



Marvin Huberman

# Perform contracts honestly

"Always be sincere, even if you don't mean it." —Harry S. Truman

On November 13, 2014, the Supreme Court of Canada released its precedent-setting decision in *Bhasin v. Hrynew* 2014 SCC 71, which recognized there is a general organizing principle of Canadian contract law, and established a new duty of honest performance of contracts.

In the lower courts, the Alberta Court of Queen's Bench held there was an implied term of the agreement between the parties, that decisions concerning the renewal of the contract would be made in good faith. It found that in the period leading up to the non-renewal of the contract, Hrynew acted dishonestly with Bhasin.

The Alberta Court of Appeal found the contract was clear and contained an entire agreement clause. In that context, it held there was no implied term of good faith.

In the Supreme Court of Canada, the questions presented were whether the common law of Canada imposes a duty on parties to perform contractual obligations honestly and, if so, whether Hrynew breached that duty.

Before the *Bhasin* decision, a duty of good faith was generally restricted to insurance contracts, employment contracts, and franchise agreements, as well as certain situations involving fiduciaries and unconscionable conduct.

In *Bhasin*, where the appellant argued that his contractual counter-party had caused him to lose the value of his business as a result of dishonest conduct, the court expressly held that parties must act honestly in the performance of contractual obligations, and failure to do so can constitute a breach of contract.

It held that Hrynew breached his duties to perform contractual obligations honestly, and the court assessed and awarded damages against them in the amount of \$87,000 for breach of this new duty. The court considered this duty to be fair, in accord with the expectations of the commercial parties, and sufficiently precise that it will enhance, and not diminish, commercial certainty.

The court stated that the organizing principle of good faith "exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interest of the contracting partner".

While the court confirmed this organizing principle is manifested in existing types of circumstances, including employment contracts, it also recognized that the principle of good faith should be developed incrementally. The court recognized a duty of honest performance as an example of this incremental development.

This new duty of honest performance, which operates irrespective of the intentions of the parties, according to the court, "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."

This duty does not, however, include a duty of full disclosure like an insurance contract; neither does it obligate a party to subordinate its interests to those of the other contracting party like in a fiduciary relationship.

The court also made it clear the principle of good faith must be applied in a fashion that recognizes the long-standing principle of freedom of contract which permits a party to pursue economic self-interest, which may cause—even intentionally—loss to another.

The court stated that the duty of honest performance may be relaxed by the parties through express contractual terms "so long as they respect its minimum core requirements." It further cautioned that the principal "must be clear not to veer into a form of ad hoc judicial moralism or palm-tree justice."

Given that concepts of reasonableness and honesty are extremely fact-specific, only time will tell whether or not this landmark decision will result in a positive incremental development in the case law dealing with the duty of honest performance or in palm-tree justice.

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