed if importation had been permitted. In other words, this appears to be another situation in which contract and tort principles converge.

129. Although many of the relatively small number of cases imposing liability for negligently caused pure economic loss on public authorities do not involve business or economic loss, there are fact situations in which such losses are likely to occur. *Paradis Honey* is obviously one of those.

---

[81] *Ibid.*, at para. 101.

130. Another illustration of a factual situation in which a business loss is likely to be the subject of such a claim would be a case in which a business person is carelessly denied a license to conduct a business. In such circumstances, the disappointed applicant is likely to pursue a claim for the profits that would have been made if the license had been granted.

131. Such a claim succeeded, for example, in *Keeping* v. *Canada (Attorney General)*.[82] In this case, the Plaintiff was improperly denied a supplementary crab fishing license as a result of the negligence of one of the Defendant's employees. The Plaintiff was awarded the lost profits that would have been earned if the license had been properly issued.

132. In sum then, in the context of the various categories of claims for pure economic loss caused by the defendant's negligence, the plaintiff may recover future profits lost as a result of the defendant's carelessness.

f) Misfeasance in a Public Office

133. A further source of tort liability affecting public authorities concerns the modern or recently-revived tort of misfeasance in a public office. The misfeasance tort is established when a public official intentionally engages in wrongful conduct that injures another.

---

[82] (2003), 16 2003 NLCA 21 (CanLII), C.C.L.T. (3d) 250 (Nfld. C.A.).

134. There are two forms of the tort that in turn pertain to two different forms of wrongful conduct. The first occurs where a public official acts, even within its statutory authority or power, for the improper purpose of injuring the plaintiff. These are cases of so-called "targeted malice". The second occurs in the absence of "targeted malice", where the public official knowingly acts unlawfully in the sense of knowingly acting without the authority to do so and does so knowing that the act would probably injure the plaintiff. It is important to note, however, that the test of knowledge or intent as an element of this tort has been liberalized in recent years. In these cases of "deliberate unlawfulness", the requisite level of intention is met if the public official either acts with knowledge of the unlawfulness of the act and the probability of injury to the plaintiff, or, alternatively, if the public official is recklessly indifferent as to the legality of the act and its probable outcome. In other words, a state of mind of subjective indifference to legality and outcome is sufficient to meet the test.

135. In the leading case of *Odhavji Estate* v. *Woodhouse*[83], the Supreme Court of Canada articulated the wrongful conduct element of the tort as requiring either the unlawful exercise of a statutory or prerogative power or the intentional breach of a statutory duty.

---

[83] [2003] 3 S.C.R. 263.

136. A leading Canadian authority that played an important role in recognizing the existence of the tort was the 1959 decision of the Supreme Court of Canada in *Roncarelli* v. *Duplessis*.[84] In this famous case, the Plaintiff was the proprietor of a restaurant. He alleged that the Defendant Duplessis, who at the time was the Premier and Attorney General of Quebec, had arranged to have his liquor license cancelled by the Quebec Liquor Commission. The Plaintiff further alleged that the Premier did so in order to punish the Plaintiff for his involvement in acting as bailsman for fellow members of the Jehovah's Witnesses religious sect who had been charged with by-law infractions for distributing religious literature. Although pleaded under the Civil Code of Quebec, it is widely accepted that the judgment is consistent with the common law tort of misfeasance in public office.

137. The Plaintiff's claim in this case enjoyed success and Mr. Roncarelli was awarded damages that were intended to compensate him for "diminution in the value of the goodwill of the business and for loss of future profits".[85]

138. In a leading British authority that played an important role in establishing the tort of misfeasance in public office in that jurisdiction, the claim related to lost profits. In *Bourgoin SA* v. *Ministry of Agriculture,*[86] a claim was brought by French turkey producers to recover lost profits on the basis that a general import license had

---

[84] [1959] S.C.R. 121.
[85] *Ibid.*, at p. 187 *per* Rand J.
[86] [1986] Q.B. 716 (C.A.)

been improperly revoked by the Defendant, with the result that they were unable to sell their product in Britain. The producers claimed for their lost profits. The Defendant sought to strike the claim as not disclosing a cause of action but that motion was dismissed. Although the court was not required to rule on the question of damages, there would seem to have been little point in permitting the claim to proceed if such a claim for lost profits was untenable.

139. In an Australian authority, *Farrington* v. *Thomson,*[87] a claim for business losses caused by misfeasance in a public office also enjoyed success. The plaintiff hotelier suffered business losses, including lost profits, when a licensing inspector tortiously closed down the bar at his hotel. The hotelier was held entitled to recover the economic losses resulting from the closure of the bar.

140. Similarly, the leading modern British authority, *Three Rivers District Council* v. *Bank of England* [88] affirmed the availability of the misfeasance tort claim in the context of a claim for business losses. In an action brought on behalf of the depositors in a failed bank, the Bank of England was held to be guilty of misfeasance in public office for its licensing and subsequent failure to revoke the license of the ultimately failed bank.

---

[87] [1959] V.R. 286 (V.S.C.).
[88] [2003] 2 A.C.1.

141. In summary, it appears to be accepted in the context of the misfeasance tort that claims for economic loss, including lost profits, will lie.

142. We may note that the claim for damages for misfeasance in public office may arise in circumstances where the impugned conduct of a public official could also give rise to a court application for judicial review of the conduct in question. This possibility might also arise in the context of other tort claims brought against public officials. In *Canada (Attorney General)* v. *TeleZone Inc.*,[89] the Supreme Court of Canada has held that a private law claim for tort damages is an alternative form of redress in the sense that it is not a pre-condition of being able to pursue a claim for tort damages that the victim must have first attempted judicial review. Unlike an application for judicial review, the private law damages claim does not attempt to nullify or set aside the conduct of the official in issue. Rather, the private law claim accepts the finality of that conduct and attempts to recover the financial loss thereby caused.[90]

g) Conclusion Concerning Lost Profits

143. From the foregoing analysis of a variety of torts, then, one can conclude that the concept of "compensable loss" in the context of the Canadian common law of

---

[89] [2010] 3 S.C.R. 585 (S.C.C.).
[90] *Ibid.*, at para. 79.

torts can encompass claims for economic loss including lost profits resulting from a tortious wrong. In *Wiebe* v. *Grunderson*,[91] Newbury J.A., writing for the majority of the British Columbia Court of Appeal, concluded her analysis of the lost profits claim in the following terms:

> "Thus despite my misgivings about the co-existence, in conceptual terms, of the right to recover 'hypothetical' lost profits and the traditional formulation of the measure of damages in tort, it would seem that the trend in Canada and elsewhere is to de-emphasize one particular "measure" or another and to strive for an award that in broad and practical terms compensates the plaintiff for all aspects of his or her loss flowing from the fraud, without being overly restricted by the nature of the cause of action. I will therefore proceed on the basis that the plaintiffs here may claim, and the court may award, damages to compensate for lost profits to the extent they are proven to have resulted directly from the defendant's fraud, and subject to the usual rules of mitigation."[92]

C. Causation

i. Contract

144. The initial threshold that must be met by a plaintiff in establishing a claim for damages for breach of contract is to demonstrate on a balance of probabilities that the defendant's breach of contract caused a loss suffered by the plaintiff for which damages are being sought. In other words, the plaintiff must prove that "it is 'more probable than not' that the defendant's breach of duty caused the loss".[93]

---

[91] 2004 BCCA 456 (B.C.C.A.).
[92] *Ibid.*, para. 40.
[93] J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages*, 3d ed. (Toronto, Irwin Law, 2014) p. 363.

In the usual case, causation is applied on the basis of a "but for" test. That is, one asks, "But for the defendant's breach, would this loss have occurred?"

145. Complications may arise in the application of the "but for" test in cases where it may be argued that the effective cause of the loss results from an intervening act or circumstance for which the defendant is, in some sense, not responsible. In such circumstances, even though it may be argued that "but for" the defendant's breach of contract, the plaintiff would not have been in a position to be subjected to the intervening act or circumstance, the defendant may be able to argue that he or she should not be liable for losses caused by the intervening act or circumstance. As is often said, the defendant may argue that the "chain of causation" has been broken by the intervening act or circumstance.

146. Although it is often said that problems of causation of this kind can be analyzed on the basis of "common sense", the analysis of cases involving intervening causes is a matter of some subtlety.

147. Cases involving intervening acts or circumstances raise no difficulty where the intervention is directly caused by the plaintiff's contractual breach. In such cases, the question of causation is rarely discussed. The more difficult cases are those in which the intervention is, in some sense, independent of the conduct of the defendant. In such cases, however, the possibility remains that the conduct of the defendant will be held to have caused the loss resulting from the intervening act or circumstance.

148. One type of case involving an intervening cause that clearly does not break the chain of causation arises in situations where the intervening cause is an intentional act of a third party who directly causes the injury but where, as well, the purpose of the contractual obligation breached by the defendant was to prevent or take care that such an act by a third party does not occur.

149. A simple illustration of this type of problem is found in the well-known decision in *De la Bere* v. *Pearson*.[94] The defendant newspaper publisher had offered to provide advice to readers with respect to the identity of suitable stockbrokers. Without making sufficient investigation, the defendant recommended to the plaintiff reader an unscrupulous and ultimately insolvent stockbroker who misappropriated the reader's funds. The defendant was liable for a loss which was, in some sense, caused by the intervening acts of the stockbroker. The defendant's contractual obligation to provide sound advice was intended to prevent such outcomes, however, and the defendant was therefore liable for the resulting loss.

150. An example of an intervening act of a third party that would break the causal chain is provided by the decision of the Supreme Court of Canada in *Canson Enterprises Inc.* v. *Boughton & Co.*[95] In this case, a member of the defendant

---

[94] [1908] 1 K.B. 280 (C.A.)
[95] [1991] 3 S.C.R. 534 (S.C.C.)

law firm failed to disclose to the client, the plaintiff purchaser of realty, that the property was being "flipped" through a third party to the claimant. The non-disclosure was arguably a breach of fiduciary obligation owed to the client and certainly amounted to a breach of contract. It was accepted at all levels of adjudication that if proper disclosure had been made, the client would not have made the purchase. The plaintiff claimed, however, not only for the inflated cost of the property, but, as well, for losses resulting from the fact that plaintiff's attempt to develop the property was frustrated by defective construction work by a third party it had retained. The construction company was unable to satisfy the plaintiff's claim and the plaintiff sought further reimbursement from the defendant law firm. The plaintiff argued that "but for" the defendant's breach, it would not have purchased the property and would not have engaged in the ill-fated construction project. The Supreme Court of Canada held that the construction losses, on a "common sense view of causation"[96] were not caused by the defendant law firm's breach of contract and the construction losses were therefore not recoverable against the firm.

151. In other cases, where the direct or effective cause may be considered to be an intervening event of some kind, the question as to whether the causal chain is

---

[96] *Ibid.*, at p. 556.

broken rests on a consideration of whether the intervening event was a foreseeable one.

152. A leading illustration of this second type is the leading decision of the House of Lords in *Monarch S.S. Co.* v. *Karlshamns Oljefabriker.*[97] This claim arose in the context of a charterparty in which the defendant failed to supply in timely fashion a seaworthy ship for carriage of the plaintiff's cargo to Sweden. The outbreak of the Second World War occurred during the delay, with the result that the voyage became impossible. The House of Lords was of the view that the outbreak of war was reasonably foreseeable and, accordingly, that the causal chain was not broken. The court distinguished intervening events such as lightning strikes and typhoons which would break the causal chain. In such cases, the consequences of the intervening event could not be visited upon the defendant in damages.

153. Cases involving losses caused by market forces that depreciate the value of an asset of the plaintiff that the plaintiff acquired as a result of the defendant's contractual breach raise similar problems. Again, resolution of these issues is normally seen to turn on determining whether the loss was reasonably foreseeable at the time of contracting.

---

[97] [1949] A.C. 195 (H.L.)

154. In the nineteenth-century English decision, *Waddell* v. *Blockey*[98], the plaintiff purchased rupee paper from the defendant, having been fraudulently induced to do so by the defendant's fraudulent representation that the paper was owed by another. Thereafter, the market for rupee paper rapidly declined, causing a loss to the plaintiff. The Court of Appeal dismissed the claim for the loss in value on the basis that there was "no natural or proximate connection between the wrong done and the damage suffered."[99]

155. The *Waddell* decision was reconsidered by the Supreme Court of Canada in *Hodgkinson* v. *Simms.*[100] In that case, the plaintiff was induced to invest in real estate tax shelters by the defendant investment adviser, not realizing that the defendant had a financial interest in the shelters in question in the form of a commission to be paid by the supplier of the shelters. The non-disclosure amounted to a breach of fiduciary duty and also a breach of contract. The plaintiff would not have made the investment if he had known of the defendant's interest. Subsequently, the value of the investments fell as a result of a decline in the real estate market.

156. A majority of a divided court held that there was a sufficient causal connection between the defendant's breach and the loss in value. La Forest J., in

---

[98] (1879), 4 Q.B.D. 678 (C.A.).
[99] *Ibid.*, at p. 682.
[100] [1994] 3 S.C.R. 377 (S.C.C.).

considering the contractual analysis, stated that "it was foreseeable that if the contract was breached, the [plaintiff] would be exposed to market risks ... to which he would not otherwise have been exposed."[101] The *Waddell* decision was rejected by the majority of the Supreme Court of Canada, which stated that it had been overtaken by modern cases.[102]

157. The dissenting minority in *Hodgkinson*, relying on *Waddell*[103], rejected the simple application of the "but for" test and would have held that the critical question was whether the market decline was a reasonably foreseeable consequence of the non-disclosure. In the minority's view, it was not.[104]

158. In cases where the volatility of the market in question is perhaps more well-known, courts appear to have little difficulty in concluding that the loss due to market decline was reasonably foreseeable. In such cases, damages are awarded for the recovery for losses caused by the market decline. Thus, in *Koufos* v. *Czarnikow (C) (The Heron II)*[105] the plaintiff recovered the loss in value of a large cargo of sugar it owned resulting from delayed delivery of the cargo at Basrah, which was caused by the defendant. During the delay, the market price for sugar fell in the Basrah market. The loss was not considered to be too remote

---

[101] *Ibid.*, at pp. 454-55
[102] *Ibid.*, at pp. 447-49
[103] *Ibid.*, at pp. 474-77
[104] *Ibid.*, at pp. 478-79
[105] [1969] 1 A.C. 350 (H.L.).

to be recoverable. Fluctuation up and down in the market price for sugar was reasonably foreseeable.

159. A second aspect of the causation issue was considered by the Supreme Court of Canada in *Hodgkinson* v. *Simms.*[106] The defendant investment adviser had argued that, in all likelihood, if there had been no non-disclosure, the plaintiff would have invested in the real estate market in any event and suffered the same or a similar loss. In other words, the loss was one which the plaintiff would have sustained even if the breach had not occurred. Relying on earlier authority[107] to the same effect, the *Simms* majority held that the burden of proof on such matters falls upon the defendant and that this burden had not been discharged by the defendant in the present case.[108]

ii. Tort

160. As in a contract damages claim, a threshold issue for the plaintiff in a tort claim is to establish that the tortious misconduct of the defendant caused the losses suffered by the plaintiff for which compensation is sought. As in the contracts context, the causation test is usually stated as involving a "but for" test. That is to say, the plaintiff must establish that "but for" the tortious misconduct, the losses sustained would not have occurred. Again, as in the contracts context, a variety

---

[106] *Supra*, note 100.
[107] *Rainbow Industrial Caterers Ltd.* v. *Canadian National Railway Co.* [1991] 3 S.C.R. 3 (S.C.C.) at pp 14 – 17.
[108] *Supra*, note 100 at pp. 441 and 445-46.

of complications can arise in applying the causation test. As in contract cases, where, for example, external or intervening factors have caused some aspect of the loss, difficult questions may arise, but the approach to these problems taken in torts cases is essentially similar to the approach taken in contracts cases. These problems are particularly complex in cases of physical injury and property damage, which is the traditional domain of much of tort law. These issues can also arise in contracts cases and again, the approach taken in both branches of the law is essentially the same. Causation issues arising in the context of physical injuries and property damage need not be further explored here.

D. Mitigation

i. Contract

161. The calculation of expectancy damages for breach of contract is subject to certain limitations, the most important of which for present purposes is a duty on the part of the victim of the breach of contract to mitigate the resulting losses. The victim of the breach cannot recover losses that the victim could have avoided by taking reasonable steps subsequent to the breach. Although sometimes described as a "duty to mitigate", the principle is rather one which simply precludes the recovery of losses that could have been avoided by conduct that could reasonably be required on the part of the victim after the breach occurred. Failure to mitigate is not a breach of a "duty" owed to the party in breach. It

simply precludes the recovery of losses that could reasonably have been avoided.

162. The classic articulation of the rule is that of Viscount Haldane in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Rys. Co. of London Ltd.,*[109] where, in explaining the first principles for calculating damages, he explained as follows:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."[110]

163. It is well-established that the burden of proof in establishing a failure on the part of the plaintiff victim of the breach to take reasonable steps to avoid further losses falls upon the defendant, the party who is in breach of contract.[111]

164. Not only does the burden of proof concerning lack of mitigation fall upon the defendant, the Privy Council has recently indicated in *Geest Plc* v. *Lansiqot*[112] that if a defendant intends to argue failure to mitigate, notice of such intention should be given to the plaintiff in advance of the hearing of the matter. Lord Bingham explained as follows:

---

[109] [1912] A.C. 673 (H.L.)
[110] *Ibid.*, at p. 689.
[111] *Red Deer College* v. Michaels, [1976] 2 S.C.R. 324 at p 331 *per* Laskin C.J.C.
[112] [2002] 1 W.L.R. 3111 (P.C.).

> "It should, however, be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter".[113]

165. It is well established that the standard of reasonableness against which the plaintiff is required to act in mitigating the loss is not a high one. An oft-quoted statement of this point is that of Lord Macmillan in *Banco de Portugal* v. *Waterlow*[114] as follows:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency".[115]

166. Further, in circumstances where there is more than one reasonable course of action that a plaintiff might take in mitigation, it is not open to the defendant to insist that the reasonable steps which are least burdensome to the defendant must be taken by the plaintiff. Thus, immediately following the passage from Lord Macmillan's opinion in *Banco de Portugal* v. *Waterlow* quoted above, his Lordship observed as follows:

---

[113] *Ibid.*, para. 16.
[114] [1932] A.C. 452.
[115] *Ibid.*, at p. 506. And see, *Inland Feeders Ltd.* v. *Virdi* (1981), 18 C.C.L.T. 72 (B.C.S.C.); *Panarctic Oils* v. *Menasco Manufacturing Co.* (1983), 41 A.R. 451 (Alta. C.A.).

> "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."[116]

167. The burden thrust upon the defendant in such circumstances is to demonstrate that the actual steps taken in mitigation by the plaintiff were unreasonable. Thus, in the more recent decision of the English Court of Appeal in *Wilding* v. *British Telecommunications Plc.*,[117] Sedley L.J., after quoting the passage from Lord Macmillan's opinion quoted above in the immediately preceding paragraph, went on to explain as follows:

> "In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable for the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to this duty to mitigate that the defence will succeed."[118]

168. The taking of reasonable steps by the plaintiff may include the acceptance of an offer by the party in breach of continued dealings with that party on revised terms. In the leading case of *Payzu Ltd.* v. *Saunders*,[119] a buyer of goods, confronted by a wrongful breach by the seller with respect to the agreed credit terms, was

---

[116] *Ibid.*
[117] [2002] EWCA Civ. 349 (C.A.).
[118] *Ibid.*, para. 55.
[119] [1919] 2 K.B. 581 (C.A.).

obliged to accept an offer by the seller to continue their relationship on altered terms. The court in that case clearly indicated, however, that such an obligation is not present in all cases and further indicated that in a personal services contract, for example, an employee who is dismissed with a false imputation of wrongdoing would not be obliged to accept an offer of continued employment with the employer. As Bankes, L.J. stated in *Payzu:*

> "There may be cases where as a matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he received from the defendant".[120]

169. This principle is not limited to the employment context. Thus, for example, in a case where fraudulently false warranties were given in a share subscription or investment agreement, it was considered reasonable for the Plaintiff to reject an offer of further dealings from the Defendant, on the basis that the Defendant's conduct demonstrated that the Defendant was not trustworthy.[121]

170. I am not aware of Canadian authority suggesting that the duty to take reasonable steps in mitigation of loss extends to the taking of litigation against the party in breach in an attempt to reduce losses caused by the breach. In the ordinary course, the plaintiff victim will have commenced litigation against the party in breach to recover damages. I am not aware that it has ever been suggested or

---

[120] *Ibid.*, at p. 588. See also Scrutton, L.J. at p. 589.
[121] *Great Future International Ltd.* v. *Sealand Housing Corp.*, [2002] EWHC 2454 (*Ch*) at para. 149, appeal allowed on an evidential point [2002] EWCA Civ. 1183, although the court also held that the offer was not a genuine and credible one.

held in a Canadian case, that a reasonable step that must be taken in mitigation might be to advance a claim for specific performance or for an injunction to prevent or reduce the flow of losses resulting from the defendant's breach. In the context of the sale of land, for example, where the vendor refuses to transfer the subject matter of the sale, it might be that losses could be contained or reduced by the purchaser advancing a successful claim for specific performance. The purchaser is not obliged to do so as a reasonable step in mitigation. The purchaser can walk away from the transaction, as it were, and simply pursue a claim for damages.

171. More particularly, I am not aware of any Canadian authority that suggests that an obligation arises as a reasonable step in mitigation to pursue litigation against the party in breach where the litigation is likely to be complex and uncertain in outcome, and where that party is highly resourced and likely to vigorously defend such a lawsuit, including the possibility of appellate review of any result favourable to the plaintiff up to and including an appeal to the Supreme Court of Canada. In my opinion, it is most unlikely that a Canadian court would determine that such a course of action by the victim of the breach was required as a reasonable step in mitigation.

172. In English cases, the question as to whether a plaintiff could be required, as a reasonable step in litigation, to bring litigation against a third party has been considered.

173. In *Pilkington* v. *Wood*,[122] for example, the defendant solicitor provided careless advice to the plaintiff client with respect to the client's purchase of realty from a third party. When the client attempted to resell the property, he discovered that the title was defective. The defendant argued that the plaintiff should have mitigated his losses by advancing a claim against the original vendor under the covenant for title. Such a burden should be imposed, or so it was argued, where, as in that case, (i) the defendant offered to indemnity the plaintiff for his costs if the claim was unsuccessful, (ii) the third party appeared to be insolvent and (iii) there was a good *prima facie* right of action against the third party.

174. The defendant's argument that the plaintiff was obliged to mitigate by bringing action against the original vendor was rejected by the court in *Pilkington* v. *Wood*. Harman J. conceded that the first two conditions might be met on the facts but suggested that the third was more problematic than the defendant suggested. He noted that the third party would very likely resist the claim. Second, the potential success of the claim was attended "with no little difficulty".[123] He went on to observe:

> "I am of the opinion that the so-called duty to mitigate does not go so far as to oblige the innocent party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party."[124]

---

[122] [1953] Ch. 770.

[123] *Ibid.*, p. 777.

[124] *Ibid.*

175. The *Pilkington* v. *Wood* line of authority is extensive[125] and supports the view that a plaintiff is not required to mitigate losses caused by the defendant by embarking upon complex, difficult and uncertain litigation against third parties, even if the defendant offers to indemnify the plaintiff with respect to any unfavourable costs award in the event that the litigation is unsuccessful.

176. There are English authorities, however, that impose on plaintiffs a duty to embark on litigation against third parties where such litigation was a normal and not difficult method of reducing or eliminating some portion of the loss caused by the defendant. These authorities typically involve defendants who are professional advisers. In *Western Trust & Savings Ltd.* v. *Travers & Co.*[126], for example, in a claim by a mortgage lender against a solicitor for negligent advice concerning the mortgage transaction, the defendant solicitor successfully argued that the lender should have first brought an action for possession of the property against the borrower, since this was a normal and not difficult method of enforcing the security.

177. I am not aware of any English cases, however, where a court has held that it would be considered a reasonable step in mitigation of its loss for a plaintiff to be

---

[125] See, e.g. *Olaffson* v. *Foreign & Commonswealth Office*, [2009] EWHC 2608 QB.
[126] [1997] P.N.L.R. 295 (C.A.).

required to embark on litigation of any kind against the party in breach of the contract whose misconduct has caused the loss.

ii. Tort

178. As in contract law, the claim for damages in a tort claim is subject to a duty to mitigate the loss. Thus, the victim, once aware of the injury, must take reasonable steps to reduce or prevent further loss. With the possible exception of fraud or deceit, the duty to mitigate exists regardless of the nature of the wrong.

E. Remoteness

i. Contract

179. A second limitation on the recovery of expectancy damages is that they are recoverable only to the extent that the losses of the plaintiff were reasonably foreseeable by the defendant at the time of contracting. The test is an objective one in the sense that it is not necessary for the plaintiff to demonstrate that the defendant actually did foresee the consequences of breach but rather that the defendant would have foreseen such consequences if the defendant, as a reasonable person, had considered the matter. This doctrine is often referred to as the rule in *Hadley* v. *Baxendale*.[127]

---

[127] (1854), 9 Exch. 341, 156 E.R. 145.

180. There are two branches of the rule in *Hadley* v. *Baxendale.* They rest on a distinction between losses that are reasonably foreseeable on the basis of the assumed knowledge of reasonable persons (the first branch), as opposed to those that become foreseeable only if special circumstances concerning the contractual context have been communicated by the plaintiff to the defendant (the second branch).

181. There is some variation in the leading cases as to how they articulate the degree of likelihood of a particular consequence necessary in order to make it reasonably foreseeable. However, a widely accepted formulation of the test is that of Asquith L.J. in *Victoria Laundry Ltd.* v. *Newman Industries Ltd.*[128] to the effect that "the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to occur"[129].

182. The burden is on the Plaintiff to establish that the loss was reasonably foreseeable in the requisite sense.

ii. Tort

183. As in contract law, a claim for tort damages is also subject to a limitation that the tortfeasor must reasonably have been able to foresee the consequences for the

---

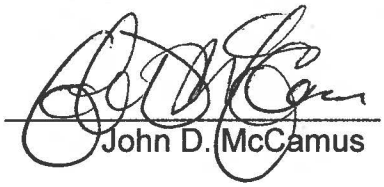
[128] [1949] 2 K.B. 528 (C.A.)
[129] *Ibid.*, at p. 539.

victim of the wrongful act. The degree of likelihood of the consequences required for them to be reasonably foreseeable may be less than under the contract standard. As suggested above, if it is correct that level of foreseeability of injury on the present facts strongly suggests that the contract test of reasonable foreseeability has been met, it must follow that the tort standard has been met as well.

184. However, in a number of the tort claims considered herein, such as a claim under the tort of inducing breach of contract, an intention to cause harm is an element of the tort itself and, accordingly, the issue of remoteness does not arise.

All of which is respectfully submitted.

Toronto, Ontario
August 14, 2017



John D. McCamus

EXHIBIT 1

JOHN D. McCAMUS

John D. McCamus is a Professor of Law and University Professor at Osgoode Hall Law School of York University, a faculty which he served as Dean from 1982-1987. His educational background includes degrees in philosophy from the universities of Western Ontario and Toronto and in law from the universities of Toronto and London. Prior to joining the faculty at Osgoode, he articled with the Toronto law firm, Fasken and Calvin, and served as a law clerk at the Supreme Court of Canada for Chief Justice Laskin. At Osgoode, his principal areas of research and teaching have included private law, especially restitution and contract, commercial law and information practices law. His published work includes two texts, *The Law of Contracts* 2d. ed. (2012) and *The Law of Restitution* 2d ed. (2004), the latter volume co-authored with P.D. Maddaugh.

While Dean of Osgoode Hall, Professor McCamus served as Chair of the Committee of Ontario Law Deans and of the Committee of Canadian Law Deans. He is the recipient of the Mundell Medal for Excellence in Legal Literature (A.G. Ont.), the Walter Owen Book Prize (Can. Bar Assoc.) the Law Society Medal and an LL.D. (Hon.) from the Law Society of Upper Canada. He was elected a Fellow of the Royal Society of Canada in 2006. He is an experienced adjudicator in human rights and labour disputes and served as a Vice-Chair of the Ontario Crown Employees Grievance Settlement Board from 1987-1996. He has served as an arbitrator in commercial disputes. He is currently Chair of the Board of Directors of the Canadian Civil Liberties Association.

Professor McCamus served, from 1993 to 1996 as Chair of the Ontario Law Reform Commission. From 1994 to 1996, Professor McCamus also served as Co-Chair of a committee on fundamental issues for the Ontario Civil Justice Review, a joint task force of the Ministry of the Attorney General and the Ontario Court (General Division). In December of 1996, Professor McCamus was appointed by the Attorney General of Ontario to chair the Ontario Legal Aid Review, an independent task force established to examine the legal aid system in Ontario and make any recommendations considered appropriate with respect to its reform. The Review's three-volume report, *A Blueprint for Publicly Funded Legal Services* was published in September, 1997. In 2007, McCamus was appointed by the Province as Chair of the Board of Directors of Legal Aid Ontario. In 1998, Professor McCamus was appointed by the American Law Institute to the Advisory Committee for the now recently published *Restatement of Restitution and Unjust Enrichment 3d (2011).* In 2007, he was elected to membership in the American Law Institute. He is currently an Associated Scholar in the Toronto office of Davies Ward Phillips & Vineberg LLP.

Curriculum Vitae

JOHN DOUGLAS McCAMUS

PERSONAL

Home Address:	101 Charles Street East, Suite #2301 Toronto, Ontario M4Y 0A9
Business Address:	Osgoode Hall Law School York University 4700 Keele St. Toronto, Ontario M3J 1P3
	Phone: (416) 736-5569 FAX: (416) 736-5736 email: jmccamus@yorku.ca
Citizenship:	Canadian

EDUCATION

1963	B.A., University of Western Ontario, General Arts (Philosophy and History).
1965	M.A., University of Toronto (Philosophy).
1968	LL.B., University of Toronto.
1969	LL.M., University of London (London School of Economics and Political Science).

PROFESSIONAL QUALIFICATION

1973	Member of the Bar of Ontario.

CURRENT EMPLOYMENT

Professor of Law and University Professor, Osgoode Hall Law School, York University

EMPLOYMENT HISTORY

1969-1970	Student-at-law. Articled to the firm of Fasken & Calvin in Toronto.

1970-1971	Legal Secretary to The Honourable Mr. Justice Laskin, Supreme Court of Canada.
1971-	Faculty of Osgoode Hall Law School of York University, Toronto, Ontario.
1982-1987	Dean
1981-1982	Director, Graduate Programme in Law
1976-1978	Associate Dean
1975	Assistant Dean
2005-	University Professor
1985-	Professor
1974-1985	Associate Professor
1971-1974	Assistant Professor Subjects Taught: Contracts, Commercial and Consumer Transactions, Contract Remedies and Restitution.

OTHER PROFESSIONAL ACTIVITIES

1972-1979	Member, Research Team, Sale of Goods Project of the Ontario Law Reform Commission.
1977-1980	Research Director, Ontario Commission on Freedom of Information and Individual Privacy (supervised the preparation of and edited 17 research monographs and drafted the Commission's final report, Public Government for Private People (1980) 3 vols., pp. 812).
1980-1985	Member, Research Team, Contract Law Amendment Project of the Ontario Law Reform Commission.
1974-	Arbitrator – various commercial and labour arbitrations.
1974-	Occasional appearances as counsel at both trial and appellate levels in the Ontario courts and in the Supreme Court of Canada, as an expert witness on Ontario law in judicial and arbitral proceedings in Quebec, New York, California, Maryland and Switzerland.

1978-	Served as Board of Inquiry under the Ontario Human Rights Code and the Canadian Human Rights Act on various occasions.
1984-1985	Chair, Committee of Canadian Law Deans
1985-1987	Chair, Committee of Ontario Law Deans
1986-	Member, 1986 - and Chair, 1992 - Board of Directors, Canadian Civil Liberties Association
1987-1996	Vice-Chair, Ontario Crown Employees Grievance Settlement Board.
1987-1992	Member, National Statistics Council.
1987-1988	Visiting Professor, Institut de Droit des Affaires, Université d'Aix-Marseille III, Aix-en-Provence, France
1990-1992	Member, Ontario Law Reform Commission (see Appendix A)
1992-	Commissioner of Freedom of Information and Privacy Protection, Council of Ontario Universities
1993-1996	Chair, Ontario Law Reform Commission (see Appendix A)
1994-1996	Chair, Fundamental Issues Group of The Ontario Civil Justice Review (established by The Ontario Court of Justice and The Ministry of The Attorney General of Ontario).
1996-1997	Chair, Ontario Legal Aid Review
1997-1998	Appointed by Department of Justice, Canada, to investigate certain allegations of anti-Semitism (260 page report released in March, 1998).
1998-2011	Member, Advisory Committee, American Law Institute, Restatement of the Law Third, Restitution and Unjust Enrichment.
1999-2000	Member, Expert Panel on Access to Historical Census Records (appointed by the Hon. John Manley, Minister responsible for Statistics Canada).

2000-	Associated Scholar, Davies Ward Phillips & Vineberg LLP
2006	Fellow of the Royal Society of Canada
2007-	Chair , Legal Aid Ontario
2007-	Member, American Law Institute

PUBLICATIONS

Books:

(ed.)
Freedom of Information: Canadian Perspectives (Butterworths, Toronto: 1981, pp. 327).

(with P. Hanks, eds.)
National Security: Surveillance and Accountability in a Democratic Society (Les Editions Yvon Blais, Montreal: 1989, pp. 269).

(with P.D. Maddaugh)
The Law of Restitution, (Canada Law Book Inc., Toronto; 1990, pp. cvii, 791), (Awarded Walter Owen Book Prize for 1990-91, David Mundell Medal for Excellence in Legal Literature).

(with P.D. Maddaugh)
The Law of Restitution, 2nd ed. (Canada Law Book Inc., Toronto, March 2004, pp. ccxv, 1134).

(with P.D. Maddaugh)
The Law of Restitution, Looseleaf Edition (Canada Law Book Inc., Toronto, March 2004, with annual supplements).

(with S.M. Waddams, M.J. Trebilcock, J. Neyers and M.A. Waldron, eds.)
Cases and Materials on Contracts 3rd ed. (Toronto, Emond Montgomery, May, 2005).

The Law of Contracts (Toronto, Irwin Law, November, 2005, pp. xxiv, 1095).

(with S.M. Waddams, J.W. Neyers, M.A. Waldron and J. Girgis, eds.) *Cases and Materials on Contracts,* 4th ed. (Toronto, Emond Montgomery, 2010).

The Law of Contracts, 2nd ed. (Toronto, Irwin Law, November, 2012)

(with S.M. Waddams, J. Girgis, J.W. Neyers and M.A. Waldron, eds.) *Cases and Materials on Contracts*, 5th ed. (Toronto, Emond Montgomery, August, 2014).

Articles and Chapters in Books:

"Restitutionary Remedies", *[1975] Special Lectures of the Law Society of Upper Canada* (Richard De Boo, Toronto), 255-299.

"The Self-Serving Intermeddler and the Law of Restitution" (1978), 16 Osgoode Hall L.J. 515-576.

(With L. Taman)
"*Rathwell* v. *Rathwell*, Matrimonial Property, Resulting and Constructive Trusts" (1978), 16 Osgoode Hall L.J. 741-760.

"Restitution of Benefits Conferred under Minors' Contracts" (1979), 28 U.N.B.L.J. 89-117.

"Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution" (1979), 11 Ottawa Law Rev. 297-336, (reprinted in L.D. Smith (ed.), *Restitution: The International Library of Essays in Law and Legal Theory, 2d Series* (Dartmouth, Ashgate, 2001)).

"Comment on the New Brunswick Right to Information Act", in McCamus (ed.), *Freedom of Information: Canadian Perspectives*, (*supra*) 219-229.

"Bill C-43: The Federal Canadian Proposals of 1980", in McCamus (ed.), *Freedom of Information: Canadian Perspectives*, (*supra*) 266-305.

"The Report of the Ontario Commission on Freedom of Information and Individual Privacy", in McCamus (ed.), *Freedom of Information: Canadian Perspectives,* (*supra*) 306-327.

"Infants Act – 'Absolutely Void' Agreement - Property Passage and Restitutionary Implications - *Prokopetz* v. *Richardson's Marina et al.*" (1980), 14 U.B.C. Law Rev. 363-375.

"Unjust Enrichment and Construction Labour Relations - The Contractors' Association as Self-Serving Intermeddler" (1981), 18 Osgoode Hall L.J. 478-493.

"The Restitutionary Remedy of Constructive Trust", *[1981] Special Lectures of the Law Society of Upper Canada* (Richard De Boo, Toronto), 85-123.

"Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada" (1983), 17 U.B.C. Law Rev. 233-274.

"Freedom of Information in Canada" (1983), 10 Govt. Pub. Rev. 51-60, reprinted in R. Martin and G.S. Adam, *A Sourcebook of Canadian Media Law*, (Carleton U. Press, Ottawa: 1989).

(With P.D. Maddaugh)
"Some Problems in the Borderland of Tort, Contract and Restitution", *[1983] Special Lectures of the Law Society of Upper Canada* (Richard De Boo, Toronto), 273-303.

"In Memoriam: The Right Honourable Bora Laskin" (1984), 22 Osgoode Hall L.J. 1-3.

"The Delicate Balance: Reconciling Privacy Protection With the Freedom of Information Principle", in R. Wall (ed.), *Conference on Privacy, Initiatives for_1984* (Government of Ontario; 1984), 51, a revised and updated version of which is published in (1986), 3 Govt. Inf. Q. 49-61.

"The Protection of Privacy: The Judicial Role" in R. Abella and M. Rothman (eds.) *Justice Beyond Orwell*, (Editions Yvon Blais, Montreal: 1986), 163-187.

"Recovery of the Indirect Profits of Wrongful Killing: The New Constructive Trust and The Olson Case" (1986), 20 E.T.R. 165-179.

(with P.- G. Jobin)
"The Design of Courses in Contract and Contractual Obligations", in R.S. Matas and D.J. McCawley (eds.) *Legal Education in Canada* (Federation of Law Societies, 1987), pp. 370-386.

(with Sharon A. Williams)
"Civil Liberties and the Combatting of International Crime: Striking the Balance" (*Proceedings of the 8th Commonwealth Law Conference*, 1987).

"After Arthurs - A Preface to the Symposium on Canadian Legal Scholarship" (1985), 23 Osgoode Hall L.J. 395-401.

"Fiduciary Duties: Common Themes and Future Developments" in *Fiduciary Duties - A Matter of Trust* (Law Society of Upper Canada: November, 1986) revised and reprinted as "The Recent Expansion of Fiduciary Obligation: Common Themes and Future Developments" in (1987), 23 E.T.R. 301-316.

"Restitutionary Recovery of Benefits Conferred under Contracts in Conflict with Statutory Policy" (1988), 25 Osgoode Hall L.J. 787-867.

"The Role of Proprietary Relief in Modern Restitutionary Law" in F. McArdle (ed.) *The Cambridge Lectures 1987* (Les Editions Yvon Blais, Montreal: 1989), 141-157.

"Surveillance and Accountability in a Democratic Society: An Overview" in P. Hanks and J.D. McCamus (eds.), *National Security: Surveillance and Accountability in a Democratic Society* (Les Editions Yvon Blais, Montreal: 1989), 1-17.

"Remedies for Breach of Fiduciary Duty" *[1990] Special Lectures of the Law Society of Upper Canada* (Richard De Boo, Toronto) 57-83.

"Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle" (1991), 2 Supreme Court L. Rev. (2d) 505-543.

"Chief Justice Dickson and the Law of Restitution" (1991), 20 Manitoba L.J. 337-366.

"Access to Information Held by the State and Privacy" *General Reports of the XIIIth International Academy of Comparative Law*, (Les Editions Yvon Blais, Montreal, 1992) 719-750.

The Unjust Enrichment Principle: Its Role and its Limits, in D. Waters (ed.), *Equity, Fiduciaries and Trusts, 1993* (Carswell & Co., 1993) pp. 129-156.

Family Law Reform in Ontario *[1993], Special Lectures of the Law Society of Upper Canada* (Carswell & Co., Toronto), 451-478.

"Equitable Compensation and Restitutionary Remedies", *[1995] Special Lectures of the Law Society of Upper Canada* (Carswell & Co., Toronto) 295-340.

"Civil Justice Reform: What Do We Know"? in D. Greschner, (ed.), *Public Perceptions of the Administration of Justice* (Les Editions Thémis, Montreal, 1996) 395-421.

"Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997), 28 Can. Bus. L.J. 107-140.

"Fiduciary Obligation and Commercial Law" in M. Pilkington, J. Spence and H. Dumont (eds.) *The Administration of Justice in Commercial Disputes* (Les Editions Themis, Montreal, 1999) pp. 53-76.

"The Evolving Role of Fiduciary Obligation" in *Meredith Lectures 1998-1999, The Continued Relevance of the Law of Obligations: Back to Basics* (Montreal, Les Editions Yvon Blais; 2000) pp.171-210.

"Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties" (2001), 35 Can. Bus. L.J. 173-215 (July, 2001).

"The Common Law: Where is it Written Down?" in Y. Gendreau (ed.), *Le lisible et l'illisible* (Montreal, Les Editions Themis, 2003) pp. 19-49.

"*Caveat Emptor*: The Position at Common Law" in *[2002] Special Lectures of the Law Society of Upper Canada: Real Property Law; Conquering the Complexities* (Irwin Law, Toronto, 2003) pp. 97-119 (March, 2003).

"Disgorgement for Breach of Contract: A Comparative Perspective" (2003), 36 Loyola of L.A.L.Rev. 943-74 (April, 2003).

"The Policy Inquiry: An Endangered Species?" In A. Manson and D. Mullan (eds.) *Commissions of Inquiry: Praise or Reappraise?* (Toronto, Irwin Law Inc., 2003) pp. 211-227 (June, 2003).

"Restitution on Dissolution of Marital and Other Intimate Relationships" in J. Neyers, M. McInnes and S. Pitel (eds.), *Understanding Unjust Enrichment* (Oxford, Hart. Pub. Co., 2004) pp. 359-381 (April, 2004).

"Mistaken Assumptions in Equity: Sound Doctrine or Chimera" (2004), 40 Can. Bus. L.J. 46-86 (April, 2004).

"Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2004), 29 Adv. Q. 72-101 (Sept. 2004).

"Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada" (2004), 41 San Diego L. Rev. 1491-1520 (Feb. 2005).

"Restitution as an Alternative to Damages in Contract and Tort" in *[2005] Special Lectures of the Law Society of Upper Canada: The Modern Law of Damages* (Toronto, Irwin Law, 2006) pp. 123-151. (May, 2006)

"Celebrity Newsgathering and Privacy: The Transformation of Breach of Confidence in English Law" (2006), 39 Akron L. Rev. 1191-1215 (March, 2007).

"The Laskin Legacy in Private Law: The Judge as Custodian of the Common Law" in C. Backhouse and N. Finkelstein (eds.), *The Laskin Legacy: Essays in Commemoration of Chief Justice Bora Laskin* (Toronto, Irwin Law Inc., 2007) pp.131-148. (June, 2007)

"Restitutionary Liability of Public Authorities in Canada" in C.E.S. Rickett and R.B. Grantham (eds.), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, Hart Pub. Co., 2008) pp. 291-318 (April, 2008)

"Mechanisms for Restricting Recovery for Emotional Distress in Contract" (2009), 42 Loyola of L.A. L. Rev. 101 (April, 2009)

"Wrongful Conduct and Change of Position" in S. Degeling and J. Edelman (eds.), *Restitution in Commercial Law* (Sydney, Sweet & Maxwell, 2008) pp. 385-409 (November, 2008)

"Mistaken Bids and Unilateral Mistaken Assumptions: A New Solution for an Old Problem?" (2008), 87 Canadian Bar Review 1-36(September, 2009)

"Rethinking Section 142 of the Restatement of Restitution: Fault, Bad Faith and Change of Position " (2008), Wash. & Lee L.Rev. 889-931 (November, 2008)

"Mistake, Forged Cheques and Unjust Enrichment: Three Cheers for *B.M.P.Global*" (2009), 48 Can. Bus. L.J. 76-101 (September, 2009)

"Liquidated Damages and the Criminal Rate of Interest: More Unintended Consequences of Section 347" (2009), 25 Bank. & Fin. L.R. 229-245 (April, 2010)

"Forty Years of Restitution: A Retrospective" (2010), 50 Can. Bus. L. J. 474-498 (March, 2011).

"Remedies to Prevent Unjust Enrichment" in *2010 Pitblado Lectures: Remedies: From Dollars to Sense (*Winnipeg, Law Society of Manitoba, 2011)

"Mistake, Forged Cheques and Unjust Enrichment: A Good Test Case for Law and Economics?" in R. Weaver and F. Lichere (eds.) *Remedies and Economics* (Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2011) pp. 264-309 (an earlier and extended version of the paper published in (2009), 48 Can. Bus. L.J.) (February, 2011).

"Unjust Enrichment, 'Existing Categories' and *Kerr* v. *Baranow*: A Reply to Professor McInnes" (2012), 52 Can. Bus. L.J. 390-415 (June, 2012).

"The Future of the Canadian Common Law of Contracts" (2014), 31 J. of Contract Law 131-150 (March, 2014).

"Waiver of Tort: Is There a Limiting Principle?" (2014), 55 Can. Bus. L.J. 333-364 (September, 2014)

"Law Reform and Distributive Justice: The Secured Transactions Scholarship of Rod Macdonald" in R. Janda, R. Jukier and D. Jutras, (eds.) The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination (Montreal, McGill-Queen's U.P., 2015) 114-127 (May, 2015)

"The New General "Principle" of Good Faith Performance and the New "Rule" of Honesty in Performance in Canadian Contract Law" (2015), 32 JCL 103-118 (June, 2015)

"Justice Cromwell and the Law of Restitution" (2017), 79 Sup. Ct. L. Rev. (forthcoming – 37 pp.)

Review Articles:

"Three Recent Works on Contractual Interpretation: Steven J. Burton, *Elements of Contractual Interpretation*; Geoff R. Hall, *Canadian Contractual Interpretation Law*; Catherine Mitchell, *Interpretation of Contracts*: Part One" (2011), 52 Can. Bus. L.J. 136-153; "Part Two" (2011), 52 Can. Bus. L.J. 300-321.

"*The Restatement (Third) of Restitution and Unjust Enrichment*" (2011), 90 Can. Bar Rev. 439-467 (July, 2013).

"*A Restatement of the English Law of Unjust Enrichment*" by Andrew Burrows (2016), 58, Can. Bus. L.J. 208 – 229.

Book Reviews:

J.S. Williams, *Limitation of Actions in Canada*, in (1973), 23 U.T.L.J. 472-479.

D.H. Flaherty, *Privacy and Government Data Banks*, in (1982), 15 Can. J. of Pol. Sci. 652-654.

Research Monographs:

Frustration and the Law of Sales, 1974 (Ontario Law Reform Commission Research Study), 90 Pages.

Mistake in the Law of Sales, 1975 (Toronto, Ontario Law Reform Commission, 1975), 97 pages.

Mistake and Frustration in the Law of Contract, 1982 (Toronto, Ontario Law Reform Commission, 1982), 367 pages.

Reports:

Ontario Commission on Freedom of Information and Individual Privacy, *Public Government for Private People* (1980) 3 vols. pp. 812 (authorship unattributed).

(with D.F. Bur), *Appellate Court Reform in Ontario: A Consultation Paper* (Toronto, Ministry of the Attorney General, 1994) 74 pages.

Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services (1997) (as Chair, co-authored Vol. 1, the substantive report, in collaboration with M.J. Trebilcock, L. Newton and N. Thomas).

Report to the Deputy Minister (of Justice, Canada) concerning certain allegations of anti-Semitism (March 1998, 260 pages)

(with Patrick Monahan and Shelley Kierstead), *A Report to the Law Society of Upper Canada: Review of Policy Options Pertaining to the Regulation of Paralegal Providers in Canada* (March, 2000, 143 pages plus appendices).

Teaching Materials:

Cases and Materials on Restitution (1976) (rev'd. annually; co-edited with P.D. Maddaugh until 1983 and from 2000).

With P.D. Maddaugh), *Equity, Restitution and Contract Remedies* (1975, 1976, 1977) (O.H.L.S. mimeo ed.).

Chapter 8, Representations and Terms: Classifications and Consequences (pp. 303-387), in Boyle and Percy (eds.), *Contracts, Cases and Commentaries* (Carswell & Co., Toronto: 1978; 2nd ed., 1981; 3rd ed., 1988; 4th ed. 1989; 5th ed. 1994; 6th ed., 1999; 7th ed., 2004; 8th ed., (edited by Ben-Ishai and Percy) 2009; 9th ed., 2014.

Journals Edited:

Editor-In-Chief	Osgoode Hall Law Journal	1989-1996

GRADUATE STUDENT SUPERVISIONS

Student	Degree	Year	Thesis topic
P.J. Brenner	LL.M.	1978	Accord and Satisfaction, Consideration and the Rule in Pinnel's Case
E. Longworth	LL.M.	1986	The Access to Information Act, 1982: Its Impact on the Private Sector
T.B. Dawson	LL.M.	1987	Estoppel and Obligation
A. Troillet	LL.M.	1999	Pension Plan Governance: The Employer's Conflicting Roles as Sponsor and Administrator

APPENDIX A

Reports and other publications of the Ontario Law Reform Commission during McCamus' Tenure as Commissioner (1991-92) and Chair (1993-96):

	Title	Date
(a)	*During Tenure as Commissioner:*	
	Report on Administration of Estates of Deceased Persons	1991
	Report on Exemplary Damages	1991
	1991 Ontario Law Reform Commission Report	1991
	Appointing Judges: Philosophy, Politics and Practice (Study Papers)	1991
	Report on Child Witnesses	1991
	Report on Testing for AIDS	1992
	Report on Public Inquiries	1992
	Summary of Recommendations	1992
	Annual Report 1991-92	1992
	Report on Drug and Alcohol Testing in the Workplace	1992
	Report on the Powers of the Ontario Film Review Board	1992
(b)	*During Tenure as Chair:*	
	Study Paper on Litigating the Relationship Between Equity and Equality	1993
	Annual Report 1992-93	1993
	Report on Family Property Law	1993
	Report on the Rights and Responsibilities of Cohabitants Under the *Family Law Act*	1993
	Consultation Paper on the Use of Jury Trials in Civil Cases	1994
	Annual Report 1993-94	1994

Title	Date
Report on Pensions as Family Property: Valuation and Division	1995
Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes	1995
Study Paper on Prospects for Civil Justice	1995
Report on the Law of Coroners	1996
Report on Genetic Testing	1996
Study Paper on Psychological Testing and Human Rights in Education and Employment	1996
Report on the Law of Charities	1996
Report on Basic Principles of Land Law	1996
Rethinking Civil Justice: Research Studies for the Civil Justice Review	1996
Study Paper on Legal Aspects of Long Term Disability Insurance	1996
Report on the Use of Jury Trials on Civil Cases	1996
Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment	1996
Final Report	1996