CULPABLE SILENCE: LIABILITY FOR NON-DISCLOSURE IN THE CONTRACTUAL ARENA

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CONTENTS

I. INTRODUCTION

This article is concerned with the extent to which one party has a common law duty to disclose information to another, either

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antecedent to or during the life of a commercial contract.[1] Though the general rule for contractual negotiations is that there is no duty of disclosure,[2] such an unqualified statement is misleading since there are numerous instances of liability being founded for a failure to disclose. Similarly, a duty to disclose during the performance of a contract can exist — even absent an express promise — as a result of the nature of the relationship between the parties, the nature of the contract in question, or the occurrence of material events concurrent with or subsequent to the contract's formation. In short, the existence of a duty to disclose in the contractual arena can escape general detection because it is implicit in or absorbed by a variety of other legal rubrics.[3]

Since the publication in 1991 of Stephen Waddams' leading article on precontractual disclosure duties,[4] several cases have been decided which impact on his thesis that "duties of disclosure are in practice imposed by a variety of judicial techniques, some of which are not usually thought of in this context".[5] The purpose of this article, therefore, is to test the continued validity of Professor Waddams' analysis as well as to attempt to predict when disclosure obligations may arise. Though I appreciate that this area of law poses a classic instance of contract-tort overlap, I do not intend to

1. It is beyond the scope of this paper to discuss settlements and marriage contracts as well as one's statutory duty to disclose.
2. See, for example, G.H. Treitel, *The Law of Contract*, 9th ed. (London, Sweet & Maxwell, 1995), p. 361 wherein it is stated that: "[a]s a general rule, a person who is about to enter into a contract is under no duty to disclose material facts known to him but not to the other party". Treitel then goes on to deal with exceptions to this general rule. See too A.G. Guest, ed., *Anson's Law of Contract*, 26th ed. (Oxford, Clarendon Press, 1984), p. 231: "there is in general no duty of disclosure of material facts before the contract is made". Similarly, P.S. Atiyah notes the general rule: "English law has traditionally taken the view that it is not the duty of the parties to a proposed contract to give information to each other", and adds that its robust individualism "can get taken so far that it offends the sense of justice." See *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), pp. 246-47. Similarly, M. Fabre-Magnan in "Disclosure and French Contract Law", in J. Beatson and D. Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford, Clarendon Press, 1995), p. 100 at p. 106 observes: "English law has been traditionally hostile to the imposition of duties of disclosure. The caveat emptor rule has remained as one of the fundamental principles of contract law." (footnotes omitted).
3. For discussion of this point, see S.M. Waddams, "Pre-contractual Duties of Disclosure", in P. Cane and J. Stapleton, eds., *Essays for Patrick Atiyah* (Oxford, Clarendon Press, 1991), p. 237.
4. *Ibid.*
5. *Ibid.*

analyze tortious remedies in any depth.[6] Also, this article does not seek to provide a comprehensive review of each area of law discussed but, more modestly, to organize and comment on recent cases in which a duty to disclose in arm's length transactions has been found.[7]

It is difficult to extract from the case law a general set of principles establishing when the obligation to speak will arise. However, it will be seen from the analysis in part II that three common factors appear consistently in the cases where just such an obligation is found. They are:

1. a pronounced informational asymmetry between the parties;
2. silence by the party with the greater information which, while falling short of fraud, is profoundly misleading because the existence of undisclosed information is both consequential and unexpected; and
3. a concomitant and express judicial focus on equitable values as the referent against which that latter party's conduct is measured.

II. THE CASE LAW

The existence of a disclosure duty is predictable when it is a routine incident of the relationship existing between the parties. Since partners are fiduciaries[8] they must, for example:[9]

> . . . refrain from all concealment from each other in the partnership business. If a partner be guilty of any such concealment and derive a benefit therefrom,

6. For a brief discussion of tortious remedies for breach of disclosure duties see, for example, L. Klar, *Tort Law*, 2nd ed. (Scarborough, Carswell, 1996), p. 492 and Waddams, *supra*, footnote 3, at p. 245.
7. In addition to work of S.M. Waddams in *supra*, footnote 3, see S.M. Waddams, "Precontractual Duties of Disclosure" (1991), 19 C.B.L.J. 349; E.A. Farnsworth, "Comments on Professor Waddams' 'Precontractual Duties of Disclosure'" (1991), 19 C.B.L.J. 351; A. Turner and R. Sutton, eds., *The Law Relating to Actionable Non-Disclosure*, 2nd ed. (London, Butterworths, 1990); P.M. Perell, "False Statements" (1996), 18 Adv. Q. 232, and J. Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993), 15 Adv. Q. 56.
8. For a discussion of the fiduciary relationship amongst partners, see M. Ellis, "Fiduciary Duty and Joint Business Relations" in *Special Lectures of the Law Society of Upper Canada, 1990: Fiduciary Duties* (Scarborough, Thomson, 1991), p. 89 at pp. 90-93. See too M. Ellis and A. Manzer, "The Consequences of Being a Partner: Fiduciary Obligations" in A. Manzer, *A Practical Guide to Canadian Partnership Law* (Aurora, Canada Law Book Inc., 1996), pp. 5-1 and following.
9. *Powell v. Maddock* (1915), 25 D.L.R. 748 at p. 749, 9 W.W.R. 353 (Man. K.B.).

> he will be treated in equity as a trustee for the firm and compelled to account to his partner.

Similarly, an agent has such an indisputable obligation of loyalty that when entering into any contract or transaction with the principal, for example, he or she:[10]

> . . . must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal.

Not surprisingly, the fiduciary relationship between trustee and beneficiary brings with it a duty to disclose. The relationship between insured and insurer is one of *uberrimae fidei* and therefore creates a similar obligation.[11] While the creditor-guarantor relationship is held to a lesser standard, it is well established that it also creates a duty of disclosure on the creditor.[12]

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10. F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 16th ed. (London, Sweet & Maxwell, 1996), pp. 223-24.
11. It is a general principle of insurance law that if an insured fails to disclose information material to the risk, the insurance contract will fail. This principle is based on the "presumed ignorance of the issuer and the peculiar knowledge of the assured concerning the facts relevant to the insurance contract" *per* K. McGuinness, *The Law of Guarantee* (Toronto, Carswell, 1996), p. 193, para. 4.118. Additionally, there is case law establishing a duty on the insurer to disclose, albeit under the rubric of a duty to inform. For example, the Supreme Court of Canada in *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, 74 D.L.R. (4th) 636, found the public insurer liable for failure to inform the plaintiff of the full range of coverage obtainable and, in particular, that underinsured motorist coverage was available. Private insurance agents are held to an even higher standard, according to the Supreme Court of Canada, which is "a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs", at p. 216 as *per Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada* (1977), 81 D.L.R. (3d) 139, 17 O.R. (2d) 529 (C.A.). *Fletcher* has been subject to a critical commentary by Lee Stuesser in "A Confusing Case of Contradictions: Case Comment *Fletcher v. Manitoba Public Insurance Corp.* (1991), 5 C.C.L.T. (2d) 64.
12. Though contracts of guarantee are not contracts of utmost good faith, it is an established rule that the creditor must disclose any information that the guarantor would not normally expect to exist and this is so even if no inquiry is made by the guarantor. For discussion, see McGuinness, *ibid.* and D. Marks and G. Moss, eds., *Rowlatt on Principal and Surety*, 4th ed. (London, Sweet & Maxwell, 1982), pp. 121-22. This rule was affirmed recently by the Supreme Court of the Northwest Territories in *Northwest Territories (Commissioner) v. Portz*, [1996] 3 W.W.R. 94, [1996] N.W.T.R. 124, where, at p. 103 W.W.R., Vertes J. quotes the following passage from P. Perell, "Discharging a Guarantee" (1994), 73 Can. Bar Rev. 121 at p. 131:

> The authorities establish that while the contract between creditor and surety is not a contract *uberrimae fidei* and a creditor is not obliged to make full disclosure to the surety of all information material to the risk, a creditor must reveal to the surety every fact that under the circumstances the surety would ordinarily or naturally expect not to exist. The omission to mention the presence of the unexpected is

Why is disclosure the rule in these examples? Why does the law not put the onus on one party to ask, rather than on the other party to tell? One solution is simply to point to the fiduciary quality or *sui generis* equitable rules which emanate from the distinctive nature of the relationship between insured-insurer, agent-principal and surety-creditor, and amongst partners. This approach is of limited utility, however, since increasingly, a duty to disclose is placed on parties who are not fiduciaries or otherwise subject to a specialized equitable regime. Recent examples are vendors of real estate, owners putting a project out to tender, and those offering contracts which contain onerous or unexpected clauses.

While it is difficult to generalize, an important factor driving these newer cases appears to be a judicial inclination to find parallels between qualities in certain arm's length relationships and those in a fiduciary or quasi-fiduciary context. More specifically, some kinds of informational asymmetries between parties are seen to create a unique and serious vulnerability in the knowledge-deficient party to which courts have attached legal significance. *Caveat emptor* is not always a practical response — nor is it always the legal response — since the ignorant party may not even know that material information is missing, let alone know what kind of information it should seek. Furthermore, the ignorant party may have reasonably relied on the good faith of the party with the information, only to suffer damages as a result of the information's current or subsequent incompleteness. Hence, through a variety of legal mechanisms, the courts have determined that where it would be inequitable or otherwise unfair for the party with the information to take advantage of his or her non-disclosure, that person has a duty to speak.

In *Opron Construction Co. v. Alberta*,[13] for example, Mr Justice Feehan ruled that the owner will generally have a duty of care to make proper disclosure to tenderers, since the owner has considerably more knowledge than the tenderers concerning the nature and conditions of work. In short,[14]

> [c]ommon law construction authorities recognize that in most tender processes, those preparing the tender package possess much greater knowledge about the circumstances of the project than do the bidders. This differential in

viewed as a misrepresentation, and the guarantee may be set aside; for this special rule, the surety's discharge is absolute.

13. (1994), 151 A.R. 241, 14 C.L.R. (2d) 97 (Q.B.).

14. *Ibid.*, at p. 338.

> the relative knowledge of the parties favours the imposition of a duty of care on those preparing the tender documents to ensure they are accurate . . . [O]nly if the information required is not specified, or the documents raise some question as to the correct interpretation of the information necessary to the bid, or the engineer clearly warns the bidder that certain information was not verified and that he or she does not vouch for its accuracy, is the contractor required to conduct further investigation; otherwise, the contractor is entitled to rely on the engineers' and owner's duty to ensure that the information in the tender documents is reasonably correct and complete.

Hence, while the duty to disclose is not inevitable given the availability of properly executed disclaimer clauses,[15] according to *Opron* it does become a general default rule in the tendering context.

Similarly, in *Begro Construction Ltd. v. St. Mary River Irrigation District*,[16] the Alberta Queen's Bench found a duty to disclose which, this time, was owed by the owner's engineer. Here, Begro was the successful tenderer on a project to reconstruct a failing reservoir outlet but sustained losses on the contract because soil conditions were considerably worse than expected. This, in turn, was partially because the owner's engineer, UMA, failed to disclose the existence of relevant reports, thereby rendering misleading the design material specifications provided to Begro.

As in *Opron*, the court was very much motivated to redress the informational asymmetry between engineer and bidder, stating that the engineer must disclose all material information in his possession "in order to enable the contractor to prepare a proper bid".[17] According to Justice Power:[18]

> UMA had knowledge of facts which it knew or ought to have known should be passed on to Begro. They had a duty to pass on those facts and a failure to do so will constitute a breach of the implied duty . . . If a party is induced to enter into a contract by not providing to the party all of the information that is available to the owner and the consulting engineers, it is not a complete answer to say to the contractor, "if you had used due diligence you would have found out that this information was available". Common sense dictates that this information in the hands of the engineers and owners was of vital importance to the contractor . . .

15. For the court's analysis of clauses purporting to exclude or limit liability, see *ibid.*, at p. 364 and following.
16. (1994), 154 A.R. 1, 15 C.L.R. (2d) 150 (Q.B.).
17. *Ibid.*, at p. 29.
18. *Ibid.*

Note too the equitable concerns motivating the judge so that the exclusion clause in place would not end up sheltering the engineer:[19]

> I am satisfied that UMA had specific information which cried out to be revealed to Begro. This court should not permit UMA . . . to take advantage of the exculpatory clauses in the contract in these circumstances. Hans Hahn, the operating mind of Begro, was a new Canadian having arrived from Germany in 1978 and Begro had no experience in the construction scene involving Southern Alberta soil conditions and irrigation systems.

The judicial inclination not to permit reliance on unusual or unexpected clauses is another area in which disclosure has become a functional obligation in arm's length negotiations. For example, in *Tilden Rent-A-Car Co. v. Clendenning*,[20] a leading case, the rental company was not permitted to rely on clauses which inordinately circumscribed the scope of the insurance coverage because it failed to draw this unexpected limitation to the attention of its customer, Clendenning. As Dubin J.A. summarized the issue:[21]

> Tilden Rent-A-Car took no steps to alert Mr. Clendenning to the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing . . . Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or *non est factum*. Having paid the premium, he was not liable for any damage to the vehicle . . .

In requiring Tilden to bring onerous clauses to the customer's attention and in refusing to allow it to rely on them even though the contract had been signed by Clendenning, the court functionally imports the equitable expectations of fairness and reasonableness into a non-fiduciary relationship. The upshot is a positive duty to

19. *Ibid.*, at p. 4. The court went on to note that, by its terms, the exclusion clauses were not drafted to protect the engineers against their own liability, at p. 29. It also observed that "Begro was in an unequal bargaining position and . . . Hahn lacked sophistication in contractual dealings", at p. 32.

20. (1978), 83 D.L.R. (3d) 400, 18 O.R. (3d) 601 (C.A.).

21. *Ibid.*, at p. 409. The duty of disclosure of such unexpected clauses imposed in *Tilden* was, apparently, extended in *Trigg v. MI Movers International Transport Services Ltd.* (1991), 84 D.L.R. (4th) 504 at p. 507, 4 O.R. (3d) 562 (C.A.), leave to appeal to the S.C.C. refused 88 D.L.R. (4th) vii, 56 O.A.C. 160*n*. In *Trigg*, the court held that simply pointing out the clause is inadequate: "the general rule is that a limitation or exemption clause is not imported into a contract unless it is brought home to the other party so prominently that he or she must be taken to have known it and agreed to it". For a critique of *Trigg*, see D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 Adv. Q. 435, at p. 450 *et seq.*

disclose on parties who wish to rely on limitation or exclusion of liability clauses which clauses a court may subsequently determine to be harsh, burdensome and otherwise unexpected.

While the *caveat emptor* principle remains important,[22] and while courts tend to follow it absent fraud, *error in substantialibus*, warranties, representations, or collateral contracts to the contrary,[23] they have also incrementally extended the list of defects which the vendors of real estate must disclose to the purchaser. This has been accomplished by bringing within the tort of deceit not just a failure to disclose latent defects[24] rendering the property dangerous,[25] or

22. As the Manitoba Court of Appeal recognizes: "The maxim *caveat emptor* is very much alive." See *Stotts v. McArthur* (1991), 75 Man. R. (2d) 212 at p. 215, 6 W.A.C. 212 (C.A.). The court quotes with approval the following statement from A. Guest, ed., *Chitty on Contracts*, 26th ed. (London, Sweet & Maxwell, 1989), vol. 1, at para. 419: "there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such nondisclosure may be in particular circumstances".
23. *Redican v. Nesbitt*, [1924] S.C.R. 135 at p. 144, *per* Duff J., as summarized in *Sevidal v. Chopra* (1987), 45 R.P.R. 79, 64 O.R. (2d) 169 (H.C.J.).
24. As P.M. Perell in "False Statements" *supra*, footnote 7, summarizes the matter at p. 242: "[a] latent defect is a defect that is not discernible to a purchaser by inspection or ordinary vigilance. It is the opposite of a patent defect."
25. *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 at p. 792, 95 D.L.R. (3d) 144 (Ont. C.A.), leave to appeal to S.C.C. refused April 25, 1979, quoted with approval in *Hoy v. Lozanovski* (1987), 43 R.P.R. 296 (Ont. Dist. Ct.) at p. 299. The court in *McGrath* appeared to find two headings under which the vendor could be found liable for a failure to speak: first, as an incident of the tort of deceit and second, as the result of a duty "on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, *e.g.*, the premises being sold being subject to radioactivity" (at p. 792). The plaintiff must prove, *inter alia*, that the vendor knew of the latent defect or had a reckless disregard of the truth. See too *Fournier v. van der Laan* (1997), 187 N.B.R. (2d) 11 (Q.B.), where the court found the previous owner as well as the vendor liable for selling a house that was dangerous. To do so, Justice Turnbull relied on the following pronouncement in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at p. 116, 121 D.L.R. (4th) 193, that:

> [i]n my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect . . .

On this basis, the court was able to impose liability on Mullin, an earlier owner of the house, since it was that earlier owner who had constructed the dangerous house in the first place. As the court states: "While there is no claim for fraudulent misstatement against Mullin, he cannot escape contribution to [the vendors], because the construction was a latent defect of which Mullin had notice which he did not disclose" (at para. 40). A recent Quick Law search (March 18, 1998) indicates that *McGrath* has been followed in four decisions, distinguished in one, explained in three, mentioned in 30, and cited in one dissenting opinion.

uninhabitable,[26] but also failures to disclose "important" latent defects known by the vendor.[27] In *Ward v. Cudmore*,[28] for example, Justice Creaghan stated that vendors are obligated to disclose substantial latent defects in the property and further that:[29]

> [t]o my mind such a principle does not place too onerous a burden on a vendor nor does it relieve the purchaser from the responsibility of taking reasonable steps to ascertain that the object of his purchase is reasonably fit for the purpose intended. To hold that a vendor has no responsibility to disclose to a purchaser a substantial latent defect of which he has knowledge is contrary to the essential principle of contract demanding a real meeting of the minds.

This analysis was recently applied by the New Brunswick Court of Queen's Bench in *Fournier v. van der Laan*[30] which added the gloss that failure in this duty is "not within the purview of the usual exclusionary clause found in most real estate agreements of purchase and sale".[31]

The foregoing discussion is intended to show the further incursion of disclosure duties into arm's length transactions. Unlike the relative predictability of the law of disclosure in a fiduciary and quasi-fiduciary context, however, it is considerably more difficult to determine whether a duty to disclose exists between parties of this nature. As the next section of this paper will discuss, the obligation to speak in the arm's length relationship can arise from multiple sources. It can come from contract law even absent an express term creating it, namely: when it is an implied term; when it is mandated by an obligation of good faith; as well as when it arises as an incident of mistake, estoppel, unconscionability or unjust enrichment.

What follows is an analysis of recent law organized around the headings mentioned just above.

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26. *Hoy v. Lozanovski*, *ibid.* and *McGrath v. MacLean*, *ibid.*
27. "If there is a hidden and important defect that is known to a vendor about his property, he has to divulge it to the purchaser" *per Tuttahs v. Maciak* (1980), 6 Man. R. (2d) 52 (Q.B.) at p. 57, quoted with approval in *Bolton v. McMuldroch* (1983), 27 R.P.R. 286 (B.C.S.C.) at p. 289. See *Jung v. Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.) at p. 126 where Gotlib J. states: "It is now clear that the law of Ontario is such that vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive."
28. (1986), 75 N.B.R. (2d) 112 (Q.B.) at pp. 123-24.
29. *Ibid.*, at p. 124.
30. *Supra*, footnote 25.
31. *Ibid.*, at para. 42.

III. DUTY TO DISCLOSE IN CONTRACT LAW, RESTITUTION, ESTOPPEL, AND MISTAKE

1. Duty to Disclose as an Implied Term

In *Opron*,[32] Justice Feehan reviewed the circumstances in which the court will imply a contractual term, including a term to disclose. Before turning to this analysis, a brief account of the facts in *Opron* is in order.

Opron Construction Co. was the successful tenderer for a construction contract related to a provincial dam project. The tender information provided to it by the province was inaccurate — Alberta had withheld certain information and even concealed other data which came to light later. These inaccuracies occasioned cost overruns by the plaintiff and it sued for breach of contract, deceit and negligent misrepresentation. The province relied, *inter alia,* on a series of exclusionary clauses to shelter itself from liability.

In response to the plaintiff's allegation that Alberta was in breach of an implied term that "there were no facts within the knowledge of the defendant or its agents which had not been disclosed to the plaintiff which were inconsistent with or contradicted the contractual warranties and representations . . . made by the defendant",[33] Feehan J. observed that implying terms into a contract involves a two-part analysis. First, it had to be decided whether the term to be implied was "inconsistent with or in conflict with any express term or disclaimer clause in the contract".[34] If not, the court would be entitled to imply the term if it: (a) arose out of established custom or usage; (b) was necessary so as to give business efficacy to the contract; or (c) arose as a legal incident of the particular class and kind of contract at issue.[35]

After a detailed analysis, Feehan J. ruled that the contract contained an implied term that the owner would "disclose relevant information in its possession which contradicts its express representations".[36] This was because first, there was no "entire contract"

32. *Supra*, footnote 13.
33. *Ibid.*, at p. 343.
34. *Ibid.*
35. *Ibid.* In positing these tests, Feehan J. relied on *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958, 136 D.L.R. (3d) 193 and *Canadian Pacific Hotels Ltd. v. Bank of Montreal* [1987] 1 S.C.R. 711, 40 D.L.R. (4th) 385.
36. *Ibid.*, at p. 344.

or merger clause; [37] second, implying such an obligation would not fly in the face of the "investigation" clause;[38] third, a term to disclose would give the contract business efficacy;[39] and fourth, such a term is a legal incident of construction contracts, absent a clause forbidding this kind of reliance,[40] due, *inter alia*, to the short amount of time tenderers are typically given to prepare their tenders.[41] In plaintiff counsel's words, "[t]o permit an owner such as the government to disclose information which it knows is contradicted by other information in its possession, is to subvert the contract itself".[42] The exclusion clauses did not assist Alberta's defence because the court also made a finding of fraudulent misrepresentation.[43] Though it was, therefore, not necessary to consider whether the "investigation clause" and other clauses effectively absolved the defendant's liability,[44] Justice Feehan did make a determination on this point as well. On the "investigation" clause, for example, he concluded that it:[45]

> . . . merely requires the tenderer "to investigate and satisfy himself of everything and of every condition affecting the works to be performed and the labour and material to be provided"; it does not specify what information he may have regard to in conducting this investigation. In particular, neither this clause nor any other forbid the plaintiff from considering and relying on the soils information conveyed in the tender package.

37. That is, the contract did not contain clauses stating that the written document was the entire document nor did it forbid the implying of terms therein (*ibid.*).
38. Section 1-2.13 of the contract in *Opron* was similar, according to the court, to that at issue in *Catre Industries v. Alberta* (1989), 99 A.R. 321, 63 D.L.R. (4th) 74 (C.A.), leave to appeal to S.C.C. refused 65 D.L.R. (4th) vii, 105 A.R. 254*n*. That latter clause provided, at p. 325, that:

    > [t]he bidder is required to investigate and satisfy himself of everything and of every condition affecting the works to be performed and the labour and material to be provided, and it is mutually agreed that submission of a tender shall be conclusive evidence that the bidder has made such investigation.

    According to Feehan J. in *Opron*, *supra*, footnote 13, at p. 344, such a clause would not conflict with a disclosure duty since,

    > [u]nlike in *Catre Industries*, the implied terms in this case do not rely upon a *guarantee* of the accuracy of the information imparted, but merely that the representor does not possess any information *contradicting* the soils information imparted in the tender documentation. Furthermore, the terms sought to be implied in this case do not constitute a *guarantee* that the technical information in the contract is "reasonably accurate" (the term sought to be implied in *Catre Industries*).

39. *Ibid.*, at p. 345.
40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. Exclusion or exculpatory clauses cannot be invoked to excuse fraudulent misrepresentations, *ibid.*, at p. 365.
44. *Ibid.*, at pp. 364-65.
45. *Ibid.*, at p. 369.

Similarly, clauses which disclaimed responsibility for interpretations of information in the tender documents were also insufficient to exclude liability for Alberta. According to Feehan J., such clauses only excluded liability for inferences which the contractor draws, not for reliance on the basic information contained therein.[46] Feehan J. also distinguished the clause disclaiming the accuracy of the information provided in the tender because it was not drafted broadly enough.[47]

The exceedingly strict interpretation which Feehan J. brought to his analysis of the exclusion clauses is consistent with the operation of the *contra proferentem* rule[48] but may also manifest the court's distaste for the objectionable "veil of secrecy"[49] which Alberta maintained at Opron's expense during the course of the entire project.

2. Duty to Disclose as an Obligation Mandated by Good Faith

Another argument successfully advanced by counsel for the plaintiff in *Opron* was that Alberta had an obligation to disclose material information as part of an implied covenant of good faith and fair dealing. More specifically, the defendant was said to be contractually obliged to disclose information to the plaintiff which was "inconsistent with or contradicted the information provided in the tender documents".[50]

Mr Justice Feehan acceded to this argument, while acknowledging that implying good faith obligations was in its infancy in Canada in 1994.[51] Fortified by certain statements of the Supreme Court of Canada regarding civil law contracts,[52] as well as by the leading decision of *Gateway Realty Ltd. v. Arton Holdings Ltd. (No.*

46. *Ibid.*, at p. 370.
47. *Ibid.*, at pp. 370-72.
48. *Ibid.*, at p. 364.
49. *Ibid.*, at p. 328.
50. *Ibid.*, at p. 343.
51. The law has continued to develop apace. For a recent treatment of the area, see S. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 Can. Bar Rev. 70.
52. *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339, 43 N.R. 283, and *Houle v. Banque Nationale du Canada*, [1990] 3 S.C.R. 122, 74 D.L.R. (4th) 577 cited by Justice Feehan at p. 333 S.C.R. and p. 346 respectively.

3),[53] he held that such an obligation should be inferred. To reach this conclusion, he noted that in the construction industry, tenderers will reasonably expect that the owner, having provided information, will not withhold information which would "materially affect the prospective tenderers' bids".[54] As a result:[55]

> [T]here is a covenant implied by law that the parties will deal fairly and in good faith with one another in the exchange of information. It is reasonable, where the owner or its agents impart critical information in the tender documents which form part of the contract, that there is an implied covenant that such information has been furnished in good faith, in the honest and reasonable belief that it is complete and accurate, with all material information provided, in the sense that there is no inconsistent information within the owner's knowledge bearing upon the tender or the performance of the contract.

In the end, the government was found liable, *inter alia*, for a failure to disclose, both precontractually and during the course of the contract.

3. Duty to Disclose as an Incident of the Law of Mistake, Estoppel, Unconscionability and Unjust Enrichment

(a) Law of Mistake

While the law does not ordinarily impose a duty to disclose prior to the execution of a contract, a *de facto* duty to disclose may arise for the party wishing to create an enforceable contract. This is because silence, which produces a unilateral mistake in the innocent party, will result in the contract being rescinded, rectified, or otherwise being subject to equitable intervention. In *Bank of British Columbia v. Wren Development Ltd.*,[56] for example, the defendant's guarantee was set aside because the bank did not provide him with the information he requested on the state of the collateral

53. (1991), 106 N.S.R. (2d) 180 (T.D.), affd 112 N.S.R. (2d) 180 cited by Justice Feehan, *ibid.*, at p. 346. Note that in the very recent decision of *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 at p. 33, 159 W.A.C. 1, a majority of the Supreme Court of Canada held that employers are held to an obligation of good faith and fair dealing in the *manner of dismissal*, though, quite properly, a requirement of "good faith" reasons for dismissal could be not be implied into the ordinary employment contract absent an express provision to the contrary: *idem*, at p. 27. Three other judges, dissenting in part, found that unfair treatment of the employee at the time of dismissal gives rise to an action for breach of an implied term of good faith and fair dealing: *idem*, at pp. 44-45.

54. *Supra*, footnote 13, at p. 349.

55. *Ibid.*

56. (1973), 38 D.L.R. (3d) 759 (B.C.S.C.).

security supporting the primary debt. Even though the defendant purportedly waived his request by immediately signing the guarantee without waiting for the bank to gather the data he had asked for,[57] the court ruled that "there was a unilateral mistake on the part of the defendant . . . which was induced by the misrepresentation of the plaintiff in failing to disclose material facts to him".[58] The court's approach thereby imposed on the bank what amounts — in practice if not in law — to a positive duty to disclose.[59]

According to the recent decision of the Saskatchewan Court of Appeal in *Montreal Trust v. Maley*,[60] to succeed in an action based on unilateral mistake the plaintiff must establish:[61]

> "(1) that a mistake occurred;
>
> (2) that there was a fraud or the equivalent on the [defendant's] part in that she knew or must . . . have known when the agreement was executed that the [plaintiff] misunderstood its significance and that she did nothing to enlighten the [plaintiff] . . ."

The rationale for such a rule is incontrovertible, namely a refusal by equity to tolerate unconscionable conduct, misrepresentation, sharp practice, fraud or its equivalent.[62]

In *Maley*, the defendant Maley had received as part of his termination settlement the right to purchase land which acquisition was intended to be subject to the plaintiff's well-known policy of retaining all surface leases. When it became clear that the leases had not been excluded in the conveyancing documents — because of a number of errors "encouraged and fostered by Maley"[63] — the plaintiff (Montreal Trust) brought an action to secure a rectification order.

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57. On the facts, the defendant proceeded to sign the guarantee immediately after being told by the credit supervisor that he did not have information on that matter but that he would "make an investigation and report later": *ibid.*, at p. 761.
58. *Ibid.*, at p. 762.
59. I am grateful to Professor David Percy for this insight. This ground for the decision also produces an outcome consistent with the rule, discussed in footnote 12, that a creditor must disclose any information which a guarantor would not expect to exist.
60. *Montreal Trust v. Maley*, [1993] 3 W.W.R. 225, 99 D.L.R. (4th) 257, leave to appeal to S.C.C. refused [1993] 6 W.W.R. lvi, 102 D.L.R. (4th) vii.
61. *Ibid.*, at p. 230, quoting from *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.) at p. 17, and referring with approval to *Blay v. Polard*, [1930] 1 K.B. 628 and *Farah v. Barki*, [1955] S.C.R. 107.
62. *Ibid.* See too G.H.L Fridman, *The Law of Contract in Canada*, 3rd ed. (Scarborough, Carswell, 1994), p. 260.
63. *Maley*, *ibid.*, at p. 228. The leases which were inadvertently conveyed to the defendant had been generating a gross revenue of almost $14,000 per annum for the plaintiff.

Not surprisingly, the court was receptive to the plaintiff's prayer for relief since the defendant knowingly took advantage of the plaintiff's mistake. Indeed, Wakeling J.A. ultimately agreed with Professor Waddams' assertion that: "[w]here there is a mistake as to contractual terms the courts have characterized such conduct as 'equivalent to fraud' and there is no doubt that relief is available".[64] He also agreed with the proposition that whether the unmistaken party created the mistake or not was irrelevant. Rather, it was the defendant's failure to point out the error that founded liability.[65]

Though the court ultimately resolved the dispute in Montreal Trust's favour on a narrower point of employment law, it also affirmed the law of mistake referred to in the preceding paragraph.[66] Furthermore, the law of mistake governed the result because, in the court's view, Maley's conduct was "sufficiently reprehensible"[67] to justify an order of rectification. In short, "it would be inequitable or unconscionable for a party to be permitted to take advantage of another's mistake, even if not induced by him".[68]

That the law has set its face against "snapping up" an offer, as in *Maley*, is equivalent to saying that the unmistaken party owes a duty to disclose a material error in the offer if he or she wishes to secure an enforceable contract. The conclusion has been affirmed often. A recent example is when McLachlin C.J.S.C. (as she then was) in *First City Capital v. British Columbia Building Corp.*,[69] observed that:[70]

> [T]he equitable jurisdiction of the courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.

64. Professor Waddams' analysis is quoted by the court, *ibid.*, at p. 229 and adopted by the court at p. 231.
65. *Ibid.*, at p. 230, quoting with approval G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto, Carswell, 1986).
66. *Ibid.*, at p. 231.
67. *Ibid.*, at p. 229.
68. *Ibid.*, at p. 230, quoting with approval G.H.L. Fridman, *supra*, footnote 65, at pp. 244-45.
69. (1989), 43 B.L.R. 29 (B.C.S.C.).
70. *Ibid.*, at p. 37. It is beyond the scope of this paper to discuss the extent to which *R. v. Ron Engineering*, [1981] 1 S.C.R. 111 has modified the law of mistake in the context of tendering.

In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*,[71] Shaw J. agreed with this exposition of law and extended it also to cover a situation where,[72]

> . . . although there was no actual knowledge of the mistake, circumstances were such that a reasonable person in the position of the party wishing to enforce the written contract ought to have known of the mistake. Thus, constructive notice will suffice.

Hence, whether the mistake is unilateral (as in *Maley*) or mutual (as in *Can-Dive*), the courts will order rectification where "it would be against conscience to allow the written agreement to prevail".[73]

(b) Estoppel

Estoppel can be invoked where one party fails to disclose a material fact to the other party, even absent any contractual obligation to do so. In *Becker Milk Co. v. Goldy*,[74] for example, the lessor argued that the lease in question had come to an end since the renewal notice was defective. Justice Keith did not accept this argument because the lessor had not brought this error to the lessee's attention. Instead, the court applied the doctrine of estoppel by silence, as set forth in *Fung Kai Sun v. Chan Fui Hing*[75] and issued an injunction restraining the defendant from interfering with the plaintiff's continued tenancy.[76]

The Supreme Court of Canada has recognized English and Canadian cases which stand for the proposition that "an estoppel by representation will result from silence where there is a duty to speak",[77] The classic ingredients of this form of estoppel are set forth in *Greenwood v. Martins Bank* in the following terms:[78]

> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

71. (1995), 21 C.L.R. (2d) 39 (B.C.S.C.).
72. *Ibid.*, at p. 69.
73. *Ibid.*, at p. 70.
74. (1977), 82 D.L.R. (3d) 598, 18 O.R. (2d) 417 (Ont. H.C.), affd 87 D.L.R. (3d) 608*n*, 20 O.R. (2d) 400*n* (Ont. C.A.).
75. [1951] A.C. 489 (P.C.). For further discussion of this case, see *infra*.
76. *Becker*, *supra*, footnote 74 at pp. 601-602.
77. *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at p. 747, 40 D.L.R. (4th) 385.
78. *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51 at p. 57, quoted by Le Dain J., *ibid.*, at p. 752.

> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.
>
> Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.

The Supreme Court has also recognized, however, on the basis of *Fung Kai Sun*,[79] that silence can trigger legal consequences. According to Mr Justice Le Dain:[80]

> In *Fung Kai Sun* . . . the Privy Council held . . . that the principle of estoppel by silence, where there is a duty to speak, applied to a case in which there was no contractual relationship between the parties . . . Lord Reid said at p. 501: "It is quite true that there was no duty in the sense that failure to perform it would be a tort or a ground for an action of damages. But it is well established that silence can in some cases give rise to an estoppel without there having been a duty in that sense".

As the court observed in *Pacol Ltd. v. Trade Lines*,[81] however, something less than a legal duty may suffice. Relying on quotations from *Moorgate Mercantile Co. v. Twitchings*,[82] Justice Webster found authority for the proposition that:[83]

> The duty necessary to found an estoppel by silence or acquiescence arises where 'a reasonable man would expect' the person against whom the estoppel is raised 'acting honestly and responsibly' to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. That proposition seems to me to be consistent with the decision in *Greenwood* (where a duty to make disclosure was admitted in circumstances in which, as I understand the law, it could not be unequivocally asserted that a pre-existing legal duty existed) and with the dictum of Mr. Justice Oliver (as he then was) in *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1981] 2 W.L.R 589.

Again, the touchstones in such cases are the equitable values of fairness and reasonableness and a wish not to reward underhanded conduct.

General equitable estoppel based on unconscionability has also proven itself to be an effective route to found liability for a failure to speak, as occurred in *Waltons Stores (Interstate) Pty. Ltd. v.*

79. *Supra*, footnote 75.
80. *Supra*, footnote 77, at p. 753. His Lordship goes on to note that in *Fung Kai Sun*, *supra*, footnote 75, Lord Reid determined that a duty arose on the facts at bar as a result of knowledge of a forgery.
81. [1982] 1 Lloyd's Rep. 456 (Q.B. Com. Ct.).
82. [1977] A.C. 890.
83. *Supra*, footnote 81, at p. 465.

Maher.[84] In that case, the Australian High Court fixed liability on the defendants for failing to advise the plaintiffs that they would not be proceeding with a lease which the plaintiffs reasonably assumed would be executed. In reliance on this belief which was at least partially induced by the defendants, the plaintiffs demolished one of their buildings and had begun to erect a new one, for its presumed tenant. The defendants stood silently by, without dispelling the plaintiff's mistaken assumption. The High Court was not impressed with the defendant's failure to speak. In the words of Mason C.J. and Wilson J.:[85]

> It was unconscionable for [the defendant], knowing that [the plaintiffs] were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted. To express the point in the language of promissory estoppel, the [defendant] is estopped in all the circumstances from retreating from its implied promise to complete the contract.

It is important to note that, to reach this conclusion, the court had to dispense with one of the traditional requirements of promissory estoppel, namely a pre-existing legal relationship,[86] hence underlining the court's overriding concern to deter unconscionable conduct[87] and to eschew legal formulae which, in this case, would impede a fair result.

When faced with arguments based on estoppel — whether estoppel by acquiescence or silence, estoppel by representation of an agent, estoppel in pais or equitable estoppel — there is an overarching judicial concern to alleviate against unconscionable behaviour. Lord Denning has boldly summarized the position with his usual panache:[88]

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases ... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a

84. (1987), 76 A.L.R. 513.
85. *Ibid.*, at p. 526.
86. It remains to be seen whether Canadian courts will follow the judicial lead provided in *Waltons*. For further discussion of this point, see S. O'Byrne, "More Promises to Keep: Contract Law Since 1921" (1996), 35 Alta. L. Rev. 165 at p. 178 and following.
87. See A. Duthie, "Equitable Estoppel, Unconscionability and the Enforcement of Promises" (1988), 104 L.Q.R. 362 at p. 366.
88. *Amalgamated Investment & Property Co. v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577 at p. 584.

> series of maxims: Estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

While judicial reactions to this summary are somewhat mixed,[89] Denning M.R.'s analysis is ultimately useful because it candidly identifies the inevitable contingency and the background, equitable values in which the courts locate the operation of estoppel.

(c) Unconscionability

It is trite law that where a failure to disclose amounts to unconscionable conduct, the contract in question can be set aside and the

89. Some Canadian courts have endorsed Lord Denning's broad articulation of estoppel. As recently as 1997, the British Columbia Court of Appeal identified this passage as a "helpful exposition of the historical formulation of equitable estoppel with its different forms and limitations, its flexibility, the reluctance to classify it into different categories and the underlying principle of what equity entails — that justice be done". See *Zelmer v. Victor Projects Ltd.* (1997), 147 D.L.R. (4th) 216 at p. 225, [1997] 7 W.W.R. 170, *per* Hinds J.A. This echoes the position taken by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 at p. 99, 52 D.L.R. (4th) 459 *sub nom. Litwin Construction (1973) Ltd. v. Kiss* wherein it quoted Lord Denning with approval and then went on to describe estoppel by representation in the following terms:

> [u]nder this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment.

See too the dissenting judgment of Lambert J.A. in *King v. Mayne Nickless Transport Inc.* (1994), 114 D.L.R. (4th) 124 at p. 127, [1994] 6 W.W.R. 160 (B.C.C.A.).

Other courts have been more reticent when faced with Lord Denning's approach. In *Imperial Oil Ltd. v. Young* (1996), 142 Nfld. & P.E.I.R. 280, 8 R.P.R. (3d) 214 (Nfld. S.C.) at p. 328, the court observed that Lord Denning's exposition is not one with which all authors appear to agree "particularly as it applies to the question of the use of estoppel as an affirmative cause of action". The British Columbia Supreme Court in *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C.S.C.) at p. 235, *per* Esson C.J. has recently expressed similar reservations:

> [i]t should be noted that the "flexible approach to estoppel" espoused by Lord Denning M.R., which would have permitted estoppel by convention to be the foundation of a cause of action, was not necessary to the decision, was not accepted by the other two members of the court, and seems not to have been accepted in later cases . . .

court may award other consequential relief. While the precise legal ingredients of unconscionability remain to be determined by the Supreme Court of Canada,[90] it minimally involves a manipulation of vulnerability which can take the form of a lack of information in the innocent party.

In *Atlas Supply Co. of Canada Ltd. v. Yarmouth Equipment Ltd.*,[91] for example, the plaintiff failed to inform the defendant that not all sales projections for a prospective franchise operation were as favourable as the one conveyed to the defendant during contractual negotiations. Though the original projections estimated only an $11,000 annual profit, they were reconfigured by the plaintiff in several misleading ways to project a profit of $33,000. When the franchise failed and the defendant was sued on his personal guarantee and under the franchise agreement, the defendant counterclaimed, alleging that the plaintiff's unconscionable conduct precluded it from enforcing the guarantee and from relying on the commercial exclusion clauses contained in the franchise agreement.[92]

Matthews J.A. found for the defendant, though the exact nature of the unconscionability test employed by him is unclear.[93] It is at least clear that he acknowledged that unconscionability is accurately formulated in a number of sources, including in the following extract from Fridman's text on contract law:[94]

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90. See R. Flannigan, "*Hunter Engineering*: The Judicial Regulation of Exculpatory Clauses" (1990), 69 Can. Bar Rev. 514 at p. 529 and following. For a recent review of academic commentary regarding unconscionability, see J.A. Manwaring, "Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law" (1993), 25 Ottawa L. Rev. 235.

91. (1991), 37 C.P.R. (3d) 38, 103 N.S.R. 1 (C.A.), leave to appeal to S.C.C. granted 38 C.P.R. (3d) iv, 108 N.S.R. (2d) 270*n*; notice of discontinuance filed April 1, 1992, [1991] S.C.C.A. No. 256.

92. The franchise agreement contained an "independent investigation" clause and an "entire agreement clause", recited in the case, *ibid.*, at pp. 77-78.

93. In a very useful analysis of the case, V.W. DaRe, "Atlas Unchartered: When Unconscionability 'Says it All'" (1996), 27 C.B.L.J. 426 at p. 431, states:

> [n]otwithstanding its reluctance to formulate a test, the majority was rather generous, although mechanical, in its application of the leading tests of unconscionability. The two-step process outlined by Waddams and elaborated in *Morrison* was adopted and applied in a haphazard manner. Unconscionability is reduced to two basic elements under this approach - inequality of bargaining power and exploitation by the stronger party.

94. *Supra*, footnote 91, at pp. 83-84, quoting Fridman, *supra*, footnote 65 at pp. 304-305.

> "Where a bargain is held to be unconscionable, it is not the consent of the victim that is impugned, but the reasonableness of the bargain, the conscientiousness of the other party, the equitable character of the transaction . . . Moreover a finding that there had not been undue influence does not preclude a decision in favour of a party who also alleges unconscionable conduct. In contrast with an attack upon consent, which is what is involved in a plea of undue influence, a plea that a bargain is unconscionable, or has been obtained by unconscionable means or methods, permits a court to invoke relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. Where such misuse of power is shown, it creates a presumption of fraud, in the equitable not common-law sense. That presumption the stronger party must repel by proving that the bargain was fair, just and reasonable."

Matthews J.A. went on to note that: (a) the inflated and reconfigured income projections given to the defendant "were flawed to the extent that the project was not viable";[95] (b) the defendant had relied on these projections and they had been given to him with precisely that intent;[96] and (c) the defendant was extremely vulnerable since, in the trial judge's words, he "did not have the resources and ability to check out the Atlas financial forecast and . . . he did not do so".[97] Given these findings, the exclusionary clause was also disallowed,[98] since the plaintiff could not prove, in Professor Fridman's words, that "the bargain was fair, just and reasonable".[99] Consequently, the defendant was only partially liable on his guarantee and the franchise fee was ordered to be returned in its entirety.[100]

In a concurring judgment, Freeman J.A. was even more direct. He described the dealings by the plaintiff as "offensive to conscience",[101] and noted that:[102] "[t]here are echoes here of the old doctrine of fundamental breach, failed consideration, mistake, breach of collateral warranty, reliance on the seller's skill and judgment. However, the concept of unconscionability says it all."

While *Atlas* has been persuasively criticized in comment by Vern DaRe for its lack of analytical rigour,[103] the case is nonetheless useful for illustrating a classic judicial reaction to non-disclosure

95. *Ibid.*, at p. 91.
96. *Ibid.*, at p. 91.
97. *Ibid.*
98. *Ibid.*
99. *Ibid.*, at p. 93.
100. *Ibid.*, at p. 94.
101. *Ibid.*, at p. 98.
102. *Ibid.*, at p. 97.
103. *Supra*, footnote 93, at p. 439.

amounting to unconscionability. In short, where the informational imbalance between parties is extreme and consequential, the courts are willing to intervene on behalf of the weaker party even in such business contracts as in *Atlas.*

(d) Examples of Restitutionary Claims

While it is beyond the scope of this paper to explore all heads of restitutionary claims which can touch upon the law of disclosure, this section will address two: unjust enrichment and one of its specialized applications, namely money paid under mistake.

(i) Money Paid under Mistake

A strategy which enforces an obligation to disclose has been for the plaintiff to allege fraud based on the defendant's failure to point out a material error, or alternatively, given the right facts, to found an action based on money paid under mistake. In *Wolfson v. Corkum*,[104] the plaintiff, a solicitor, inadvertently released excess mortgage funds to the defendant, who was the officer of the solicitor's corporate client, because he had negligently failed to make all the deductions required by the mortgagee. The defendant did not draw the error to the plaintiff's attention but simply spent the funds by paying down other debt. The plaintiff brought an action based, *inter alia,* on fraudulent misrepresentation. His argument was that since the defendant knew or was wilfully blind to the fact that the cheque was noticeably greater than expected, he was obliged to return the excess amount. The court held that, while the defendant "soon became aware of Wolfson's error, if not at the time of closing [then] shortly after", a remedy in tort was not available since there was no evidence that Corkum had induced the error and there was insufficient evidence to establish fraud or misstatement.[105] The plaintiff did prevail, however, under the rubric of money paid under mistake of fact. To establish this outcome, Justice Palmeter purports to adopt Dysart J.'s analysis in *Ste. Rose v. Royal Bank*[106] to the following effect:[107]

104. (1996), 154 N.S.R. (2d) 329 (S.C.).

105. *Ibid.*, at p. 335. According to the court, the transaction was rushed and so it was possible that the defendant "did not pay much attention to what he was signing and perhaps even to the amount of the cheque".

106. [1928] 1 W.W.R. 663 (Man. K.B.) See notation in footnote 107, *infra.*

107. Quoted by the court in *Wolfson*, *supra*, footnote 104, at pp. 335-36. Note that this quotation is not, in fact, from the *Ste. Rose* case but this author is unable to locate its actual source.

> First that the mistake is honest. There must be on the part of the person paying the money the genuine bona fide belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have learned. His laches or negligence will not of themselves affect his belief . . .
>
> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it . . .
>
> The third condition is that the facts, as they are believed to be impose an obligation to make the payment.
>
> The fourth condition to recovery is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer. This proposition is not the exact converse of the third condition. The money may be owing to the receiver from a third person who induced the payment, but the existence of such a debt is not enough to defeat recovery.

Justice Palmeter found that all these conditions were clearly met on the facts of the case and so declined to engage in detailed application. Instead, and in short order, he required the individual defendant to return the money to Wolfson, thereby ensuring that the defendant's strategic silence, while falling short of fraud, would not leave the innocent party without a legal remedy. Put another way, Corkum's failure to disclose did not and could not entitle him to retain money which was not his — he might as well have spoken up in the first place.

(ii) Unjust Enrichment

While unjust enrichment is frequently associated with matrimonial or "family" cases, as Wilson J. summarized the law,[108] it now commonly applies to arm's length transactions as well.[109] Hence, in *Wolfson*,[110] the court quite properly allowed it as a second ground for recovery:[111]

> The criteria for unjust enrichment has [*sic*] been set out by Dickson, J. (as he then was), in *Becker v. Pettkus* [*sic*]: "'Unjust enrichment' has played a role

108. *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 at p. 16, [1989] 2 S.C.R. 574 at pp. 630-31.
109. *Ibid.*
110. *Supra*, footnote 104.
111. *Ibid.*, at p. 336, applying *Pettkus v. Becker* (1980), 117 D.L.R. 257 at pp. 273-74, [1980] 2 S.C.R. 834 at p. 848.

> in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses* v. *Macferian* (1760) . . . put the matter in these words: 'the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'" and further . . . "there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment."

Similarly, in *Suess v. Rosenlehner Estate*,[112] the court found to be actionable the defendant's failure to disclose that the harvester he was selling to the plaintiff was subject to a chattel mortgage. By virtue of unjust enrichment, among other grounds, Suess was able to recover from the defendant the amounts he had had to pay the mortgagee to allow him to retain possession of the machinery.[113]

Not surprisingly, when one party culpably fails to disclose relevant facts to another and derives a benefit from his or her silence, the novelty of the particular facts will — given equity's reach — be no bar to recovery. As Dickson C.J.C. noted:[114]

> [i]t would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise . . . The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.

La Forest J.A. (as he then was) echoed the same sentiment when he stated in another case that: "the law will afford a remedy for unjust enrichment in the absence of valid judicial policy militating against it".[115] Hence, while there is no "general category of remedies" attached to unjust enrichment,[116] there are numerous mechanisms, both in equity and at common law, to undo its effects, namely: the constructive trust; tracing; property transferred by operation of law, and monetary awards.[117] These are intended to ensure — even on facts which fall short of misrepresentation, fraud, or breach of a term — that the non-disclosing party reaps no lasting reward from his or her culpable silence.

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112. [1986] B.C.J. No. 2839 (QL) (B.C. Co. Ct.).
113. *Ibid.*
114. *Pettkus, supra*, footnote 111, at pp. 847-48, cited to S.C.R.
115. *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at p. 245, 54 N.B.R. (2d) 293 (C.A.).
116. Andrew Tettenborn, *Law of Restitution* (London, Cavendish Publishing, 1993), p. 15.
117. *Ibid.*

IV. CONCLUSION

The trends identified by Professor Waddams in his 1991 article continue apace.[118] Recent case law indicates that disclosure obligations in the commercial sphere have a broad, albeit imprecise legal impact. Such a duty, although at times unwieldy and difficult to predict, is clearly driven by a judicial desire to deter blameworthy silence related to severe informational asymmetry[119] and is animated by equitable values which seek to mitigate the harsh individualism of classical and neo-classical contract law encapsulated in such phrases as *caveat emptor*. Indeed, courts are more willing now to question the axiomatic relevance of such 18th and 19th century principles that, for example, purchasers should "fend for themselves in seeking protection by express warranty or by independent examination".[120] For example, it was an open questioning of laissez-faire values which led the Supreme Court of Canada to reject *caveat emptor* as a defence to a subsequent purchaser's action against the contractor for construction defects.[121]

This shift in judicial reasoning and informational values calls into question L. Atkin's exposition of the law of unilateral mistake,[122] long regarded as classic. Consider, in particular, the following examples which he offers:[123]

> A. buys B.'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B. has made no representation as to the soundness and has not contracted that the horse is sound, A. is bound and cannot recover back the price. A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty. A. agrees to take on lease or to buy from B. an unfurnished dwelling-house. The house is in fact uninhabitable. A. would never have entered into the bargain if he had known the fact. A. has no remedy, and the position is the same whether B. knew the facts or not, so long as he made no representation

118. *Supra*, footnote 3.
119. Note that throughout this paper, I have generally assumed that the more powerful party is also the party which has the superior information but as Professor Hickling noted at the Annual Workshop, *supra*, footnote *, there can be situations where the weaker party has the better information. In the employment context, for example, it is the job applicant who has the superior information concerning his or her employment history, not the prospective employer.
120. *Winnipeg Condominium*, *supra*, footnote 25, at p. 220.
121. *Ibid.*, at p. 221.
122. *Bell v. Lever Bros. Ltd.*, [1932] A.C. 161 (H.L.).
123. *Ibid.*, at p. 224.

> or gave no warranty. A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a byepass road which will divert substantially the whole of the traffic from passing A.'s garage. Again A. has no remedy. All these cases involve hardship on A. and benefit B., as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts — i.e., agree in the same terms on the same subject-matter — they are bound, and must rely on stipulations of the contract for protection from the effect of facts unknown to them.

In at least three of the four examples given in this passage, there is a conflict between the classical position and how these cases might be treated today.[124] Lord Atkin's view that the purchaser of the unsound horse is without remedy is vulnerable, given the willingness of the modern judiciary to hold even those in a non-fiduciary transaction to the equitable standards of fairness and reasonableness. A judge driven by these values may well be tempted, albeit controversially, to conclude that there had been an *error in substantialibus* — that an unsound horse is different in kind from a sound one — or agree that there had been a total failure of consideration. Lord Atkin's conclusion regarding the painting erroneously believed by both vendor and purchaser to be that of a old master is likely to be followed given that there is no actual informational asymmetry between the parties nor, on the assumed facts, has the vendor acted in anything less than a candid manner.

Conversely, Lord Atkin's conclusion in the third example — that the vendor of the uninhabitable house was not amenable to legal attack — is precarious, particularly when the vendor knows about its uninhabitableness, given the Ontario Court of Appeal's reasoning in *McGrath v. MacLean*.[125] His fourth example — that the vendor need not disclose a fact which would substantially interfere with the revenue potential of the subject property — is also likely to be questioned by a modern court. A court may well conclude that the vendor was in breach of an implied contractual term to disclose or a duty to act in good faith. To the extent that the vendor had followed the usual course and permitted the purchaser

124. I am grateful to Professor Percy of the Faculty of Law, University of Alberta, for this insight and for his assistance in drafting this section of the paper.

125. Indeed, *McGrath*, *supra*, footnote 25, determined that the failure to disclose latent defects rendering a property uninhabitable falls within the purview of the tort of deceit. For discussion of this and related cases, see *supra*, footnotes 25 to 31 and accompanying text.

to review revenue figures prior to execution of the contract, he has not been silent and in fact has made representations. That being the case, *Opron* could be invoked to establish an implied term that the vendor would subsequently "disclose relevant information in [his] possession which contradicts [his] express representations"[126] and, further, that the revenue statement provided by the vendor had "been furnished in good faith, in the honest and reasonable belief that it [was] complete and accurate, with all material information provided, in the sense that there [was] no inconsistent information within the owner's knowledge".[127] In short, a court may well protect the purchaser's reasonable expectation that the vendor would not withhold information which would materially affect the future viability of the business.

Alternatively, under the line of cases represented by *Moorgate Mercantile Co. v. Twitchings*,[128] it could be argued that the vendor had a duty to "'act honestly and responsibly' to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations".[129] That is, the purchaser quite reasonably expected that he was acquiring rights to a garage the revenue prospects of which were not in current peril. Since the vendor knew that the purchaser was not acquiring such a right at all, it follows under *Moorgate* that the vendor would have an obligation to speak. At minimum, these arguments — which would most certainly have been non-starters in 1931 — have concrete potential in 1998 because modern courts have repeatedly demonstrated a willingness to judge commercial conduct against the standards of honesty, reasonableness, and fair play.

Admittedly, uncertainty accompanies any judicial inclination to assess whether the defendant's silence violates the standards set by the values of equity. As Mr Justice Grange has observed:[130]

126. *Supra*, footnote 13, at p. 349. A judge might well be able to build on the analysis in *With v. O'Flanagan*, [1936] Ch. 575 (C.A.). In that case the vendor made representations as to the worth of his medical practice during the course of negotiations, which representations had become false by the time the contract was to be executed. In such circumstances, the court found that there was an obligation on the vendor to make that disclosure.

127. *Supra*, footnote 13, at p. 349. Recall too, Feehan J.'s willingness to disallow a series of exclusion of liability clauses in order to reach this result.

128. *Supra*, footnote 82.

129. For discussion of this and related cases, see footnotes 79 to 83 and accompanying text.

130. Justice Grange, "Good Faith in Commercial Transactions", *Law Society of Upper Canada Special Lectures, 1985, Commercial Law: Recent Developments and Emerging Trends* (Don Mills, Richard De Boo Publishers, 1985), p. 69 at p. 71.

> [w]hat is reasonable or unconscionable? I can answer that quite simply. "Give me the facts and I'll tell you." The trouble is that you can readily find another judge or another body of judges or indeed any member of the public who disagrees with my moral concept.