do in order to complete this step. While limited, there is a small bit of antitrust risk while the companies are still separate even after antitrust regulators have cleared the deal. Once they have merged operations, however, the two companies are now one and cannot be liable under the antitrust laws aimed at illegal agreements between competitors.

Let's Be Honest, eh: The New Canadian Duty of Honesty in Contractual Performance

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In November 2014, the Supreme Court of Canada issued a landmark decision that dramatically impacts the obligations of parties to commercial contracts governed by Canadian law.

In *Bhasin v Hrynew*, a unanimous Supreme Court of Canada recognized that good faith contractual performance is a "general organizing principle" of Canadian common law, and that parties to a contract are under a duty to act honestly in the performance of their contractual obligations. The case is the first in which our highest court has considered whether the common law imposes a duty of good faith in contractual performance. (Note that the ruling does not affect contracts governed by the Civil Code of Quebéc, which already recognizes a duty of good faith in performance, which would include a duty of honesty.)

The Facts

The appellant, Harish Bhasin, sold investment products for Can-Am. Their relationship was governed by a dealership agreement that automatically renewed for successive three year terms unless either party gave notice to the contrary at least six months prior to the expiry of any term.

There was a history of animosity between Bhasin and Larry Hrynew, another Can-Am dealer who was one of Bhasin's key competitors. Hrynew wanted to capture Bhasin's niche market, and proposed a merger with Bhasin. When Bhasin rejected his proposal, Hrynew pressured Can-Am to force the merger. Can-Am proceeded to design a restructuring plan that would have involved merging Bhasin's agency under Hrynew's agency. However, Can-Am denied to Bhasin that any such plans had been made.

At about the same time, the Alberta Securities Commission required Can-Am to appoint an officer to review its dealers for compliance with securities laws. The role would require the officer to conduct audits of Can-Am's dealers. Can-Am appointed Hrynew, with the result that he would audit his competitors' agencies, including Bhasin's, and have access to their confidential business information. When Bhasin complained about the conflict of interest in Hrynew being both a competitor and an auditor, Can-Am misled Bhasin about how and why Hrynew was selected for the role and repeatedly told Bhasin that Hrynew was bound by duties of confidentiality in that role (when, in fact, this was not the case).

When Bhasin refused to allow Hrynew to audit his records, Can-Am gave notice of non-renewal. Bhasin commenced this litigation in response.

The Supreme Court concluded that Can-Am acted dishonestly toward Bhasin in exercising the nonrenewal clause, because it misled Bhasin about its proposed agency restructuring and Hrynew's role as auditor. Can-Am's dishonesty was directly and intimately connected with its performance of the agreement and its exercise of the non-renewal provision. Accordingly, the Court found that Can-Am breached the dealer agreement, and its duty to perform the agreement honestly.

The Decision

In its unanimous decision, the Supreme Court embarked on a detailed survey of the law of good faith in Canada (and elsewhere). It noted that Canadian law has been reluctant to consistently impose a stand-alone duty of good faith. This resistance has largely been attributable to concerns that such a duty would invite courts to interfere with the express terms of a contract, disrupt commercial certainty, and undermine freedom of contract.

Canadian courts have nevertheless infused their analysis of contractual disputes with concepts of good faith. However, their means of applying the concept to their analysis has have been far from universal: "it is often unclear whether a good faith obligation is being imposed as a matter of law, a matter of implication or as a matter of interpretation."

Indeed, the law of good faith contractual performance has evolved in a 'piecemeal' fashion, where courts enforce a duty of good faith in a variety contractual contexts. For example, franchise legislation imposes a statutory duty of good faith and fair dealing. Insurers are required by law to deal with their insureds' claims fairly and in good faith; likewise, insureds are required to act in good faith by disclosing to their insurer all facts that are material to the insurance policy. The law requires good faith bargaining in the labour context and good faith termination of employment by employers. Considerations of good faith also permeate doctrines that evaluate the fairness of contractual bargains, such as unconscionability and those dealing with power imbalances between contracting parties.

This 'piecemeal' approach has resulted in a lack of consistency, certainty, and coherence, and brought the law out of step with the reasonable expectations of commercial parties.

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The "General Organizing Principle" of Good Faith

To remedy these inconsistencies and bring Canadian common law in line with parties' reasonable expectations, the Supreme Court in *Bhasin* recognized what it called a "general organizing principle" of good faith.

The Court was clear that this organizing principle does not constitute a "free-standing rule," the breach of which is enforceable in and of itself. Instead, it forms a standard that manifests itself in other recognized, enforceable doctrines where the law already requires honest, candid, forthright, or reasonable contractual performance. The Court also left the door open to novel claims, noting that the list of applicable doctrines based in good faith "is not closed" and that the organizing principle "should be developed where the existing law is found to be wanting."

Anticipating concerns that an organizing principle of good faith will lead courts down the rabbit hole of precluding legitimately self-interested commercial conduct, the decision confirms that parties remain free to pursue their own individual economic interests. Causing loss to another party in the pursuit of business objectives is not necessarily contrary to good faith. The Court was quick to caution against applying the organizing principle to engage in judicial moralism or scrutinize the motives of contracting parties.

However, the reasonable expectations of contracting parties nevertheless include a level of honesty and good faith in contractual dealings. While this expectation does not go so far as to automatically render the parties fiduciaries to one another, "a basic level of honest conduct is necessary to the proper functioning of commerce."

The Duty of Honesty in Contractual Performance

Accordingly, in addition to affirming the general organizing principle of good faith, the Court held there is a general duty of honesty in contractual performance. The Court noted that this new duty does not arise as a result of an implied contractual term. Rather, it stands as a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. This duty precludes contracting parties from lying or otherwise knowingly misleading each other about matters directly linked to the performance of the contract.

> Importantly, the Court stated that a duty of honesty does not impose a duty to disclose or any fiduciary responsibility, and it limited the scope of the duty of honesty as follows:
>
> It does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

And, the Court clarified that there is a distinction between not disclosing a material fact (even the intention to terminate an agreement) and actively misleading or deceiving a contractual counter-party.

The Court also pronounced that, because the duty of honest contractual performance is a "general doctrine of contract law that applies to all contracts," the parties are not free to exclude it (and that the duty is not negated by the existence of a generically worded entire agreement clause). That said, the Court acknowledged that the scope of this duty may be relaxed in certain contexts, and even limited by express contractual terms so long as those terms respect minimum core requirements. In short, the Court would permit parties to define the precise content of honest performance and the standards by which that performance is to be measured in their agreement, provided that the language chosen is not manifestly unreasonable.

Implications

The Supreme Court expressly noted that while longer term contracts "clearly call for a basic element of honesty in performance," so too do "transactional exchanges." So, the performance of obligations under M&A agreements will be subject to the principles enunciated by the Court and the anticipated fall-out from the decision.

While the Court embarked on its analysis with the admirable intention of enhancing commercial certainty, the decision is likely to have the opposite effect on the predictability of contract law. Future courts will now have to grapple with what, exactly, "honest performance" entails, and the extent to which that duty may be modified by express contractual terms. For example, might the duty of honesty extend to the parties' precontractual negotiations and discussions?

Bhasin makes it clear that the precise scope of what constitutes 'appropriate regard' for another's interests will vary with the circumstances, and it will be up to subsequent litigants to test what those circumstances are and when the duty may be relaxed. By way of example, the decision makes a distinction between long-term contracts and those of a transactional nature, inviting future litigants to flesh out if and how the former should be held to a higher standard than the latter.

Attempting to limit the scope of the duty by way of express contractual terms may be appropriate in the context of certain business relationships. Indeed, putting fresh eyes on the terms of existing commercial contracts—and the means, methods and rationale for their performance—might be warranted. However, this case also drives home the message that duties and obligations under a contract can extend far beyond the words written on the page.

Parties wanting to benefit from the duty also should generously ask questions of their contracting counter-parties, since a dishonest answer could give rise to a cause of action.

As both the spectrum of this organizing principle and the precise scope of this duty are interpreted by lower courts, parties to Canadian contracts—including M&A agreements—should be on their best behaviour. Prudent parties will ensure they live up to their best practices of acting with honesty, candour, and transparency in their dealings with their contractual partners. Businesses should be mindful of the fact that not only their conduct, but also their intentions, will be examined under a microscope when contractual relationships turn sour.