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CONSTRUCTION PARTNERING: GOOD FAITH IN THEORY AND PRACTICE

Andrew J. **Heal.**

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Abstract: How partnering as cooperative approach to contract management acts as form of dispute prevention in construction industry, focusing on implied duty of good faith and fair dealing in Canada and changing role of lawyer.

***167** "Conflict today is a growth industry ... we are living today in times of intense change, and change naturally creates conflict. We cannot choose to eliminate this conflict--nor should we--but we can choose how we handle conflict." [FN1]

"No man is his brother's keeper; the race is to the swift; let the devil take the hindmost." [FN2]

Introduction

Alternative Dispute Resolution ("ADR") in the construction industry finds its most recent and successful innovation in partnering. Partnering provides a mature approach to conflict and the disputes that conflict produces. Partnering moves beyond a narrow adversarial view of contractual interaction to an expressly cooperative approach. This article analyses how a partnering overlay on construction contracts promises and achieves timely and less costly outcomes for construction disputes in Canada through a review of the legal and non-legal published experiences with **construction partnering,** primarily in the United States, but also in Australia and the United Kingdom. [FN3]

The partnering theory explored in this article will be measured against how ***168** partnering works in practice in the construction industry. [FN4] I will argue that partnering is a best practice conflict management technique. Partnering addresses one of the fundamental problems of the conventional practice of postponing the resolution of disputes during construction contract performance. [FN5] Partnering makes it more likely that the number of disputes that require litigation will be significantly lower than on non-partnered construction projects. I will also argue that duties of good faith and fair dealing may be implied by the court in the resolution of construction disputes in Canada where parties chose a partnering overlay to their contractual relationship, and have not otherwise resolved their dispute. [FN6]

The origins of partnering are in the United States where doctrines of good faith and fair dealing are firmly entrenched in contractual analysis. Implied duties of good faith and fair dealing in contract--explicitly recognised in the United States and gaining recognition in Canada--are fundamental to partnering. In my view, Canadian courts will more likely imply duties of good faith and fair dealing in contract performance and enforcement where the parties have chosen a partnering overlay to their relationship.

Partnering is a procedural overlay to a contractual relationship

Partnering is a dispute prevention technique that is an overlay for an underlying contractual relationship.

While partnering seeks to address how parties are to interact in areas of conflict, the relationships among the parties to a construction project are primarily fixed by contract. Through contract, the various participants seek to define and limit their rights and obligations with respect to each other using traditional contract notions of risk allocation in a way no different from other commercial contracts.

***169** The prevailing view is that construction contracts are not conceptually unique. [FN7] Consequently, the general rules of contract formation apply together with usual rules of contract interpretation. Partnering is a procedural "overlay" to the underlying contractual framework with dispute prevention as its goal. It arose because players in the construction industry were becoming increasingly frustrated with the cost and delay associated with other means of dealing with disputes, the defensive attitudes and the lack of coordination that such attitudes produce. [FN8]

The Associated General Contractors of America ("AGC") describe construction contracting as a very competitive and high risk business. [FN9] The AGC endorses partnering as a concept that "creates a win/win attitude" among all the team players. [FN10] "Partnering is not a contract, but a recognition that every contract includes an implied covenant of good faith." [FN11] The AGC material sets out the key elements of partnering as commitment, equity, trust, establishing mutual goals and objectives, a plan to implement such mutual goals and objectives, with a continuous evaluation of the plan through timely communication and decision making. The material also includes a sample partnering charter, a sample facilitator's agenda, and sample partnering evaluation forms.

Partnering can be regarded as an innovation or a new name for traditional principles of co-operation and trust. Partnering can be single project or multi project partnering. From a lawyer's perspective, reduced to its practical essence, partnering means that the contract parties get together at the beginning of a job, ***170** identify common interests and agree on procedures to expedite resolution of problems that are likely to arise. [FN12]

The usual procedural elements of partnering involve a preconstruction "workshop", a problem-solving escalation plan, a partnering charter or mission statement, and continuous evaluation of whether the goals and objectives are being met. The idea of the preconstruction workshop is to introduce parties to each other, and to identify their expectations and mutual objectives. The problem-solving escalation plan is an agreed procedure where conflicts will be escalated in a "step process" to predesignated higher representatives of each party. The partnering charter (or mission statement) is supposed to be a nonbinding document, committing each party to the goals and procedures of partnering for the project.

In addition to minimising lost time and cost, partnering promotes innovation through value engineering and ongoing "constructability" input. It also provides improved quality assurance because of increased communication. Partnering has had its greatest impact in the United States, particularly in Arizona, Florida, Kansas, Texas and Washington where state Departments of Transportation have partnered over 700 projects. One study concluded that more than a third of the Departments of Transportation had programmes in place to measure the impact of partnering, and of those who measured the impact of partnering, 85 per cent of them believe that the partnering procedures improved performance. [FN13]

Partnering emphasises an environment of co-operation among various parties. To this extent it can be considered a mature means of dispute prevention, rather than a traditional method of ADR. Partnering is a mature process because it positions the information gathering process and the decision making process at the lowest levels and empowers each of the representatives on each of the rungs in the dispute escalation ladder to manage the conflict to avoid an unresolved dispute. [FN14] The construction industry has adopted the concept of partnering and is using the philosophy as a management tool, beginning at the front end of a construction project. Working relationships are established through a mutually developed, formal strategy of

commitment and communication. [FN15] The legal expression of this partnering process of co-operation can be found in the implied covenants of good faith and fair dealing which are part of contractual analysis in the United States.

Partnering is a process. Author and practicing construction litigator, Justin Sweet, [FN16] has described the process component as follows:

> ***171** "Partnering is more of a pre-contract and performance process than a contract for a building project. A legal partnership is a legal entity in which people join together and share profits and losses. But I am talking about not the noun of a partnership but the general verb built, ungrammatically from the noun. The process seeks to reduce or even eliminate the adversarial mood created in the traditional method of contract. Such a mood can be harmful to the co-operation needed to have a successful construction project. Partnering is an attempt to get key personnel together to realize that, while they are not partners in a technical sense, they are partners in the sense that each one is relying to a degree upon the other for economic success." [FN17]

It has been said partnering does not replace a construction contract--but it does at least "enable it to be administered on a more harmonious basis". [FN18] Partnering necessarily imports the concepts of "good faith" and "fair dealing". Partnering must be at least this because notions of "good faith" and "fair dealing" are already implied terms of contract law in the United States. This is not yet so in Canada. [FN19] As a consequence, the partnering charter or mission statement ought to be thought through carefully such that the partnering spirit can be reconciled with the contractual provisions.

What is partnering?

Partnering as dispute management process

While there are various definitions of partnering, it is essentially a "co-operative approach to contract management that reduces costs, litigation and stress". [FN20] Essentially, partnering is a best practice management technique and relational process. The Dispute Avoidance and Resolution Task force (DART) of the ***172** American Arbitration Association has prepared a report on partnering, and a form of declaration of "Principles for the Prevention and Resolution of Disputes". The DART report describes partnering in this way:

> "Partnering is a voluntary, organized process by which two or more organizations having shared interests perform as a team to achieve mutually beneficial goals. Typically, the partners are organizations that in the past worked at arm's length or may have had competitive or adversarial relationships with one another. Generally, the more partners that are involved, the better the overall results. Partnering is also a collaborative process that focuses on co-operative solving of problems participants have in common. Properly applied, it yields reconciliation (win-win) as opposed to either compromise (lose-lose) or concession (win-lose). It is not a social process that simply promotes courtesy and politeness among participants, but rather good faith joint resolution of problems. Partnering is a nonbinding process. It neither alters the contract documents nor the relationships between the parties. Instead, it is a commitment between the parties to use the agreed-upon partnering process and to deal with one another as true partners." [FN21]

In order to harness the benefits of the partnering process, new competencies must be learned within an organisation. In multi partner projects, the implementation of partnering is challenged by differences in established ways of doing business across organisations, which can lead to mistrust and adversarial posturing. The key is to transform this adversarial mind set to a co-operative mind set. An orderly and systematic way of managing this change is necessary. The first relationship to be transformed is the internal relationship between employee and manager. A manager must manage his or her employees using a management philosophy that focuses on developing employee pride, workmanship and productivity improvement through the elimination of rework. However, partnering's primary focus is external.

As more than a formal internal management strategy, partnering requires all parties to agree from the beginning on an external structure (e.g. the partnering charter, including the problem solving escalation plan) to focus on creative co-operation to avoid adversarial confrontation. [FN22] The model charter underscores ***173** the commitment of "agreeing to agree". [FN23] In an uncertain environment such as construction, risk is inherent, and the parties involved in the contract try to limit their exposure in part by risk shifting. Because contracts do not inherently promote efficient risk shifting to the party best able to control the risk, adversarial relationships in construction projects are usual and disputes ought to be expected. It is preferable to avoid, through a partnering overlay to a construction contract, a "blurring" of risk allocation and control of those risks between the parties. [FN24]

The construction industry has unique management problems. Construction is a project based operation. Each project tends to be "one-off". The operation of each component organisation (architect, engineer, contractor, supplier) are interdependent, although linked in ways specific to each project. [FN25]

Partnering at least lets the parties plan ahead on how to deal with conflict, and helps them to identify expected problem areas. Partnering usually begins at a workshop [FN26] comprised of the key on site personnel of the owner, contractor and consultant. The workshop will usually be guided by a neutral facilitator. The workshop usually leads to the creation of a blueprint partnering charter. It defines intermediate and long term time goals for the project. Contrast partnering and its emphasis on open communication with the traditional view that design professionals ought to reduce or eliminate direct contact with the contractor. [FN27] Part of the attractiveness of partnering is that it recognises a business need and desire to change a "win/lose" philosophy. The idea is that the parties ought to take control, by themselves, of costly disputes to change to a "win/win" philosophy. [FN28]

***174** Brooke and Litwin, who have studied partnering from a management perspective, make the point that an underlying and unified shared purpose really enhances partnering. Where there is an inspiring cohesive goal, the parties can work jointly towards it. Brooke and Litwin analysed management practices from a survey of multi disciplinary project management organisations over a period of 20 years. Brooke and Litwin then compared management practices that do and do not predict success in project management by comparing a group of high performing project managers with average performing project managers. [FN29] The authors then presented their findings to a group of engineers, scientists and academic leaders who indicated that trust, performance objectives and feedback were critical factors for success. This reinforces the effectiveness of the partnering process. Canadian studies on the best practices for maintaining more stable contractor/owner relationships suggest the importance of moving away from risk shifting to risk management. [FN30]

It has been said that the Canadian construction industry has not embraced partnering as fully as it ought to because of concerns that it will change legal obligations. Lawyer and partnering facilitator Gail Forsythe states:

> "Members of the Canadian construction industry may have misconceptions about partnering due to a lack of familiarity with the concept. For example, ***175** partnering does not change the legal obligations under the contract nor does it involve a rewriting of the contract. Partnering does not involve a sharing of risk or profit. Partnering is merely an attitude based upon good faith; it is not the legal relationship that we know as a 'partnership'." [FN31]

Partnering is a relatively young dispute prevention process in Canada, although it has been around for almost a decade in the United States. In Canada, many projects have been the subject of partnering. [FN32] It is not surprising that issues arising out of partnered projects have not yet been litigated in Canada or the United States. Should the courts attach legal significance to the partnering commitment?

The notion that partnering has no legal consequences is open to challenge. At common law and by stat-

ute, "partners" are, among other things, bound to render full information to each other. In essence, they owe each other reciprocal duties of "good faith" performance. In my view, these legal concepts are precisely what the concept of "partnering" seeks to appropriate, in notions of "good faith" and "fair dealing". This is the reason for the use of the word "partner". This expressed intention may well have legal consequences, short of implying all the usual obligations of partnership. [FN33]

The other compelling part of the theory of partnering is that participants should act more like a team rather than relate in inherently adversarial ways. Partnering is an example of an organisational process seeking to change the construction industry's prevailing adversarial philosophy. To this extent I agree that a "change in attitude" is required of the participants to relate in non-adversarial ways in contract performance.

The American origins and theory of partnering

The United States Army Corps of Engineers pioneered the concept of partnering through seeking to avoid disputes associated with fixed priced low bid public ***176** contracts in the late 1980s. [FN34] Partnering involves co-operative project management. Post contract award and preconstruction meetings are held among the participants to develop mutual goals and strong working relationships. The goals and relationships are reinforced by periodic team meetings. The idea is that by working together, the administrative burden on a project is streamlined and problems are identified early on. The net result is fewer disputes, but only with real commitment.

Partnering only works if every project participant's willingness to work together is sustained throughout the duration of the project. Prompt and good faith efforts to avoid and resolve disputes are key to successful partnering.

Defending one's position without compromise or taking the hardline on any dispute defeats the purpose of partnering. [FN35]

Partnering explicitly recognises that disputes are inevitable. No construction design is ever perfect, unforeseen conditions or events will likely occur that require adjustment in contract performance. It is not the contractual relationship by itself between contractor and owner that creates an adversarial relationship, but unresolved problems during the course of the contract performance. One major advantage of the prevention or the early resolution of disputes through partnering is the avoidance of the difficulty of reconstructing events after the fact. This is the principal source of the cost of litigation sought to be avoided by partnering.

Partnering is not simply about saving money. For the clients, partnering also offers the perception of improved quality, safety, and fewer errors. Better communication and common goals help build trust and respect. [FN36] Other benefits include lower risk of cost overruns, expedited decision making and lower administrative costs, increased opportunities for innovation, and value engineering. Harder to measure, but an important additional impact, may well be the improved public reputation of being considered easy to work with and non-adversarial.

***177** Following a philosophical commitment to partnering there must be the appropriate commitment of resources. Commitment can be demonstrated by an equitable division of partnering costs, including the neutral facilitators and workshop fees. [FN37] Of course there are opportunity costs to having employees attend the workshop and any follow up work by the neutral facilitator. Senior management must lead by example, demonstrating enthusiasm and commitment for the partnering process. Each participant must be encouraged to perceive his/her ideas as equally important and shared leadership is encouraged.

The DART report recognises that the failure to resolve disputes early will create an adverse impact on the best interest of the project and the parties. [FN38] The DART report suggests that the days are gone

when design and construction inefficiency could be ignored and buried in project costs. [FN39] The intent of the DART declaration is to ask the parties to designate representatives to negotiate resolutions to disputes. The DART declaration expressly states the parties to it are not entering into a binding agreement and the declaration (or partnering charter or mission statement) is:

> "... an expression by each party to the other of the serious and good faith desire to co-operatively achieve resolution of their claims and disputes, which will avoid engaging in formal dispute resolution procedures."

Studies relied upon in the DART report suggest that 90 per cent of the participants surveyed believe that partnering improved the quality of projects. Some of the projects averaged 7 per cent savings, and a larger number were completed early, or on time. The DART report suggests that each party must be objective and fair with each new issue. For example, the report suggests that partners need to avoid letter wars. They suggest an effective technique is to review draft letters with the intended receiving party, and to incorporate the receiver's ideas on how to express the issue, prior to finalising them.

Partnering has been endorsed not only by Contractor Associations, but also by insurers of design professionals. DPIC Companies Inc., the United States insurer of over 7,600 design professionals in Canada and United States, provides insurance coverage to encourage partnering. [FN40] Following its success with mediation, DPIC recently instituted insurance coverage called "Partner/Team Cover" which provides an entire design team with insurance coverage for a specific project. In-house studies by DPIC have shown that transaction costs and the size of losses associated with disputed claims dropped as DPIC's use of ADR increased. "Partner/Team Cover" is intended to go the next step to encourage partnering. On selected projects DPIC helps educate stakeholders about partnering, and may pay some of the expenses for the initial partnering facilitation, and follow-up workshops. With "Partner/Team Cover" the owner receives guaranteed coverage and dedicated limits on a project (cover up to 10 years), with a greater chance of the project being delivered on time, and within budget. DPIC ***178** has proactively participated in the implementation of partnering on some of its insured's projects in order to pre-empt claims.

Partnering client, not lawyer driven

The promise of a swift and fair dispute resolution process is what the public wants and the construction industry is no different. [FN41] The public wants a process that promotes early resolution. Recent empirical research in Ontario suggests that the volume of construction litigation, and construction lien actions in particular, has decreased. Statistics prepared by Prof. Garry Watson indicate a decline in court filings from 1992 to 1996 in Ontario. [FN42] This could mean that clients are adopting less adversarial attitudes. [FN43] Resolution through ADR avoids the prospect of court delay and expensive legal proceedings.

The evolution of ADR in construction began with arbitration. Arbitration, however, has lost a certain degree of the flexibility in its process that was one of its greatest advantages over litigation, and is not now really regarded by clients as an alternative. [FN44] Its variant forms were mainly intended to provide faster and commercially oriented outcomes, usually through the use of recognised experts as the arbiters. [FN45] A quick decision may not be as critical in certain circumstances ***179** where the dispute (and its settlement cost) can be deferred until later. However, the benefit of the early resolution of disputes prevents the breakdown of an ongoing relationship.

The traditional adversarial process with party presentation and party prosecution of "rights" is being eroded anyway--by interventionist judges, by imposed case management and by the new "triage" of mandatory mediation of court cases in Ontario. [FN46] Will partnering deliver better on the promise of less costly and faster outcomes? Does it give parties a more satisfactory resolution measured in terms of cost, time and greater participation? I believe that it does.

Partnering works better with project neutrals

"Project neutrals", "referees" and "dispute review boards" function as autonomous tribunals, with members appointed by each of the parties (and one joint appointee), and provide for expeditious on site consideration of unresolved disputes by an expert, or panel of experts. [FN47] This can help prevent the escalation of an unresolved dispute. Further, it takes the dispute out of the hands of those on the job who may be too close to the problem. The cost of such resolution is usually a fraction of the cost of full scale litigation or arbitration. Further, the neutral often has the opportunity to actually observe the construction problems when they occur or as they are occurring. This avoids having to reconstruct events after the fact. The mere fact of the option may make the parties work harder to reach their own solution.

Project neutrals have the advantage of retaining intimacy with the project (relieving the architect or engineer of the obligation to resolve disputes in a potential conflict of interest situation). They head off trouble and help the parties avoid more costly methods of resolving disputes. Partnering goes a step further than a dispute review board. It has been described as a new transformative relationship. It is a transformation in attitude to "foster a nurturing environment that promotes risk sharing". [FN48] This is an agreement in principle to share the risks involved in completing the project, and to establish and to promote a non-adversarial environment.

If formal dispute resolution is part of partnering, then the formal contractual steps must be taken before the consequences of a partnering overlay will be imposed on the parties. Partnering means at least trying to agree. The courts in similar circumstances have made the parties try first before intervening. For example, in ***180** Hooper Bailie Associated Ltd v. Matcon Group PTY Ltd (1992) 28 N.S.W.L.R. 194, an Australian court considered whether it would enforce a contractual conciliation clause before permitting another party to proceed to arbitration. Matcon was being wound up and the liquidator attempted to commence arbitration proceedings prior to completion of a conciliation of a dispute. Hooper went to court to prevent the arbitration from proceeding until the conciliation was over. The court granted a stay of proceedings pending the conciliation. The court said:

> "Agreement to conciliate or mediate is not to be likened to an agreement to agree. Nor is it an agreement to negotiate or negotiate in good faith, perhaps necessarily lacking certainty in obliging a party to act contrary to its interest. Depending upon its express terms and any terms to be implied, it may require the parties' participation in the process by conduct of sufficient certainty for legal recognition of the agreement."

Where there is a clear structure for Alternative Dispute Resolution imposed by the parties (in that case conciliation) with the giving of evidence, making of submissions and rulings or determination, the court may well oblige the parties to adhere to their bargain. But in partnering the parties expect an "agreement to agree", and what it means in practice is pursuing negotiations in good faith will fall to be determined. On the traditional approach referred to by the court in Hooper, the "agreement to agree" gives no weight to an implied duty of good faith in negotiations to resolve disputes.

The principal causes of construction disputes and the ability of partnering to deal with them

Construction disputes are generally viewed as caused by many different factors and there may be a concern that a dispute resolution process have the ability to deal with them. How do you deal with the bully, the "staller", the deep pocket, the empty pocket--various parties with different power dynamics--in construction disputes? [FN49] Partnering can effectively deal with these kinds of disputes that arise on construction projects because it gets to disputes early. It is a preventative process. The 10 principal causes of construction disputes have been identified as:

1. unrealistic shifting of risk under the contract;
2. unrealistic expectations, particularly under financed owners;

3. ambiguous or incomplete contract documents;
4. unrealistically low bids;
5. poor communication between project managers;
***181** 6. inadequate management;
7. failure to deal promptly with change;
8. lack of team spirit or collegiality among participants;
9. an adversarial or litigious mind set; and
10. failure to assume responsibility for dispute resolution at the source. [FN50]

Surveys have shown that disputants in construction disputes rank the saving of money as the most important reason to use ADR, although the saving of time and producing a better outcome are also important. [FN51] This is true of partnering too. Savings of time and cost by preventing disputes will likely be the principal reason for clients to choose partnering. [FN52] Part of the reason for this is the immense factual investigation required and its attendant cost. [FN53]

Another feature of construction contracts thought to affect the number and seriousness of disputes is the separation of design and building functions. [FN54] Construction projects have other dispute promoting factors. Contractual documents are often standard forms, and not tailored to the specific project, creating interpretive gaps. The inherent unpredictability and complexity of modern construction projects creates unforeseen risks. [FN55] Unfair risk shifting may well be the most avoidable source of many disputes. Disputes may also arise when the quantity originally estimated differs significantly from the unit price quantity in the bid documents. [FN56]

Technical specifications and plans are at the heart of any construction contract. The preparation of the specifications along with co-ordinated plans are the single ***182** most important documents generated by the design professionals. [FN57] These documents represent the culmination of the planning and design efforts. The best dispute avoidance technique regarding plans and specifications is quality. Some specifications include catch all phrases that require the contractor to perform work that may be implied as incidental, or required in compliance with the "authorities having jurisdiction". [FN58] Identifying, through the joint efforts of partnering, externally imposed requirements is more likely to assist in mutually satisfactory outcomes.

Yet, the interest of the contractor in minimising project performance to maximise profit is directly opposite to the interest of the owner to secure maximum performance at the least cost. [FN59] One of the key purposes of construction contracts is the allocation of risk among the parties. On a purely practical basis the unfair allocation of risks on a construction project promotes, instead of discourages, later disputes. [FN60] For example, the project design consultant may naturally align with the owner. The consultant is called upon to administer the contract and his/her own design in a fair and unbiased manner. Partnering can better address these competing interests by attempting to align the contractor's, owner's and consultant's interests into common project goals.

The court's view of good faith in contract in Canada and how it relates to partnering

The recent judicial trend is toward finding a general implied duty of good faith and fair dealing in contracts in Canada. However, this has not been historically the case in Canada, and with the analysis of construction contracts in particular. For example, in Dilcon Constructors Incorporated v. British Columbia Hydro and ***183** Power Authority, Allan J. of the British Columbia Supreme Court considered, among other things, the concept of good faith performance of a construction contract. [FN61]

In Dilcon, Allan J. found on the facts no breach of any duty of good faith, and found as a matter of law that there is no general duty of good faith imposed on parties to a contract. The court's flat rejection of a duty of good faith in British Columbia in 1992, has softened in recent years. [FN62]

Dilcon claimed a failure of Hydro to act in good faith:

> (a) by intentionally failing to disclose relevant information and intentionally creating contractual ambiguities; and
>
> (b) by failing to act fairly when making decisions required to be made during performance of the contract. [FN63]

In analysing the specific facts, His Honour first noted that unlike the law in the United States or the civil law in Quebec, there is no general duty of "good faith" and "fair dealing" in the law of British Columbia. Further, His Honour saw an absence of vulnerability on the part of Dilcon so as to impose a duty of fairness and avoidance of conflict usually founded on fiduciary duty. He found no actual breach of duty, and found that of the kinds of harm alleged (misrepresentations), if they had in fact occurred, they would be actionable in tort anyway. Most importantly, he found that, had there been a general duty of good faith, it would apply equally to both parties.

> ***184** "With respect to both the formation of the contract and its performance, Hydro had an obligation not to cause harm to Dillingham [Dilcon] either by withholding information in its possession or by giving false information. Such acts or omissions would have constituted fraudulent or negligent misrepresentations. Having in mind the evidence of the Hydro witnesses who were involved in the drafting of the contractual language, I conclude that there was no deliberate attempt to mislead the Contractor in the course of preparing the Contract documents. If ambiguities were created unintentionally, then the contra proferentum rule would apply to resolve such an ambiguity against the drafter ... If there were a general duty of good faith, such a duty would apply to both parties." [FN64]

In Dilcon, the contractor probably set the bar too high for itself because it alleged intentional acts of obfuscation and the supplying of false information. A lower good faith standard may have been a duty not to unfairly shift the entire risk of unforeseen soil conditions to the contractor, and to make some mutual accommodation for the change in methodologies because of site conditions. It was not entirely Hydro's fault that the work was more difficult than anticipated (remedial work) and there was merit in Hydro's point that not all the changes required were "extra work". The parties' approach was adversarial and there appeared to be no view of a common problem or common goals for the project. Each appeared to have lost sight of the consequences of taking advantage of the other's mistakes in what was an extremely difficult remediation/repair project.

A view of good faith as not profiting from another's obvious mistake has been expanded and developed recently in Ontario. In Kubota Canada Limited v. Merchant Private Limited [FN65] the court expressly articulated a general duty of good ***185** faith in contract in respect of contract performance and enforcement. In Kubota the court would not permit Tuckahoe to rely on Kubota's mistake and technical failure to give notice under a purchase option under which Kubota mistakenly paid certain sums to Tuckahoe. Madam Justice Molloy broadly commented that the position taken by Tuckahoe did not accord with the principle of good faith dealings and contractual relations increasingly recognised by Canadian courts.

The explicit recognition of a good faith and fair dealing doctrine will enhance conceptual and doctrinal clarity. In a partnering context, it acknowledges what the parties are doing expressly anyway. It will add a healthy measure of doctrinal integrity to reasons for judgment and it will further the important realisation that contract law and doctrine can on occasion align itself with the vocabulary and values of the people it serves. By making a good faith doctrine explicit the need for doctrinal manipulation is minimised and the needs of a real world community with heavy relational elements is better served. [FN66]

The expression "good faith" makes frequent appearances in contract law. [FN67] However, good faith can be used in different contexts with different meanings. [FN68] Good faith is a concept capable of both enlarging and restricting contractual obligations. It may also offer an overall theory of contract law itself.

One of the problems with good faith is that it is a vague concept. It may be easier to articulate what good faith is not than what it is, which may provide little guidance to parties seeking to arrange their affairs. Prof. Brownsword favours equating good faith with honesty and fair dealing judged by the standard of ordinary people in their practical experience. Importing good faith is going beyond preventing active deception. It may be contrary to good faith to not disclose important information. There is a legitimate criticism that substituting a standard of fair dealing may upset the supremacy of contractual intention. Only such terms as can be confidently attributed to the parties' unstated intentions are usually implied.

> "... once we have to transpose the issue from the classical context of the discrete (spot) contract and short-term adversarial dealing to the context of longer term dealing with a willingness to invest in the future, it is a great deal more plausible to imply terms that involve some act of co-operation or sharing of risk--and, what is more, to do this from the basis that such ***186** implications are necessary if we are to be faithful to the parties' expressed intentions and expectations." [FN69]

Yet, adopting a good faith and fair dealing doctrine is not so much to rewrite the general principles of contract law as a recognition that adversarial dealing is not the "only game in town". For example, good faith in negotiations could mean an inquiry into the reasons for breaking off negotiations. There is an important difference between walking away from negotiations for any reason and walking away for a reason that keeps faith with the integrity of the negotiating situation. The distinctive function of contract law is to secure the reasonable expectation that exchanges will be mutually beneficial. [FN70] Good faith and fair dealing in contract performance does not substitute the parties' bargain--it fills in the gaps. The parties can choose to engage in detailed planning or substitute good faith at the margin.

Although the good faith doctrine in Canada remains to be developed, [FN71] the implied duties of good faith and fair dealing could be invoked to rule out bad faith and non-co-operative conduct in certain circumstances such as:

> "... negotiating without serious intent to contract, abusing the privilege to break off negotiations, entering a transaction without intending to perform or in reckless disregard of prospective inability to perform, nondisclosure of known defects [in the subject of a sale], abusing superior bargaining power, evading the spirit of a transaction, lack of diligence, willfully rendering only substantial performance, and abusing the power to specify terms or to determine compliance ... interfering with or failing to cooperate in the other party's performance, pretending to dispute or arbitrarily disputing, adopting overreaching or 'weaseling' interpretations or constructions of contract language, taking advantage of the other party's weakness to get a favourable readjustment or settlement of a dispute, abusing the right to adequate assurances of performance, refusing for ulterior reasons to accept the other party's slightly defective performance, wilfully failing to mitigate the other party's damages, and abusing a privilege to terminate contractual relations." [FN72]

***187** Recall that partnering has had most of its origins in the United States. The Uniform Commercial Code (one of the legislative expressions of the duty of good faith) provides that the parties may determine the standard by which the performance of their obligations are to be measured, provided such standards are not manifestly unreasonable. [FN73] There are both objective and subjective standards of good faith. [FN74] The possibility of contracting out of the duty of good faith remains open. [FN75] This would certainly be saying something meaningful to the party opposite (i.e. indicating that you do not wish to be fettered by duties of fairness and good faith in disclosure of information and performance of contractual obligations). Partnering must include notions of "full and frank dialogue". [FN76]

The courts are likely to initially take a deferential view of partnering outcomes to the extent that those outcomes were the product of voluntary and good faith participation. The very purpose of partnering is to promote less costly and timely resolution of disputes. The court will continue to regard upholding a prior agreement as a powerful argument to prevent the clogging of judicial resources that led to the criticisms that

resulted in greater use of ADR in the first place. Canadian courts may well imply a good faith standard into a partnering overlay--a party must have regard to another party's "legitimate interests" even though the purpose of the contract is for each party to promote its own interest, and that discretion left unfettered in a contract may not be entirely free in that the contractual discretion may not be exercised in bad faith. [FN77] A partnering overlay removes the uncertainty as to whether a covenant of good faith is to be implied in every contract or only where consistent with the parties' intention, because the partnering arrangement is an expression of that intention.

One partnering technique that promotes early disclosure [FN78] and early resolution is "step negotiation". In step negotiation, the representatives of a party must attempt to resolve their dispute, and if not, refer the matter to their superiors in ***188** both organisations. [FN79] Partnering uses this process; it is a fundamental characteristic of partnering. It is sometimes called "escalating" a dispute, an "escalation ladder", or a "dispute resolution ladder". Issues are to be resolved at the lowest possible levels. Escalation of issues is possible, but comes to be looked upon as cultural failure. Formal dispute resolution such as litigation then becomes the last, and least desirable, option. Driving decision making down to the members of self-managing teams, however, affirms the need to train those below the project management level in dispute resolution skills.

There is a perpetual tension in the law of contract between two objectives: the need for certainty and the need for flexibility. It is at this point of tension and the current swing towards flexibility that may well lead into the infusion of a broad duty of "good faith" and "fair dealing" in the performance of construction contracts governing parties in a partnering relationship.

Discussions of good faith and fair dealing are emerging in the case law and still await resolution by the Supreme Court of Canada. [FN80] In the United States the influential Uniform Commercial Code is explicitly based on the concept of good faith for contracts subject to it. [FN81] The American Law Institute's Restatement of Contracts Second (a persuasive authority, but not a statute like the Uniform Commercial Code), provides at section 205:

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." [FN82]

In the Canadian contractual context, and in particular construction contracts, there has not been such a broad and explicit articulation of principle. [FN83] I believe that a necessary extension of this principle in the context of partnering will be to hold the partnering participants to standards of good faith and fair dealing in their contractual dealings where they have expressly articulated that they are in a partnering relationship.

What may be striking about a judicial inclination to monitor the exercise of contractual rights for conformity to perceived standards of fairness or reasonableness, is the extent to which that may compromise certainty in favour of flexibility.

***189** A good faith standard may have its greatest impact in negotiations. In a partnering relationship the negotiations which may follow the discovery of inaccurate or incomplete specifications, an unworkable construction methodology or other hiccups in a construction project, will provide opportunities to test the good faith of the participants in their dealings to resolve such problems. [FN84]

The origin of modern contract law in both the United States and Canada is the English law of contract. [FN85] An important feature of classical contract theory is the development of a general body of contract law that overshadows the various branches of specific contracts. Classical contract law embodies a number of features (the absence of pre-contractual duties) that offer considerable advantages to the powerful and knowledgeable whilst imposing significant obligations on the "ignorant and the unwary". [FN86] The doctrine of good faith provides an important tool for the control of contractual terms and their application. Eng-

lish judges seem reluctant to import notions of good faith into negotiation. [FN87] Lord Steyn has suggested that, while business people have no problem with the concept of good faith or fair dealing, English lawyers remain hostile to any incorporation of good faith principles into English law. However, Lord Steyn suggests that there is not much difference between objective requirements of good faith, and the reasonable expectation of the parties. [FN88]

In construction projects designed and built under serious time pressure, the parties may spend inadequate amounts of time clarifying their various responsibilities and how conflict is to be managed. Disputes about the meaning of contractual terms is one of the largest sources of contractual litigation. Words are not "transparent crystals". [FN89] Under the pressure of events, business bargains have to be struck. Partnering assists parties to reach agreements when under pressure because they have planned ahead of time what areas are likely to lead to disputes ***190** and thought out a decision making process (the dispute escalation ladder) for designated representatives to deal with the problem. This is a mature approach to conflict--recognising the inevitability of conflict--and preparing a process for its resolution. Further good faith and fair dealing as a procedural overlay through partnering bridges the gap between partnering theory and partnering practice, where there are no express contractual provisions spelling out exactly who is to do what. [FN90] An obligation of good faith and fair dealing may well require disclosure of material information inconsistent with, or contradictory to, the information provided in the contract or the plans and specifications. [FN91]

Partnering involves a "shift in attitude". [FN92] In my view, all successful dispute resolution mechanisms must be transformative in some way. [FN93] With real communication and understanding comes the disclosure of true interests and values. Real communication and understanding also reduce problems of "selective perception". Selective perception is the problem of forming and holding quickly reached judgments, then filtering out contradictory information. Partnering encourages real communication.

It has been said that rights based talk and rights based solutions sometimes do little to fix the underlying problems. If you fix the problem and not the blame, then no one gets the blame. Fixing the problem and not the blame helps bring a new perspective to resolving construction disputes. [FN94] An approach to dispute resolution that is exploratory and sharing, as opposed to adversarial, makes sense where the objective is preserving an ongoing relationship. A partnering process design that affects the linkages among rights, interests and powers produces more durable outcomes in the construction industry. A durable outcome is one that satisfies the parties and is respected by them. It is likely a more satisfactory outcome because the parties' real interests have been satisfied.

The rôle of the lawyer in partnering

Underlying the partnering approach is a re-examination of the real interests of the parties and the preparation of processes that will further those interests by handling disputes economically and efficiently. Lawyers can assist their clients by counseling them as to their rights and helping to clearly spell out who is to do ***191** what, both in the contract and in the partnering charter. [FN95] A contract lies at the heart of virtually every transaction in the construction industry, and the lawyer's role here does not change. The rules of contract interpretation, and a lawyer's assistance, play a crucial role in defining the duties and obligations of the various parties.

Certainty of contractual obligation can be achieved, in part, through use of well thought out documents, such as the standard documents prepared by the Canadian Construction Association. [FN96] Of interest is the new CCDC-2 step provisions, which may well make disclosure and good faith express terms of the construction contract, although stated to be without prejudice. Section 8.2.3 states, in part, that, "the parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of all relevant facts, information and documents."

[FN97] The use of partnering means that the role of lawyers will change and that they should be used more for dispute prevention and less for dispute repair. [FN98] Lawyers "feed off of the refusal of ... parties to accept responsibility ... for problems which are frequently of their own making". [FN99]

United States studies indicate that partnering decreases costs and delays in practice

Partnering has become an increasingly popular form of business relationship in the American engineering and construction industries over the last decade. [FN1] There have been many surveys of partnered construction projects to discover ***192** which organisations were using partnering, and why, with many reports of partnering leading to cost savings. [FN2]

Lawyers may not realise that the work of changing the methods of dispute resolution is taking place largely without them. A comprehensive survey of attorneys, design professionals and contractors was conducted in 1994 in the United States to determine what construction industry professionals thought about dispute resolution procedures. The survey results were published in the Construction Lawyer. [FN3] An important part of the survey is where the respondents were asked to rate the effectiveness of various ADR approaches.

Mediation was favoured by attorneys in most categories, including reducing the cost of resolving disputes, reducing time to resolve disputes, enhancing understanding of the dispute, minimising future disputes, and opening channels of communication. Early neutral evaluation was favoured with respect to preserving job relationships and meeting job budgets, according to attorneys.

According to design professionals, partnering was found to be the most favoured method in every category except for enhancing understanding of the dispute where they found early neutral evaluation to be the most effective method. Construction constructors, on the other hand, found partnering to be the most effective ADR method in every category surveyed. [FN4] The survey results may well illustrate that arbitration and other forms of dispute resolution are simply viewed as too time consuming and costly, and too much like actual litigation to accomplish their stated goals. Design professionals and contractors overwhelmingly preferred a partnering process to other ADR methods.

Some studies have shown that partnering can increase project costs. One set of studies interviewed 21 public and private organisations that were consumers of construction services. The purpose of this survey was to abstract from the data a model in order to assist an organisation to methodically prepare for and maintain a successful partnering relationship. Interestingly, contrary to some earlier ***193** research, this research indicated a partnering cost in the range of 0.25 per cent to 2.0 per cent of total project costs, with most of the responses indicating partnering cost less than 0.25 per cent. However, the benefits of partnering were described as difficult to determine. [FN5]

Other studies are generally more positive about the cost/benefit analysis of partnering. One study used remediation projects as a study group (projects involving the removal of hazardous wastes or clean up of contaminated soil or ground water). Sixty completed remediation projects were studied to identify and document the effects of different project management structures and contracting strategies on project outcomes. [FN6] Moderate project delays and cost escalations were reported on many projects in the group. Partnering was used in 17 per cent of the projects. Other forms of team building were used (including partnering), and strong communication was maintained on the partnered projects through regular project meetings. In terms of the effects of partnering, partnering did not appear to impact on the number of disputes. By comparison, a broader concept of "team building" used on other projects seemed to have a lower rate of disputes than the non-team building projects. However, both team building and partnering had a marked effect on project cost control. Projects using some form of team building were more than twice as likely to be on budget. Further,

80 per cent of the projects using partnering were on budget, whereas only one-third of the projects that did not use partnering were on budget. Further, while partnering did not have a marked difference on scheduling, projects were completed closer to schedule in team building projects. [FN7]

One study of more than 280 construction projects suggests that the establishment of a problem solving process before the project begins is the only partnering variable significantly related to all success measures. [FN8] Identifying problem areas before the work begins was found to be significantly related to controlling cost, technical performance, customer needs, and overall results, but not for meeting schedule and avoiding litigation.

Relationships founded on the principles of partnering must be nourished and partnering strategies must be constantly monitored. Capitalising on the energy and enthusiasm of the initial workshop must be followed up to ensure partnering continues to work. [FN9]

***194** Traditional advocacy rôles not appropriate for partnering

When lawyers convince themselves that what they are saying is unquestionably true, they may create advocacy distortion. The dilemma is that effective advocacy advances a case to the point where it is ripe for resolution--and then perversely blinds counsel and the client from pursuing the goal so near their grasp. [FN10] Partnering has at its heart party participation in designing and fashioning the dispute resolving process. Partnering gives disputants maximum participation in the process over and through which the resolution will be achieved. [FN11] There is a maximum party control of process and outcome. The principle technique of partnering is preventing and resolving construction disputes through early escalated intervention. [FN12] Partnering is essentially a consensus model process. In the consensus model of dispute resolution, those responsible for the decision participate in it, and are responsible for the follow up. The responsibility for the loser is on the winner. Dispute resolution design where the winner is responsible for the loser [FN13] promotes shared commitment to fix the problem, not the blame.

Real communication is the disclosure and advocacy of interests and values, not rights. Engaging in partnering involves an element of vulnerability and letting go. The parties must foster an approach towards conflict which emphasises shared effort over competing effort. [FN14] For example, a single project may require a low partnering commitment, whereas relationships over multiple projects may require a higher degree of commitment. Dispute resolution must be taught and performed at the lowest levels possible in order for partnering to work. The escalation of disputes originating in the field is the major barrier to the success of work process alignment described as one of the five steps in the partnering process model. [FN15]

***195** One of the reward systems developed on a recent partnering construction project in Toronto was to invite the onsite construction team members and their spouses to a formal party when each of certain project milestones was reached. It turned out that no one wanted to be responsible for having the others miss the party, and the project completion schedule was met. Resolving disputes at the lowest level helps to reduce the number of escalated disputes that must be resolved by management. [FN16] It reduces unwanted strain on the partnering relationship. Partnering has permeated the culture of design professionals, to the extent that requests for proposals ("RFPs") are now recommended to include a team concept that integrates a partnering approach. [FN17]

Lawyers' views of partnering

Some United States construction litigation lawyers are encouraging **construction partnering.** [FN18] Partnering is meant to prevent the adversarial cycle from starting in the first place. [FN19] Legal commentators acknowledge that the term "partner" is not an accurate one, as the positions of the partners in a traditional sense contain legal rights and obligations, while partnering is more a mutual expression of a desire to

work well with others. The partners in a partnering relationship are often referred to as "stakeholders" in the sense that each will benefit from a successful ***196** project. The stakeholders include the owner, the design team, the construction manager, contractors and their principal subcontractors.

The lawyers see the necessary preconditions to successful partnering as including: appropriate interaction with use of active listening, appreciative understanding and valuing diversity. The workshop develops the necessary synergy for team building. Differences must be understood, and ambiguity tolerated. In this way new possibilities can be examined and common goals established. A plan is then implemented to monitor progress and supply feedback. The basic outcomes needed for any workshop have been described as:

(1) goal identification;
(2) team building;
(3) a partnering agreement;
(4) an issue resolution mode; and
(5) a partnering evaluation procedure. [FN20]

Partnering can start with easy wins because all stakeholders have some obvious common goals such as safety. Goals which are not common must be discussed, so that ways to plan to manage conflict can be developed. One key element is that disputes are automatically escalated if they are not resolved within a given period of time. Partnering results may also be tied to the participants' levels of sophistication and commitment. Lawyers who are sensitive to this type of relationship can enhance the potential for successful partnering by assisting communication and helping negotiate contracts from the perspective of risk sharing rather than risk shifting.

Partnering, of course, will not function unless each party is willing to accept tradeoffs and compromises. A party which stands on its rights belongs in court. Some legal commentators acknowledge that there is uncertainty as to how these non-binding procedures of partnering may affect the rights and obligations of the parties in the event that litigation does occur. One acknowledges partnering may have legal consequences. Is one of the consequences changing the contract risk allocation? [FN21] Partnering documents do not spell out exactly how delays, extras, changes or other traditional contract issues will be affected by partnering. Partnering documents also do not usually contain language such as "compromise" or "tradeoffs" or the like in addressing dispute avoidance or resolution. However, that must be the unstated premise of partnering.

***197** Canadian construction lawyers have not yet endorsed partnering quite as enthusiastically, but view it with much potential. [FN22] The courts are acutely aware of the cost of justice to the parties. [FN23] Further, courts recognise that case management of complex construction disputes is desirable, although their intervention at the pre-trial stage is usually well after most costs are sunk. [FN24] The reported causes of cost and delay are common to both the United States and Canada. [FN25]

The best dispute resolution mechanisms are those which prevent disputes from happening. The goal of partnering is to create a synergistic bond between the contracting parties in order to prevent disputes. It can be created for a single project or for a number of projects. The partnering charter is meant simply as an endeavour by the parties to memorialise an understanding that they will deal with each other as honourable and respected partners. [FN26]

Sweet suggests that partnering may have been "with the construction industry" all along, but has blossomed recently because of the open eyes of those in the construction process reacting against a debilitating claims atmosphere. Further these "now repentant sinners realize that if they don't do something to avoid claims they will be in the hands of the despised lawyers". [FN27] Australian authors ***198** seem more cautious in their endorsement of partnering. [FN28] However, the promise of partnering is that it is a mature dispute resolution process. It focuses on dispute prevention as opposed to alternative ways to resolve claims

after the fact. [FN29]

Conclusion

A mature approach to conflict and dispute prevention is not a "winner take all approach". Partnering appears to produce durable outcomes as all interested parties have both participated in the decision and have a stake in the persistence of the solution. I believe a "leap of faith" may be required to make partnering work. A "leap of faith" is a willingness to act in good faith and fairly, and to reasonably expect others to act in good faith and fairly too.

When disclosing interests and values, we may be acting in a way contrary to the traditional contract view of self-interest. Maybe the traditional contract paradigm of rational self interest is too narrow and excludes an implicit norm of "good faith" and fair dealing--apparent in partnering--that informs human behaviour. A norm that finds expression in the mature conflict prevention and resolution process of partnering. As partnering gains favour, clients will demand counsel who can assist in the design and implementation of creative solutions. Counsel who can negotiate and who can prepare construction contracts, partnering charters and partnering agreements that address and comprehend, not just rights but also interests and values, will better assist their clients in producing durable resolutions to construction disputes.

FN B.A., LL.B. Partner with the law firm of Blaney, McMurtry, Stapells, Friedman and a founding member of the firm's Architectural/Construction/Engineering/Services Group, Suite 1400, 20 Queen Street, West Toronto, Canada M5H 2V3; direct dial: (416) 593-3934. Andrew **Heal** is currently pursuing a Master of Laws degree at Osgoode Hall School in Toronto.

FN1. William Ury, "Forword" in Designing Conflict Management Systems (Cathy Constatino and Christina Sickles Merchant, eds, San Francisco, Jossey-Bass, 1996), p. ix.

FN2. Grant Gilmore, The Death of Contract (Columbus, Ohio State University Press, 1974).

FN3. Other informal and formal practices to resolve construction disputes include: negotiation, mediation and arbitration (even mandated by contract-- CCDC2 1994, s.8.2), the use of dispute resolution boards (formal dispute resolution tribunals), geotechnical design summary reports (baseline geotechnical studies), escrow bid documents (where bid documents are sealed to later prove contractor's extra claims are legitimate). See e.g. Paul Sandori, "Alternative Dispute Resolution" (1993) 18 C.L.R. (2d) 231.

FN4. The construction industry has been identified as the second largest industry in the province of Ontario: "Construction Liens" (1995) 19 C.L.R. (2d) 314 at 314. In 1996, construction was the largest non-manufacturing industry in the United States, representing 14 per cent of GDP. (Preface, Partnering in Design and Construction (Geoffrey Kneeland, ed., New York, McGraw-Hill, 1996)). Resolving disputes is critical to this industry as smaller contractors, subcontractors and suppliers have traditionally been thinly capitalised to the extent that they are usually unable to sustain significant losses and continue in business.

FN5. "The conventional practice of not addressing disputes until the end of a project burdens the relationship between a contractor and owner, forcing them to continue working together with unresolved disputes until the end of their project. As a result, disputes often lead to posturing and other dysfunctional gaming behavior between the key players who need to work together in order for the project to progress effectively and efficiently." (Frank Sander and Christopher Thorne, "Dispute Resolution in the Construction Industry" (1995) 19 C.L.R. (2d) 194 at 195. In Ontario, the Ministry of the Attorney-General established the Attorney-General's Advisory Committee on Alternative

Resolution of Construction Disputes in 1994. Their final report does not address partnering.

FN6. Kimberley Kunz has, at least in the case of United States construction contracts, linked the relationship between the implied covenants of good faith and fair dealing in contract, and partnering. "Partnering, simply put, is the express recognition of the implied covenant of good faith and fair dealing. It requires contracting parties to use best efforts, through a mutually developed, formal strategy of commitment and communication, to create an environment of trust and team work for the cooperative avoidance of disputes, and the facilitation of project completion in a timely and cost effective manner [emphasis added]." (Kimberly Kunz, "Counsels' Role in Negotiating a Successful **Construction Partnering** Agreement", Construction Law, November 15, 1995, p. 19.) In my view, the "express recognition" of a partnering overlay adds more in common law jurisdictions where implied covenants of good faith and fair dealing are otherwise part of the law of contract.

FN7. "As far as the law of contracts in general is concerned, building contracts as such do not possess any esoteric characteristics which distinguish them from other forms of contracts, and they merely represent one particular species of the genus of contracts as a whole." Immanuel Goldsmith and Thomas Heintzman, Goldsmith on Canadian Building Contracts (4th ed., Toronto, Carswell, 1988).

FN8. While particular relationships and particular contracts may differ, the traditional standard form of construction contract is between owner and contractor, with a design professional as the defined project consultant. Methods of contract payment can vary with "fixed price", "unit price", and "design/build" being the three principal standard forms of construction contracts. See, e.g. the CCDC and CCA standard forms of contract published by the Canadian Construction Association.

FN9. The very existence of lien laws suggests that construction work is inherently unstable with a high degree of financial risk. Local lien legislation encourages workers to work on construction projects when pay may be otherwise uncertain. A statutory lien assures workers that if they are not paid they have a security interest in the lands and premises constructed. Further, because the chain of linked contracts grows in length, disputes and negotiations can become more complex. Usually the bargaining power in determining such disputes follows the money source. The project lender usually has more bargaining power than the owner, the owner usually has more bargaining power than the prime contractor who has more in turn than his or her subcontractors. When there is vastly unequal bargaining power there can be the temptation to abuse power. This tends to promote disputes. On the other hand, if you have nothing, you have nothing to lose. Justin Sweet, Sweet on Construction Law (Chicago, American Bar Association, 1997), pp. 10, 354-355 and 474.

FN10. In 1991 the Associated General Contractors of America in the United States prepared a short booklet and video on partnering, Partnering: A Concept for Success (Washington, D.C., Associated General Contractors of America, 1991). Similarly, Defence Construction Canada has prepared its own partnering booklet (The Partnering Guide: An Approach to Construction Management, October, 1995) and a bilingual video (Partnering: A Strategy for Success). These publications are a good introduction to partnering.

FN11. Partnering: A Concept for Success, supra, p. 2. This idea also appears in the Defence Construction Canada material: "Partnering a project does not change the contract, but does help all parties to recognize that the requirement to act in good faith is a basic tenet of contract law", The Partnering Guide: An Approach to Construction Management, supra, p. 1.

FN12. Douglas Oles, "Partnering on Construction Projects", in The National Construction Law

Round Table 1996 (Aylmer, Quebec, Canadian Bar Association, 1996), p. 3.

FN13. Oles, supra, referring to the study of Kenneth R. Baker, Measuring the Benefits of Partnering (1995).

FN14. Constantino and Sickles Merchant, supra, p. 5 argue conflict and dispute are not synonymous, and that disputes are the product of unresolved conflict.

FN15. R. G. Taylor and B. Hinkle, Jr, "How to use ADR clauses with standard form construction industry contracts", Construction Law, April 15, 1995, p. 42.

FN16. Justin Sweet's book, Sweet on Construction Law, is a very good overview of construction law, written in an alternative style. It self-consciously omits footnotes. In his chapter on dispute resolution, Sweet makes the point that "perhaps too much energy" is devoted to thinking about dispute resolution, and not enough about dispute prevention. How are disputes to be avoided? How can we help parties resolve them? If a third party must be brought in, who do we bring in and what process do you use? Sweet, supra, p. 441.

FN17. Sweet, supra, pp. 99-100. Sweet sees great promise in partnering.

FN18. Partnering: Changing Attitudes in Construction (Washington, D.C., The Associated General Contractors of America, 1995), p. 4.

FN19. Although as early as 1985 Prof. Edward Belobaba argued good faith and fair dealing are already a de facto doctrine in Canada, lacking only explicit judicial recognition: Edward Belobaba, "Good Faith in Canadian Contract Law" in Commercial Law: Recent Developments and Emerging Trends (Toronto, Special Lectures of the Law Society of Upper Canada, 1985), p. 73. In England, Lord Mansfield said as early as 1766 that good faith was applicable to all contracts and dealings: Carter v. Boehm (1766) 97 E.R. 1162 at 1164. Further, Jamie Cassels examines the extent to which Canadian law does and should recognise an obligation to bargain in good faith, setting out many Canadian and U.S. authorities: Jamie Cassels, "Good Faith in Contract Bargaining: General Principles and Recent Developments" (1993) 15 Advocates Q. 56. And most recently, Edward Chaisson suggests the good faith doctrine is moving north from the United States to Canada: "U.S. Commercial Law Crosses Northern Border: Good Faith and Fair Dealing is a U.S. Doctrine that the Canadian Legal System Must Now Address", The National Law Journal, September 4, 1995, C16. Similarly, in Australia good faith and fair dealing are not yet openly recognised in contract law doctrine. One commentator has made the point that expectations raised by partnering may lead to claims if the parties' commitment does not conform to the expectations: John Dorter, "Partnering: Think it Through", Building and Construction Law, February 13, 1997, p. 23. Dorter cites an anecdotal example of a claim being advanced in the context of a partnering relationship where allegations were made by the contractor that the partnering charter was a collateral contract, there were misleading representations made at the partnering workshop, and contradictions between the construction contract and the partnering relationship constituting a waiver of some of the contract provisions. There is no citation of a reported case.

FN20. Kathleen Brooke and George Litwin, "Mobilizing the Partnering Process" (1997) 13 Management in Engineering (No. 4) at 42, quoting from a study of the Bonneville Lock and Dam, Portland District, U.S. Army Corps of Engineers.

FN21. DART, infra, p. 86.

FN22. F. H. Griffis refers to the Demming management philosophy as a theoretical basis for partnering. O'Brien and Fergusson criticise Griffis' presentation of the Demming management philosophy, "a management initiated solution which provides the philosophical underpinnings of increasingly popular management approaches such as partnering". O'Brien and Fergusson suggest that it is not clear what the causes of problems are in the construction industry. The primary problem is poor flow of information between those who design and those who construct. If each firm adopts sub-optimisation as a philosophy to improve the process over which it has control, a lack of coordination among many firms trying to sub-optimise each of their processes might lead to counter-productive results. For example, an engineering process can be optimised, say on the basis of cost, but construction costs can suffer because not enough was spent on "constructability" efforts (i.e. how easy is it to build the lower cost design). Fixed price contracts make contractors act as costminimisers, seeking to reduce their costs with little regard to the effect on the total cost of the project or life cycle costs. However, time and money spent at one stage in the development cycle may substantially save money at a later stage. F. H. Griffis, "ADR, TQM Partnering, and Other Management Fantasies" (1992) 118 Journal of Professional Issues in Engineering Education and Practice 331 and William O'Brien and Kelly Fergusson, (1994) 120 Journal of Professional Issues in Engineering Education and Practice 235. In the end both sides of the debate support the fundamental premise of partnering--increased communication.

FN23. Brooke and Litwin, supra, p. 43.

FN24. Dorter, supra, p. 23.

FN25. Ron Hellard, Project Partnering: Principle and Practice (London, Thomas Telford, 1995).

FN26. A partnering relationship may also involve a pre-workshop stage. The objective of this stage is to develop a commitment to the partnering concept among the participants. A neutral facilitator works with the participants to determine their needs and then designs the partnering workshop. This may involve interviews or surveys of key employees to identify matters for discussion during the partnering workshop. Ultimately both the pre-workshop and workshop can be creative processes where the parties design their partnering arrangement themselves with the assistance of the neutral facilitator. With continuous feedback and evaluation, and post project evaluation, partnering follows the basic structure of designed conflict management systems referred to by Constantino and Sickles Merchant, supra.

FN27. The traditional view is that eliminating direct lines of communication makes it more difficult for a contractor to claim reliance on negligent misstatements of the design professional.

FN28. Forsythe argues that partnering may be introduced at any state of construction. However, she suggests that partnering is most effective and participants are most receptive to team building prior to adversarial positions being formed through disputes. While warning that a group in crisis may have unrealistic expectations of partnering, Forsythe does not cite any examples of when partnering cannot be used. The key features of the workshop stage are the creation of a working group designed to indemnify common goals and building relationships of trust to improve the speed and quality of communication. The focus is on mutual interests. Specific objectives of a workshop might include:
(a) enhancing specific communication and negotiation skills;
(b) creating a sense of team;
(c) developing trust and personal relationships;
(d) identifying common project goals;

(e) demonstrating commitment to the goals by an informal team generated statement or charter;
(f) identifying criteria for project success and plans to achieve the project goals;
(g) identifying obstacles to achieving the goals and joint plans to overcome the obstacles;
(h) raising issues that need to be addressed by the group;
(i) increasing the level of awareness concerning the causes of and approaches to the cost of conflict;
(j) designing systems to manage conflict when it arises; and
(k) developing plans to communicate the partnering concept to each person at lower organisational levels to maintain commitment.
Gail Forsythe "Partnering: Effectively Working Together to Minimize and Resolve On Site Disputes" (1993) 18 C.L.R. (2d) 142 at 145-146.

FN29. These following were not the best predictors of success for partnering management strategies:
(1) ability to create realistic comprehensive business plans; or
(2) setting specific deadlines for project elements.
The practices that helped most in terms of on time, on budget results had to do with relationships and feedback. The management skills that counted most in the management of complex projects were:
(1) establishing clear, specific performance objectives with subordinates;
(2) helping subordinates understand how their jobs contribute to the overall success for the organisation; and
(3) giving subordinates feedback on how they are doing.
Further, surprising to the authors was that while "in conflict situations, looking for a point of reconciliation of views, rather than differences" sounds like good partnering behaviour, in fact, the best predictor of success is "encouraging the open airing of problems and difference of opinion": Brooke and Litwin, supra, pp. 44-45.

FN30. An Alberta Task Force was established to look into the best practices in the areas of more stable contractor relationships, and other issues. The authors presented the findings of the task force surveys concluding, among other things, that there is a wide acceptance of the view that their preoccupation with the awarding contracts on the basis of lowest lump sum bid often results in a higher price for the product. Litigation, disputes and claims were found to be most common in lump sum as compared to other contracts. The authors observed that a need was realised by some respondents to move from risk shifting to risk mitigation or elimination. It was noticed that the contract documents were not filling the intended role of being a guideline for the relationship between the contract and parties through the project. In one survey 95 per cent agreed or strongly agreed that the use of contractors' expertise during the design process increased the opportunity to reduce cost, 72 per cent agreed or strongly agreed that an exculpatory clause increased the likelihood of a contract dispute, 83 per cent agreed or strongly agreed that more effective risk management will reduce the final cost of construction to the owner. In a similar survey noted by the authors, 73 per cent of the respondents did not use partnering or did not have opportunities to use it. See Peter Dozzi et al. (1996) 122 Journal of Construction Engineering and Management 30.

FN31. Forsythe, supra, p. 144. I believe partnering does have legal significance in that it brings with it implied duties of good faith and fair dealing which, in my view, may be part of contract analysis as it is developing in Canada. anyway. However, I also agree with Forsythe that partnering does not and should not be interpreted as importing the traditional rights and obligations of "partnership".

FN32. See Forsythe, supra, n. 5. She lists several British Columbia projects including the Bal-

lantyne Pier, Pacific Place. In Ontario, there are no published statistics on partnering. Anecdotal accounts obtained from industry professionals are as follows: Susanne Palmer (also a member of DART, infra) of the Palmer Partnering Group, Toronto, cites the Sheppard Line of the TTC Expansion as a successful example of partnering in Canada. PCL Constructors Canada Incorporated has used partnering successfully on many of its projects including the National Trade Centre in Toronto. Susanne Palmer cautions that trying to squeeze partnering into the "old" legal system may be missing the point. Ross Nicholls, President of Defence Construction Canada indicates that the Federal Dept of National Defence is in the process of publishing statistics and surveys on partnering, but that the feedback from contractor and other partnering participants seems to be generally very positive. Partnering has been used by Defence Construction Canada on more than 50 projects with a total construction value well over $200 million.

FN33. In Ontario, the common law principles of partnership are codified in the Partnerships Act, R.S.O. 1990 c.P-5. The recognised principles of partnership include the obligation to account and full disclosure (s.28), and sharing profits and losses, the joint and several liability of partners to creditors of the firm, and the power of partners to bind each other as reciprocal agents in the usual course of business. These are not part of any notion of partnering advocated in this article. It is the obligations of full disclosure, inter se, and not the actual or apparent authority to create mutual financial obligations that is central to partnering.

FN34. Allen, supra, p. 62. The term partnering originated in the private sector. Originally it was used to describe a strategic alliance among two or more companies, and had nothing to do with construction. Larry Bonine, "How Public Sector (Fixed-Price) Partnering Got Started" in Partnering in Design and Construction (Geoffrey Kneeland, ed., New York, McGraw-Hill, 1995), p. 19. Developing the framework of partnering and championing its public acceptance is generally credited to Col. Charles Cowan of the U.S. Army Corps of Engineers, later the Director of the Arizona Department of Transport: Ron B. Hellard, Project Partnering: Principle and Practice (London, Thomas Telford, 1995), p. 113. Bonnine, supra, p. 26, and Partnering: Changing Attitudes in Construction, supra, p. 48.

FN35. Allen, supra, p. 62.

FN36. The different participants in a construction project and a partnering relationship are often referred to as "stakeholders" (i.e. someone with an interest in the project outcome). Forsythe makes an interesting insight that the prevailing preconception among stakeholders is that they themselves are "honest, trustworthy and capable", but that others are not as "honest, trustworthy or capable". Her partnering workshop survey data suggest that improved quality is most likely to occur once a participant realises other stakeholders have equivalent or higher expectations of themselves. Her post partnering workshop survey data also indicate that perceptions of "co-operation", "honesty", the "desire to obtain an agreement" and the "ability of others to demonstrate respect", increased after the partnering workshops. Conversely, it appears that the "desire to avoid conflict" and the "ability of others to be clear and unambiguous" (real communication) decreased after a partnering workshop when the number of participants increased. Thus, there appears to be some ambiguity in the survey results. Consequently, it is unclear whether the differences in some of these survey results may be simply a function of changing group dynamics, Forsythe, supra, pp. 147-148.

FN37. Forsythe, supra, p. 149.

FN38. Generally, the best interests of the parties are served by allocating risks to the party best able to control them. This differs from the traditional contract approach in which the stronger party seeks

to allocate all risks to the weaker party. Gaede, infra, p. 75.

FN39. DART report "Building Success for the 21st Century: A Guide to Partnering in the Construction Industry" [1997] Dispute Resolution Journal 86 at 87.

FN40. Keith Hunter and James Hoenig, "Construction Dispute Prevention Comes of Age" (1995) 50 Dispute Resolution Journal 53.

FN41. e.g. Executive Summary: Systems of Civil Justice Report, 1996, (Ontario). The report identifies the main concerns of the public about accessibility to the civil justice system. These are: delay, cost, and lack of understanding (p. 3).

FN42. Unpublished statistics. Prof. Garry Watson, Osgoode Hall Law School, York University, Toronto. The statistics from Prof. Watson show a drop in construction lien actions in Toronto from 1992 to 1996, consistent with anecdotal evidence. Such anecdotal evidence is confirmed by Steve Tatrallyay the past Chair of the CBAO (Construction Section). However, he believes that notwithstanding that "few cases are [now] being brought before the courts", construction law will "continue to have a significant presence in the courts in the future". J. Stephen Tatrallyay and R. Bruce Reynolds, "Submission to the Civil Justice Review re: Review of the Civil Justice System by the Construction Section as Relates to Construction Issues" (1996) 25 C.L.R. (2d) 247 at 250.

FN43. The search for alternatives to litigation is not new. Arbitration was practised in medieval England and its roots can be traced to ancient Greece. "The roots of Arbiters and Umpirage are based on centuries-old custom. Those lessons of ancient times are badly needed in today's society, which is starved for affordable advocacy. As long ago as 4000 B.C., there are references to arbitration on Sumerian carvings, while there are similar references to arbitration in Egypt by 1500 B.C. In the territory governed by Athens around 480 B.C., elders were sent out to the villages to arbitrate disputes for fees and, by 350 B.C., Plato wrote, 'In the first place, there shall be elected judges in the courts who shall be chosen by the plaintiff and the defendants in common; they shall be arbiters rather than judges.' Another popular text was the Arbitatium Rediviam, which described the origins of various names for arbitration: 'It is said to be called an Arbitrement, either because the Judges elected thereon may determine the Controversies not according to the Law, but according to their opinion and judgment of honest men. Or else because the Parties to the Controversies have submitted themselves to the Judgment of Arbitrators, not by Compulsion or Coercion of the Law, but of their own accord. It is called an Award, of the French word Agarder, which signifies to decide or judge, and some time in the Saxon or Old English, it was called a Love-Day, because of the quiet and Tranquility that should follow the ending of the Controversies.' " William G. Geddes, "From Athens to AMIC: The History of Alternative Dispute Resolution" (1997) 21 Law Now 9. Mr Geddes is a lawyer and arbitrator based in Edmonton, Alberta. See also Fenn, infra, p. 145.

FN44. The point is well taken that construction professionals hardly regard arbitrations as an "alternative" technique. Peter Fenn, 'Mediating Building Construction Dispute" in Rethinking Disputes (J. MacFarlane, ed., 1997), p. 145; and Gordon Plottel, "Building Resolutions: Arbitration in the Construction Industry" (1988) 26 C.L.R. 48 at 48.

FN45. Kerry Short, "What Alternatives are there to Litigation for Construction Dispute Resolution?" (1988) 8 C.L.R. 213, writes a brief early Canadian article on alternative approaches to litigation. He astutely points out the evidentiary value of a mediation/arbitration (alternative process) as a step prior to litigation makes subsequent court challenge an "uphill battle".

FN46. The flip side has been argued that this "triage" may inappropriately block access to justice.

Some say ADR may only benefit the sophisticated user. High volume, low significance claims that are minor or routine may be disposed of non-adjudicatively through ADR without even the benefit of a third party intervenor, other than an overworked "bureaucrat". H. W. Arthurs, "Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29 at 48. Will this lead to first and second class justice? If ADR remains an "alternative", then litigation always remains available and access is no less restricted. On the other hand, can we afford not to have ADR available for commercial disputes? Peter Wardle, "Making Commercial Arbitration Work" (1997) IV Commercial Litigation 182.

FN47. Other ADR processes that can be used as adjuncts to partnering include, of course, mediation, the mini trial, and "baseball arbitration": see Robert MacPherson and Richard Steen, "Alternative Dispute Resolution as a Partnering Tool" in Partnering in Design and Construction (Geoffrey Kneeland, ed., New York, McGraw-Hill, 1996), p. 137.

FN48. Sandori, supra, p. 238.

FN49. For every one way to speed up a case, there are 10 ways to slow it down. "If someone wants to stonewall, its far easier to stonewall in arbitration than it is in a lawsuit, and it is not too hard [to stonewall] in a lawsuit sometimes ...": Robert Jenkins, construction litigator, in a panel discussion in 1991 reported in "Construction Litigation: Tips from the Experts" (1994) 4 C.L.R. 294 at 299. The consensus view of the panelists was that ADR in a multi party/multi issue dispute may well not be the best route, and that case managed litigation was their preferred option.

FN50. Darrick Mix, "ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism" (1997) 12 Ohio State J. on Dis. Res. 463 at 463; and Gail Forsythe, "The Revised CCDC 2: Negotiation and Mediation of Construction Disputes" (1995) 18 C.L.R. 240 at 252, n. 26. Both authors cite a survey of attendees at the U.S. Construction Industry Institute Annual Conference, 1991. The survey is also reported in "Preventing and Resolving Construction Disputes" 9 Alternatives to High Cost Litigation 182 at 185.

FN51. Deloitte and Touche Litigation Services 1993 Survey of General and Outside Counsels, cited in Forsythe, supra, at p. 254, nn. 44 and 45. In British Columbia, cost and delay have been described as the "twin evils of cost and delay". Bonita Thompson, "There Must Be a Better Way" (1989) 32 C.L.R. 74 at 77. In the Deloitte and Touche survey it was reported that fewer than 50 per cent of general contractor's counsel recommended ADR but tended to show opposition to alternative procedures such as partnering, which leaves out attorneys. Rob McManamy, Industry Pounds Away at Disputes, E.N.R., July 11, 1994, p. 24.

FN52. Although partnering also tends to lead to safer projects with fewer days lost to job site injuries and accidents, and improved communication makes value engineering more likely.

FN53. Allen Overcash, "Toward the New Construction Philosophy" (1992) 47 C.L.R. 263.

FN54. Overcash, supra, p. 264. Other obstacles include: the multi-party nature of the process (owner, contractor, project manager, subcontractor, architect, engineer), the narrow profit margins, the intense personality conflicts, and adverse weather conditions.

FN55. Plottel, supra, p. 48. Plottel also says "that no contractor will overlook a dispute that will mean his bankruptcy". Conversely, owners and contractors will act rationally and not pay when it "pay(s) not to pay". This defers the early resolution of disputes. Mix, supra, p. 463.

FN56. Some inaccuracies are to be expected since many unit price bid quantities are difficult to predict prior to construction. One suggestion to avoid disputes in this area is to set a percentage variance in the quantity estimate thereby allowing for a negotiated unit price change in the event that an estimate proves inaccurate, a 15-25 per cent variation seems a reasonable limitation on usual unit price items, with a higher or lower variation in unusual circumstances. A partnering overlay where the parties attempt in good faith to fairly resolve such problems should be encouraged.

FN57. There are many events which may entitled a contractor to change in price or extension in time for performance. A project under time constraints can lead to design that has not been thoroughly reviewed which later lead to disputes. Construction is not the time to co-ordinate drawings. No design is ever perfect and addenda will be necessary to pick up oversights, just as change orders will be necessary to correct problems discovered in the field. In evaluating a change, the most important procedural requirement of a construction contract is usually the notice provision. In most instances the notice requirements must be followed or the contractor may waive its right to the claim. The notice provision is based on the principle that if the owner knew the contractor was going to claim that certain work was beyond the scope of the contract, the owner and the consultant would then have the opportunity to take action to avoid such a claim or, at a minimum, to monitor the magnitude of the work of the claim. A consultant may have to avoid a conflict of interest where the allegation is that the plans and specifications are unclear. Given the fact that the consultant usually works for the owner, the consultant may be naturally reluctant to explain to its owner/client why the project will cost more money or take more time than anticipated, because the plans and specifications are said to be defective. Richard Allen, Dispute Avoidance and Resolution for Consulting Engineers (New York, ASCE Press, 1997), pp. 54-55.

FN58. In practice this can translate into "the contractor is required to perform that which the engineer failed to detail in accordance with those codes to which engineer failed to refer". Most engineers maintain a library of precedent specifications including standard specifications used on all projects and custom specifications prepared on past projects. In the normal course, applicable standard and custom specifications from past projects are reorganised into working specifications for the project at hand. The working specifications is then revised to accommodate the new project. Custom sections may be added and plans prepared which include standard details. Allen, supra, pp. 26-27.

FN59. "The tendency for both owners and contractors to assume an adversarial posture with each other is based on the inherent conflict between owner's costs and contractors' profits. This is essentially a zero-sum game in which one party's gain is the other party's loss": Erik Larson, "Partnering on Construction Projects: A Study of the Relationship Between Partnering Activities and Project Success" (1977) 44 IEEE Transactions on Engineering Management (No. 2) 188.

FN60. Allen, supra, p. 22.

FN61. Dilcon Constructors Incorporated v. British Columbia Hydro and Power Authority (1992) 7 C.L.R. (2d) 22. In Dilcon, certain remedial work was tendered to stabilise the slope of a river valley. The work was necessary because the slope destabilised after a dam had been constructed and its accompanying reservoir filled with water. The remedial work design was "tentative", "flexible, and subject to constant change". At issue were certain requests for extension of time and additional costs, based on the classic case of different conditions than those expected at tender. There were monumental factual and legal questions to be decided which comprised 105 days of evidence at trial, and the review of thousands of documents. Also at issue was how the contractor went about advancing its claims, whether properly submitted to the engineer, and whether the contractor knew of the poor soil conditions. During the course of the execution of the work, the speciality subcontract-

or retained by Dilcon became "financially crippled" and the remaining drilling work had to be carried out by Dilcon itself. In a careful and fulsome judgment of approximately 170 pages, Mr Justice Allan canvasses many issues, factual and legal, common to changed soil conditions disputes. They include allegations of: failing to follow the contract provisions for claims for extras, making misrepresentations as to the available soils information, intentionally drafting the contract ambiguously so as to mislead the contractor, and Dilcon itself causing the delay because of inefficiency. Following this case it is no surprise that Hydro eventually instituted a dispute resolution process to keep BC Hydro out of court. See Forsythe, supra, p. 250, n. 1. This would have been the ideal project to partner where uncertain conditions (the remediation of an earlier project) and a "design as you go" approach really needed the good faith joint efforts of owner, contractor and design professional.

FN62. S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 Journal of Contract Law; and S. M. Waddams "Essential Principles: Expectations, Fairness and Good Faith" in New and Overlooked Issues in Contract Law (Toronto, CBA(O) Insight, 1998), while ultimately recognising good faith may be a useful concept, expressing caution that it may be over used. See also Roger Brownsword, "Good Faith in Contracts Revisited" (1996) 9 Current Legal Problems 111.

FN63. The contract had specified a settlement process for extra claims. The Chief Engineer (a Hydro senior employee) was empowered under the contract to make certain rulings on additional compensation claims. He in fact did so, and awarded additional monies in excess of $1 million to Dilcon. Dilcon pressed its claim for increased compensation nonetheless, and, notwithstanding an earlier commitment to possible mediation or arbitration, took the case to trial after further unassisted negotiations yielded no solution.

FN64. Dilcon, supra, p. 69.

FN65. [1997] O.J. No. 2028 (Madam Justice Molloy): "The good faith requirement in contractual performance has long been recognised in certain species of contract [in Ontario]. For example, in LeMesurier v. Andrus (1986) 12 O.A.C. 299, 54 O.R. (2d) 1 (CA) ... The approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts, one explicitly set forth in the American Uniform Commercial Code and in the American Restatement and exhibited, although perhaps in disguised form, in many English and Canadian cases--see the lecture of Professor Belobaba, Special Lectures of the Law Society of Upper Canada (1985), [Belobaba, supra] ... The LeMesurier v. Andrus decision has been extensively applied in cases involving contracts for the sale of land ... Essentially, the courts have imposed upon parties a duty to act in good faith when invoking escape clauses in such contracts. There is no particular reason that this good faith requirement should only be imposed in contracts for the sale of land. If it is rooted in common law and equitable principles of fairness, and I believe it is, it should have equal application to all contracts ... In Opron Construction Company v. Alberta (1994) 151 A.R. 214 (QB), Feehan J. found that the defendant in a construction contract had breached an implied covenant of good faith. In that decision, Justice Feehan traced the development of the principle as applied in a number of Supreme Court of Canada cases. In some of the earlier of these decisions the Court interpreted art. 1024 of the Quebec Civil Code as including the principle that each party to an agreement 'owes good faith to the other, both in the manner of stating the agreement and in its performance'. Subsequently, the Court extended that principle to impose a duty to bargain in good faith arising at common law in a situation where this was in keeping with business morality and within the expectations of the parties: see International Corona Resources Ltd v. LAC Minerals Ltd (1989) 101 N.R. 239; 36 O.A.C. 57; 61 D.L.R. (4th) 14 (S.C.C.). Feehan J. applied these decisions as well as the Nova Scotia Supreme Court decision in Gateway Realty Ltd v. Arton Hold-

ings Ltd (1991) 106 N.S.R. (2d) 180; 288 A.P.R. 180 (TD) and the Ontario LeMesurier case in reaching the conclusion that there is a common law duty to perform a contract in good faith. I agree ... The application of a good faith standard is by no means foreign to our system of law. Numerous statutes incorporate a good faith requirement and the concept is a familiar one in the areas of public administrative law, constitutional law and labour relations. Professor Belobaba makes a compelling case for using judicial language and norms which are understandable and relevant to the real world. The explicit adoption of a good faith and fair dealing doctrine would go a long way to making contract law relevant to the community it serves. If nothing else, the economic rationale for such a doctrine is alone persuasive: a good faith doctrine would minimise transaction costs by acting as a 'gap filler' and would thus relieve contracting parties of the need to make 100-page agreements for each and every transaction."

FN66. Belobaba, supra, p. 88.

FN67. S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations", supra, p. 55.

FN68. Waddams, supra, p. 56. One example of "good faith" is the primary level of duty agents owe their principals. This is a not a concept of good faith that ought to be imported into partnering. Another point about good faith is that good faith performance and good faith enforcement of contracts can be distinguished. The idea of good faith performance is that contractual rights cannot be exercised, in some circumstances for motives of self-interest. See also David Friedman "Good Faith and Remedies for Breach of Contract" in Beatson and Friedman, eds. Good Faith and Fault in Contract (Oxford, Clarendon Press, 1995), p. 400.

FN69. Brownsword, supra, p. 124.

FN70. Brownsword, supra, p. 137.

FN71. Although it is developing in the area of limiting the exercise of discretion in invoking privilege clauses when rejecting low bid tenders and "bid shopping". See Ken Toby Ltd v. British Columbia Buildings (1997) 34 C.L.R. 81 (BCSC) in British Columbia; and George Wimpey v. Hamilton Wentworth (1997) 34 C.L.R. 123 (Ont. Ct Gen. Div.) in Ontario; with MJB Enterprises Ltd v. Defence Construction Canada [1999] S.C.J No. 17 now the latest word from the Supreme Court of Canada. In MJB, the Supreme Court found an implied term that only "compliant" tenders would be accepted. The privilege clause did not permit "bid shopping".

FN72. Such as, e.g. in the United States, see Corey R. Chivers, "Contracting Around the Good Faith Covenant to Avoid Lender Liability" (1991) Colum.Bus.L.Rev. 359, citing Summers, " 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va.L.Rev. 195 and Burton. "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 Harv.L.Rev. 404 at 465 and n. 21. Substantively, the implied duty of good faith in the United States has been invoked to rule out a wide variety of forms of bad faith. See also in Canada. Elizabeth Hewitt, "Implied Terms: Reading Between the Lines" in New and Overlooked Issues in Contract Law (Toronto, CBA(O) Insight, 1998) with reference to the exercise of discretion in a commercial franchise and other contract termination contexts in a fair and reasonable manner with the advice that lawyers ought to counsel their clients to act "reasonable and fairly" in contract performance.

FN73. Waddams, supra, p. 67.

FN74. Ross Landsberg and Peter Megens, "Applications of Good Faith in Contracting" (1996) International Const.L.Rev. 180 at 181.

FN75. Although some U.S. authorities suggest a good faith standard of performance cannot be bargained away: Chaisson, supra, p. C16, and Chivers, supra. Further, O'Byrne, supra, argues (with reference to the Alberta Opron case) that all contracts subject to a standard of good faith that can be modified by the parties' agreement: O'Byrne, supra, p. 94.

FN76. Richard Turner, "Avoidance and Resolution of Construction Disputes--Prior to and During the Construction Process" [1997] International Const.L.Rev. 384. Richard Turner, a practising lawyer in London and Dubai, suggests that there should be a seamless integration of contract documents (first draft by the lawyer) with the plans and specifications (first draft by the design professionals) such that there will be "one consistent unambiguous document ... free from the conflicts and gaps which so often lead construction projects to end up in disputes". He sees what he calls the "continuing dialogue arrangements" which dialogue includes input from the lawyer and design professional as described in the "buzz word partnering". Turner proposes that the contract expressly provide for the resolution of disputes during construction through a step approach ("tier approach") with mediation or conciliation first followed by a binding dispute resolution method (expert, dispute review board). Arbitration or litigation would only follow after construction is completed.

FN77. Shannon K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995) 74 Can.Bar.Rev. 70 at 72, 74.

FN78. Early full disclosure mirrors an element of the good faith doctrine espoused by Belobaba. "The common law is moving towards the ultimate conclusion requiring disclosure of all material facts where elementary fair conduct demands it"--citing Prosser in Holmes, "A contextual study of Commercial Good Faith: Good Faith Disclosure in Contract Formation" (1978) 39 U. Pitt L.R. 381, at Belobaba, supra, n. 73.

FN79. Fenn, supra, p. 149.

FN80. Don Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993) 14 Advocates' Q. 435.

FN81. UCC, s.1-203: "every contract or duty within this Act imposes an obligation of good faith for its performance or enforcement" and s.2-103: "good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".

FN82. An explicit good faith and fair dealing requirement has been part of sales transactions for years requiring "honesty in fact and the observance of reasonable standards of fair dealing in trade". The restatement goes further by requiring good faith and fair dealing in the performance of every contract. Belobaba, supra, p. 74 and n. 7.

FN83. Although, notions of good faith and fair dealing inform the equitable doctrines of inequality of bargaining power, unconscionability and other equitable doctrines that justify the non-performance of contracts. General statements about good faith can be found in Lac Minerals Limited v. International Carona Resources Limited [1989] 2 S.C.R. 574, where a plurality of the Supreme Court of Canada said the institution of bargaining in good faith is one that is worthy of legal protection where such protection accords with the expectations of the parties. Don Clark argues that the Supreme Court of Canada in Houle v. Canadian National Bank [1990] 3 S.C.R. 222 has found a duty of good faith in the exercise of contractual discretion between parties within an existing con-

tractual relationship. Clark argues the court has affirmed a principle of good faith in both the civil law and common law traditions, Clark, supra, p. 436; Cassels, supra, p. 57 and p. 71.

FN84. In Houle, supra, the appellant bank precipitated a sale of assets of a family owned company, the bank moved quickly and suddenly to make demand on a secured promissory note where the customer had been a customer of the bank for 58 years. On the facts, the court regarded the bank's demand of the loan to be unreasonable, even though on an objective economic basis it was not. The bank had acted following an oral report of an accounting firm on the financial status of the customer. If this is the civil law (Quebec) expression of an implicit duty of good faith, the common law expression is generally found in Gateway Realty v. Arton Holdings Limited (1991) 106 N.S.R. (2d) 180 (NSSC). See also Hewitt, supra, pp. 14-15 for the argument that no implied terms were in issue in Gateway.

FN85. Jack Beatson and Daniel Friedman, "Introduction: from 'Classical' to Modern Contract Law in Good Faith and Fault in Contract Law" (Oxford, Clarendon Press, 1995), p. 3.

FN86. Beatson and Friedman, supra, p. 11.

FN87. Rt Hon. Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 Law Quarterly Review 433 at 438: "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations", per Lord Ackner in Walford v. Miles [1992] 1 All E.R. 453 at 460. More than that, traditional contract analysis fails to capture the "grey area". Traditional rules of contract formation and the desire of certainty over flexibility leave "no room for the norms and remedies that gradually increase in intensity as the relationship between the parties grow". See also Cassels, supra p. 76.

FN88. The impetus to consider whether good faith ought to be brought more squarely into English law is the European Economic Union. Principles of European law (civil codes) require that parties must negotiate in good faith, conclude contracts in good faith, and carry out contracts in good faith. In exercising rights and performing duties each party must act in accordance with good faith and fair dealing. Further, the parties cannot contract out of this duty in civil law systems. Lord Steyn, supra, p. 438, citing Principles of European Contract Law, Part I: Performance, Non-performance and Remedies, prepared by the Commission on European Contract Law (Landon and Bobeal, eds, 1995).

FN89. Lord Steyn, supra, citing Oliver Wendell Holmes, p. 439.

FN90. Landsberg and Megens, supra, p. 187. They suggest good faith obligations are most likely to arise on infrastructure projects: "... An express or implied obligation in the contract, or in relationships established as an adjunct to the major contracts, but which may not themselves be contractually binding on the parties (e.g. partnering charter) to assist in dealing with contractual performance, or to address unforeseen difficulties ...". In my view, changed or different soil conditions, issues ("concealed or unknown conditions" in the language of CCDC 2 (1994)) or inadequate disclosure of soils information may be the greatest source of such arguments for implied terms of good faith and fair dealing.

FN91. See, e.g. Opron Construction Company v. Alberta (1994) 151 A.R. 241 (QB). "Alberta Environment owed an obligation of good faith and fair dealing to the plaintiff to disclose that it possessed material geotechnical information which was inconsistent with or which contradicted the information which had been provided to the plaintiff in the tender documents". O'Byrne, supra, p. 82.

FN92. Forsythe, supra, p. 143.

FN93. It is a truism that when parties come together in an ADR process (and partnering included) they have often taken the difficult first step of having been able to agree on something.

FN94. Some argue more broadly that ADR is part of a fundamental transformation of how we view law. The willingness of lawyers to embrace dynamic change may become the hallmark of the practice of law into the 21st century. Rod Macdonald, "Images of Law, Imagining Lawyering", August 23, 1997, draft paper delivered to the students of the part time LL.M. programme in ADR, Osgoode Hall, York University.

FN95. "Lawyers should be involved in creating and then implementing the partnering relationship. Partnering will work only if contract documents are risk sharing and not risk shifting devices. Dispute is controlled by managing risk; risk must be borne by the party most able to control it. Lawyers who are properly informed of partnering objectives and who are involved early in the project partnering process, are the best tools to ensure that contract documents are drafted equitably to promote partnering. Harsh risk shifting clauses are inconsistent with the team building approach. If your lawyers recognise this and draft the contract accordingly, a project is more likely to be partnered successfully." V. Fredrick Lyon, "Your lawyer as a Project Team Member" in Partnering in Design and Construction (Geoffrey Kneeland, ed., New York, McGraw-Hill, 1996), p. 128.

FN96. The most recent CCDC 2 documents contain a dispute resolution system designed to facilitate the economical, efficient, fair and less adversarial resolution of disputes. The CCDC 2 process is designed to maintain outcome control in the hands of the parties. The theory is that parties who retain control of the resolution of their conflict are more likely to honour their commitment. This also allows the exploration of innovative solutions. Such innovative solutions should be explored at the contract formation stage. The CCDC 2 step provisions through negotiation and mediation, and finally arbitration are mandatory. If they are not successful, then the dispute can be referred to arbitration and, if no arbitration, finally the courts. The mediation will take place with the appointed project mediator who has qualification requirements in accordance with the companion rules to the CCDC 2 provisions. A dispute is broadly defined as any difference between the parties as to the interpretation, application or administration of the contract, or a failure to agree where an agreement is called for.

FN97. CCDC 2 (1994) provisions and the CCA 14 (1997) design/build provisions: 8.2.3, 8.2.6 and 8.2.8, the step provisions follow three stages--unassisted negotiation, mediated negotiation and arbitration. The fundamental principle is described as the parties being required to "put their cards out on the table".

FN98. "Dispute Prevention Through Partnering" in Alternative Dispute Resolution in the Construction Industry (R. F. Cushman et al., eds, 1991), p. 40.

FN99. Lyon, supra, p. 129.

FN1. Travis Crane, Jennifer Felder, Paul Thompson, Matthew Thompson and Steve Sanders, "Partnering Process Model" (1997) 13 Management in Engineering 57.

FN2. Kunz, supra, n. 7, citing "D. Mosley, C. Moore, M. Slagle and D. Burns, Partnering in the Construction Industry: Win-Win Strategic Management in Action. vol. 10, no. 3, National Productivity Review 319 (22 June 1991) ($600,000 savings on an $80 million Army Corp. of Engineers project); S. Wolcott, Trust, Handshake Mark "Partnering" on Construction Job; Good-faith Dealing

in the Construction Industry, vol. 10, no. 43, The Kansas City Business Journal 1 (10 July 1992) ($3 million savings on a $60 million office building project); R. Dussault, Partner Keeps Communication Lines Humming; Partnering Contracts in the Construction Industry; Special Report: Construction, vol. 10, no. 34, The Business Journal Serving Greater Sacramento 19 (15 November 1993) (unspecified savings on a $43 million public convention center); B. Dixon, New Transportation Route: Partnering; Arizona Department of Transportation's New Technique in Getting Contracts Done, on Time and Under Budget, vol. 111, no. 44, Arizona Business Gazette 1 (1 November 1991) (up to $100 million savings on a $2 billion freeway system and savings of $40-$50 million on public transportation with potential doubling of this figure over next 5 years); K. Wargin, Scottsdale Airport, ADOT Team on "Partnering" Pilot Project; Arizona Department of Transportation; Scottsdale update, vol. 12, no. 42, The Business Journal-Serving Phoenix and the Valley of the Sun 15 (24 August 1992) (at least $1 million savings on highway project); A. Gruhn, Connecticut DOT Turns to Partnering, vol, 124, no. 11, Public Works 57 (October, 1993) (estimate $7 million savings on $415 million transportation infrastructure projects anticipated); C. Brown, Putting the Civil in Civil Engineering: U.S. Army Corps of Engineers Cooperating with Contractors More than in the Past, vol. 13, no. 7, Oregon Business 32 (July 1990) ($700,000 savings to date on $328 million dam lock replacement project).

FN3. Thomas Stipanowich and Leslie King O'Neal, "Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution--Part I" [1995] Construction Lawyer 5.

FN4. Darrick Mix, supra, pp. 479-481 citing Thomas Stipanowich and Leslie King O'Neal, supra.

FN5. Crane et al., supra, p. 58.

FN6. David and Cynthia Ruff, David Dzombak, Chris Hendrickson, "Owner Contractor Relationships on Contaminated Site Remediation Projects" (1996) 122 Journal of Construction Engineering and Management 348.

FN7. Budget overruns and delays are common on remediation projects. The management structure seems to impact on the overall results. Flexible management structures such as turnkey and design/ construction arrangements and flexible contracts such as cost plus are better suited to accommodate performance uncertainty. Traditional project structure in which the owner contracts both with design and construction firms tend to be the worst performers overall. A much larger fraction of these projects with separate design and construction contracts resulted in costs of typically 20 per cent or more over budget. On the other hand, mechanisms to promote partnering and team building contributed significantly to overall project success, defined by budget and schedule, minimising the cost impact. Ruff et al., supra, p. 353.

FN8. Larson, supra, p. 193.

FN9. "Partnering: A Common Commitment to Common Goals" (1995) 50 Dispute Resolution Journal 30 at 32.

FN10. Is this "particular late-twentieth century cultural artifact we happen to know as law" blinding us to other social visions and values? (see Arthurs, infra, p. 45). Was this Shakespeare's insight, metaphorically speaking, when he said: "First, let's kill all the lawyers"? Henry VI, part I.

FN11. Richard McLaren and John Sanderson, Innovative Dispute Resolution: The Alternative (Toronto, Carswell, 1997), pp. 1-2.

FN12. "The earlier information is available, the less likely parties will form hardened positions. Little or no information fosters erroneous assumptions about what is not known. These assumptions generally conjure worst case scenarios prompting courses of action that deny finding optimal solutions for all, and lose opportunities to make 'real differences'." Barry Stuart, speaking about ADR techniques in the context of criminal law, "Sentencing Circles: Making Real Differences" in Rethinking Disputes (J. MacFarlane, ed., 1997), p. 222.

FN13. There is an interesting anecdote by Michael Murphy, "A Contractor's Partnership Baptism" in Partnering in Design and Construction (Geoffrey Kneeland, ed., New York, McGraw-Hill, 1996) that as a small subcontractor on a large project he admitted his mistake and with the help of all fixed the problem at the least cost. His opening line: "Ladies and gentlemen, I come hat in hand. I screwed up. I need help."

FN14. This point is made generally for mediating commercial disputes. Genevieve Chornencki, "Mediating Commercial Disputes: Exchanging 'Power Over' for 'Power With' ", in Rethinking Disputes (J. MacFarlane, ed., Toronto, Emond Montgomery, 1997), p. 168.

FN15. The partnering process model is identified as consisting of five steps. The first step is the owner's internal alignment phase, where the owner defines the activities it is able to perform and what services are needed from others. Internal barriers are to be removed in partnering by laying the fears of owner and employees that partnering will make their tasks redundant. The second step is partner selection, where selection criteria are identified and potential partners are screened through interviews, or some other process. The third step partnership relationship alignment, the owner and partner align the relationship by developing mutually acceptable objectives, and developing a reward system to encourage goal accomplishment.

FN16. It is at the lowest levels that the dispute resolution process should begin. The lowest level of decision makers need to be educated about partnering, and made to feel that they are a valuable and necessary part of the process. Crane et al., supra, p. 62.

FN17. In the United States, successful consultants are advised to submit RFPs that integrate the partnering approach utilised by local agencies to address key project concerns, such as providing high quality, meeting the project schedule, meeting the project requirements, and staying within budget. Ernesto Avila, "Demystifying the Local Agency Procurement and Selection Process for Professional Engineering Consultant Services" (1997) 13 Management and Engineering p. 94.

FN18. Gerard Ittig, Kasimer and Ittig, 18 Street N.W. Washington, D.C. 200 in "Partnering" (1993) Controlling Construction Claims: A Complete Course (Toronto, Infonex, 1993). Ittig, a practicing construction litigator (well versed in the traditional approaches and has written a paper on advancing delay claims), suggests that partnering rests in the creation of personal relationships among the parties to a construction project. See also Douglas Oles, supra.

FN19. Ittig views partnering in its present form as voluntary and non-binding. Ittig carefully suggests that partnering does not necessarily modify any existing contractual constraints. While partnering's common goal is to avoid litigation, to be effective, there must be dispute resolution procedures as part of the partnering relationship. Modern contracts contain numerous dispute containing provisions which sometimes do not operate fairly. Risk shifting clauses have been legally described by various names as "exculpatory clauses", "notice clauses", "indemnity clauses" and "force majeure clauses". In each instance the intent of the clause in contract language is to shift the risk and burden of loss from one party to another. This may only make sense if the risk is shifted to the party

able to control the risk. Ittig argues that the contract drafter inserts such clauses to impose a fixed, pre-determined structure on what is usually a fluid and changing process. In this way the drafter does not need to think deeply about specific problems. The drafter does not worry about the kinds of delays that may occur, how they may be avoided or how their impact may be reduced. The risk has been shifted to another. Concerned that failure to comply strictly with such risk shifting clauses may be a waiver, contractors will usually write the necessary claim and notice letters. Ittig suggests that the traditional sequence becomes:

(1) the owner/consultant ignores the letter; or

(2) the owner/consultant rejects the contentions in the letter; or

(3) the owner/consultant instructs the contractor to proceed with the impact to be determined later; or

(4) the consultant meets with the contractor to resolve the issue in an atmosphere of mutual respect and trust.

The parties often view the letter writing as an exhibit building exercise and respond accordingly. Blame is fixed, but not the problem. Ittig, supra, pp. 2- 3.

FN20. Ittig, supra, p. 12.

FN21. Ittig acknowledges partnering raises some legal questions and suggests these:

1. What is the effect on personal injury liability where all parties are actively involved in aspects of design (e.g. value engineering)?

2. What is the effect on liabilities for delay damages where all parties are actively involved in scheduling efforts?

3. Are the liabilities of the design consultant or construction manager reduced by the allowance of direct contract between subcontractors and the owner?

4. To what extent can admissions between stakeholders be used against them in court if litigation is unavoidable?

5. Can the partnering agreement create legally enforceable rights and obligations?

Ittig, supra, pp. 29-30.

FN22. e.g. R. Bruce Reynolds "Alternatives to Court" (1993) Controlling Construction Claims: A Complete Course (Toronto, Infonex, 1993). Reynolds emphasises the non-contractual nature of the partnering charter or mission statement.

FN23. "Construction litigation is labour intensive and therefore very costly ... The client should be warned of this very heavy cost at the outset in the hope that settlement will be encouraged." Remarks of Rosenberg J. in "Construction Litigation" (1985) 10 C.L.R. 221 at 221.

FN24. "The Court will usually lend its weight to the process of dispute resolution and issue definition only at the pre-trial stage." Mr Justice R. E. Holland (now retired and practicing ADR) and Phillip Morris advocated earlier and more frequent judicial intervention more than a decade ago in "Construction Litigation: A View from the Supreme Court Bench" (1985) 12 C.L.R. 193 at 193. The consensus among practitioners seems to be that case management seems to result in more focused and narrower disputes going to trial faster even though the application of and nature of case management may not be uniform across jurisdictions: see "Construction Litigation: Tips from the Experts", infra; Reynolds, supra, pp. 3-6. For example, the practice in cases referred to the Master at Toronto usually undergo a form of case management and the setting of timetables and forms of disclosure. The organised presentation of disputed issues in a schedule is routine (e.g. "Scott" schedules: see Court Forms and Precedents (Butterworths, 2nd ed., 1981) and Official Referees' Business (2nd ed., Sweet and Maxwell, 1988).

FN25. In Ontario, the civil litigation of construction disputes involves cost delay among other problems. Some of the reasons litigation is inadequate to meet the needs of dispute resolution in the construction industry is because:

(1) the litigation process does not take into account the need to resolve disputes during construction;

(2) the litigation process makes it difficult to quickly gather many parties together and directly address issues;

(3) the litigation process (with the exception perhaps of the lien masters in Toronto) does not provide an expert adjudicator (each process is essentially adversarial and makes compromise more difficult);

(4) the litigation process with detailed pleadings and discoveries confuses the real issues in dispute; and

(5) although case management is developing, case management is not consistently applied to maximum efficiency across jurisdictions.

Reynolds, supra, p. 6. For example, like Ontario, Santa Clara County in California uses a special master who is an experienced trial lawyer in construction disputes. Sweet, supra, p. 446.

FN26. Reynolds, supra, p. 81. Lyon, supra, argues that partnering does not create any new duties, but in the United States implied duties of good faith and fair dealing are already recognised.

FN27. Sweet, supra, p. 468.

FN28. Dorter, supra; Landsberg and Megens, supra; and A. H. Gaede, Jr, "Partnering: A Common Sense Approach to Preventing and Managing Claims" [1995] International Const.L.Rev. 72.

FN29. Gaede, supra, p. 72.

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