

Unfair Contract Terms: An Interim Report

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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This project is being carried out as part of the Institute's Community Law Reform Project, which is made possible with the financial support of the Law Foundation of British Columbia and of the Ministry of Attorney General. The Institute gratefully acknowledges the support of these bodies for its work.

Library and Archives Canada Cataloguing in Publication

British Columbia Law Institute

Unfair contract terms: an interim report / British Columbia Law Institute.

(BCLI report; no. 35)

ISBN 1-894278-27-5

1. Contracts—British Columbia. I. Title. II. Series

KEB250.B75 2005

346.71102'2

C2005-900738-9

KF808.B75 2005

INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Unfair Contract Terms: An Interim Report

Every day most of us engage in activities that are governed by, or involve the creation of, a contract. In many cases, these contracts contain contract terms that give one party a legal advantage over the other. It is important to recognize that contracts—even one-sided contracts—should be enforced if they are freely made. But it is equally important to recognize that there are limits to this principle.

This Interim Report focusses on a limit to the general principle of enforceability, unfair contract terms. These are specific contract terms that are particularly harsh, grossly one-sided, or unconscionable. This Interim Report surveys recent cases dealing with unfair contract terms, the tools that the law currently provides to the courts to regulate unfair contract terms, and several approaches to reform of the law.

Part of the project on unfair contract terms involved consultations with the public. The results of that consultation indicate that legislative reform of this area of the law is not a pressing concern. This document has been styled an interim report to reflect that, although the Law Institute is not making specific recommendations for reform at this time, it will maintain a watching brief on unfair contract terms.

Ann McLean
Chair,
British Columbia Law Institute

February 2005

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I. INTRODUCTION

A. Background

When will a contract not be enforced? The law provides numerous answers to this question. These answers vary with the circumstances in which the question is asked. This Interim Report is concerned with one specific instance of non-enforcement, which will occur when a contract or a contract term is determined to be unfair.

At the foundation of the law of contracts is the principle that valid agreements will be enforced. Certainty, constancy, and stability are its central values. The law vindicates the idea that one's word should be one's bond. It is also important to allow contracting parties to have considerable freedom in choosing how they structure their agreements. As one case put it, "[i]t is not the function of the courts to protect adults from improvident bargains."¹

These values associated with certainty are not the only values that the law of contracts respects. In exceptional cases the courts have refused to enforce and the legislature has restricted the use of a contract term because it is unfair. This willingness to act in such a dramatic fashion is not based on the possibility that a contract term will deliver an uneven result. Rather, it is a recognition that unfair contract terms can cause significant harm. They may result in sizeable economic losses for a contracting party. They cause increases in litigation. Finally, they engage the moral sense of the courts and the legislature, which speak of them in the lexicon of moral disapproval, using words such as unconscionable, unconscientious, and abuse of power.

The values of certainty and fairness are not mutually exclusive. Commentators often speak in terms of striking a balance between them.² This metaphor contains a recognition that, for

1. *Griesshammer v. Ungerer*, (1958) 25 W.W.R. 689, 14 D.L.R. (2d) 599 at 604 (Man. C.A.), Tritschler J.A.

2. For an elegant variation ("charting a middle course") on this balancing metaphor see Gerald H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 352–353:

The legal history of the past two hundred years indicates that courts in England . . . and courts in Canada . . . have experienced great difficulty over steering a straight course between the Scylla of strict enforcement of agreements reached without fraud, duress, mistake or misrepresentation, and the Charybdis of rescission or avoidance of contracts that are considered to be unconscientious or unfair. There is general agreement amongst lawyers in England, Canada and the United States that some method must be found to permit the regulation of contracts that favour one party unduly at the expense of the other, as long as there are some other factors present indicating that this unbalanced state has not been arrived at in a totally free and legitimate manner. But there is no such general agreement as to the validity of the way in which English, Canadian or American law has solved the problem.

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the vast majority of contracts, unfairness will not be an issue. If judicial or legislative review, however well-intentioned, upsets this balance by routinely casting doubt on the enforceability of contracts, then neither value will be well-served.

Currently, British Columbia law provides the courts with a variety of tools for dealing with unfair contract terms. Some of these tools derive from previously decided cases; some find their source in statutes. This Report will examine those tools with reference to the values of fairness and certainty. It will also discuss a number of options for reform, which may advance both values. No formal recommendations for reform will be made in this Report. Rather, this Report is intended to stimulate discussion and to provide the materials to decide whether reform of this area of the law is necessary now or will be necessary in the future.

B. Consultation on Unfair Contract Terms

The initial phase of the Law Institute's project on unfair contract terms focussed on consultations with the public. A Consultation Paper was published in May 2004. The Consultation Paper posed a number of questions, which asked readers to describe their experiences with specific unfair contract terms and to comment on a number of strategies for dealing with unfair contract terms. These questions were also posted in an interactive format on the Law Institute's website. In addition to the Consultation Paper, a brochure summarizing the Law Institute's project on unfair contract terms was prepared. Fifty thousand copies of the brochure were printed. The brochures were distributed to the public through such institutions and agencies as libraries, chambers of commerce, unions, municipalities, and condominium management associations. Finally, a press release was prepared and sent to print and broadcast media in British Columbia.

C. Why an Interim Report?

The Law Institute thanks all those who took the time to respond to the Consultation Paper or the interactive questions on our website. Although the volume of responses was not high, the content of the responses was taken into account in formulating the development of this project. Few respondents were directly concerned with the general questions relating to unfair contract terms.

Some examples drawn from the responses illustrate that the concerns of many respondents lie with issues that are far removed from legislative control of unfair contract terms. A large portion of the respondents were concerned with various aspects of family law, particularly the division of family assets and the enforcement of maintenance orders. A number of other respondents addressed employment and labour law issues, such as management bargaining practices in unionized workplaces and attempts to characterize employment relationships as being engagements of independent contractors. Finally, other respondents

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took issue with residential tenancy agreements, government tendering procedures, and strata corporation governance.

The respondents raise a number of serious legal and social issues. In some cases, they touch on topics that could form the subject of future law reform projects. In fact, a number of the concerns related to family law have already been addressed in work of the British Columbia Law Reform Commission.³

Both the modest number of responses received in the consultation phase of this project and the nature of the responses indicate that the time may not yet be ripe for legislative reform. We do not believe that our consultations have provided us with an adequate foundation to make legislative recommendations in this Report. That said, unfair contract terms will continue to pose a challenge for the courts—and for consumers, nonprofit agencies, strata corporations, small businesses, and others. Specific, concrete problems may arise in the future and call for recommendations for legislative action. The Law Institute plans to maintain a watching brief on unfair contract terms. We are issuing an interim report at this time both to make available the results of our research and consultation and as a spur to the further discussion and consideration of unfair contract terms.

D. The Scope of this Report

There is no limit to the types of contracts that may be reviewed for their fairness. The majority of recent cases have involved what may be broadly called agreements to settle litigation. These cases often occur in connection with motor vehicle accidents.⁴ A number

3. See e.g. *Report on Spousal Agreements* (LRC 87) (Vancouver: The Commission, 1986).

4. See e.g. *Smyth v. Szep*, (1992) 63 B.C.L.R. (2d) 52, [1992] 2 W.W.R. 673 (C.A.), Taylor J.A. (Wood J.A. concurring) (plaintiff, who was a nineteen year old university student, settled action in direct negotiations with Insurance Corporation of British Columbia adjuster, without the benefit of independent advice or personal knowledge or experience of the settlement process—settlement terms unfair when viewed in light of medical information that the adjuster knew or ought to have known—settlement set aside), *leave to appeal to S.C.C. refused*, (1992) 70 B.C.L.R. (2d) xxxiii (S.C.C.); *McCullough v. Hilton*, (1998) 63 B.C.L.R. (3d) 272, 7 C.C.L.I. (3d) 259 (C.A.), Esson J.A. (for the court) (plaintiff was unemployed, on social assistance, and had not completed high school—settled claim after direct negotiations with adjuster—settlement set aside at trial—Court of Appeal reversed trial judge, noticing that plaintiff initiated settlement negotiations, “benefitted” from the proceeds of the settlement, and that the relevant medical information could not have reasonably been within the contemplation of the parties at the time the settlement was concluded); *Gindis v. Brisbourne*, (2000) 72 B.C.L.R. (3d) 19, 183 D.L.R. (4th) 431, 2000 BCCA 73, Prowse J.A. (Saunders J.A. concurring) (plaintiff had a pre-existing degenerative back condition—negotiated settlement of motor vehicle claim with adjuster, without benefit of legal representation—settlement set aside at trial—Court of Appeal reversed trial judge, noticing that plaintiff “aggressively” pursued his claim and was not intimidated by disparity in bargaining power), *leave to appeal to S.C.C. refused*, [2000] S.C.C.A. No. 145 (QL).

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of other cases result from unjust dismissal litigation.⁵ In addition, legislation in force in this province has extended the review of contracts for their fairness into other areas, notably in connection with consumer transactions.⁶

This Report will not attempt to survey all developments across this field. Rather, it will focus on two specific, and largely overlooked, matters. These are: the review of specific contract terms and the application of principles of contractual fairness in areas other than consumer protection.

Review of contracts for their fairness has involved the scrutiny of two aspects of a contract. First, there has been a focus on what has led up to the document being executed: the parties, their experience and character, and the process of negotiation. Second, there has been review of the actual terms of the agreement itself. It is more common to find this distinction drawn outside British Columbia. The first item is frequently labeled “procedural unfairness,” the second “substantive unfairness.”⁷

This Report will concern itself primarily with substantive unfairness.⁸ This choice is made for a number of reasons. This Report will attempt to stimulate discussion on whether specific contract terms may be described as being unfair. The treatment of such contract terms is, fundamentally, a policy decision. Focussing on the contract term helps to shed light on the nature of that decision, and the ways in which the legislature could contemplate reforming it.

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5. See e.g. *Sui v. Westcoast Transmission Co.*, (1986) 14 C.C.E.L. 117 (B.C.C.A.), Hinkson J.A. (for the court) (plaintiff “not an ignorant man”—no unfair advantage taken of him); *Henderson v. Advantage Marketing & Advertising Inc.*, (1991) 35 C.C.E.L. 200 (B.C.S.C.), Hood J. (plaintiff “a sophisticated man of business”—settlement not unconscionable); *Lambert v. Digital Rez Software Corp.*, (2002) 17 C.C.E.L. (3d) 131, 2002 BCSC 481, Maczko J. (court sets aside settlement that was effectively imposed on plaintiff—plaintiff not required to show that defendant acted with malice).
 6. See *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2; see especially part 2 (unfair practices). Most of the provisions of this omnibus statute—including part 2—came into force on 1 July 2004. On that date, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 and the sections of the *Consumer Protection Act*, R.S.B.C. 1996, c. 69 dealing with unfair practices were repealed. In the main, part 2 restates the substantive law set out in the two repealed statutes.
 7. The source of the labels “procedural unconscionability” and “substantive unconscionability” is an American law review article: Arthur A. Leff, “Unconscionability and the Code—The Emperor’s New Clause” (1967) 115 U. Pa. L. Rev. 485 at 487. The labels have been used by the American courts, and by courts elsewhere. See e.g. Australia: *West v. AGC (Advances) Ltd.*, (1986) 5 N.S.W.L.R. 610 at 620–622 (S.C.), McHugh J.A.; New Zealand/ United Kingdom: *Hart v. O’Connor*, [1985] A.C. 1000 at 1017–1018 (P.C.), Lord Brightman.
 8. As a result of this focus on substantive unfairness, this Report will not address issues that are more closely related to procedural unfairness, such as undue influence, fraud, misrepresentation, and duress.
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A distinction between substance and procedure is illuminating if it focusses discussion on underlying policy choices. However, such a distinction may be too rigidly sustained. Some issues are not helpfully discussed with reference to such a distinction. One such issue forms the second central topic of this Report. That topic relates to the entities to be granted protection under any legislation restricting the use of unfair contract terms.

Legislation regulating unfair contracts in British Columbia largely focusses on consumer transactions, which involve individuals entering into contracts with businesses for personal or domestic reasons. The courts have taken a broader approach. This Report will examine whether the options for reform may apply this broader approach as well. This discussion will focus on specific entities, and on whether any common elements unite those entities that may require protection.

These two topics may be usefully linked together. When the courts review the fairness of contracts involving parties that are not consumers their focus tends to be on substantive issues connected with the contract's terms, and not on procedural issues. Recent cases dealing with unfair contract terms raise issues and make points that are relevant to both topics.

E. Terminology

This Report employs the word “unfair” in place of the traditional term “unconscionable.” The reason for selecting “unfair” as the general term of description is that “unconscionable” has become identified with an important common law approach to the issue.⁹ There may be other approaches to the problems discussed here, which may be implemented through legislation.¹⁰

In addition, this Report occasionally refers to unfair “contracts.” Both the common law and statutory provisions in force in British Columbia take the position that the review of contracts on the basis of their fairness involves an examination of more than the written document itself. The course of negotiations, the character and experience of the parties, and the circumstances surrounding execution are also relevant to this inquiry. The word “contract” is therefore used in an expanded sense, as a simple way to include all the elements that the courts and the legislature have decided are relevant to this inquiry. Elsewhere in this Report—including the title—the phrase unfair “contract terms” is used. This choice of words is meant to focus the discussion on the actual provisions of a written agreement.

9. The unconscionability doctrine is discussed in part III.B., below, at 13*ff*.

10. For further discussion of this point see Law Commission of New Zealand, “*Unfair Contracts* (NZLC PP 11) (Wellington: Law Commission, 1990) at paras. 4–11.

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An extensive discussion of remedies does not form part of this Report. Nevertheless, it is necessary to single one out. The judicial doctrine of unconscionability developed in connection with the remedy of rescission. Rescission is more than a termination of a contract; it is an unmaking of a contract, an undoing of it from the very beginning. In order to achieve this result, each party must give back whatever was received under the contract.

Finally, there is the key word in this Report, “unfair.” What is meant by unfairness in this context is not something that can be defined simply in one paragraph. Unfairness is tied both to specific patterns of facts and a general, often unarticulated, moral sense. In the latter vein, an English judge, Lord Evershed M.R., once remarked that “[t]his contract is so one-sided that I am astonished to find it written on both sides of the paper.”¹¹ Unfairness, as Lord Evershed M.R. points out, goes beyond a mere inequality of result. Its specific qualities, though, manage to be both blatant and difficult to state precisely. Some approaches to defining “unfairness” will be raised for discussion in this Report.

II. RECENT CASES DEALING WITH UNFAIR CONTRACT TERMS

A. Introduction

Singling out certain contract terms as being unfair in a general or abstract sense is a difficult task. The mere fact that a contract term could produce a disadvantageous result for one of the parties is not an appropriate standard to use in order to determine whether a particular contract term is unfair. Context is most often the key to making the determination. For the purposes of this Report, that context will be provided by several recent court cases that touch on the issue of unfair contract terms. The contract terms discussed in those cases were: clauses effecting automatic renewals of a contract’s term of agreement; acceleration clauses; and contract terms excluding or limiting liability.

B. Automatic Renewals

Some contracts provide for automatic renewals of the agreement. For example, a one year agreement for the rental of a piece of equipment or the provision of a service might provide for an automatic renewal for further periods of one year. The renewal may come into effect at the option of the service or equipment provider. Or, the agreement may be renewed in the absence of notice from the other contracting party, applying a variation on the “negative option” schemes that exist in many consumer contracts.

An example of an automatic renewal clause is found in the Court of Appeal decision in *32262 B.C. Ltd. v. Balmoral Investments Ltd.*¹²

11. Quoted in Robert E. Megarry, *A Second Miscellany-at-Law* (London: Stevens & Sons, 1973) at 276.

12. 1999 BCCA 184 at para. 7, Mackenzie J.A. (for the court) [*Balmoral Investments*].

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29. RENEWAL. It is mutually agreed that upon faithful performance by the Advertiser of all the provisions of this Agreement and upon expiry thereof, or of any extension thereof, the Agreement shall be deemed to be renewed for a further term as set out in this Agreement and automatically thereafter for another further identical term, unless either party to this Agreement, at least thirty (30) days before the expiry of the term comprises [sic] of this Agreement, or any extension thereof, or any renewal thereof, shall have given to the other written notice of that party to terminate the Agreement or vary the rate in effect at the expiry of the then current term. It is further agreed between the parties hereto that should this Agreement not be automatically renewed at the end of any term and the Display is left in place on a month to month basis then it is agreed that the month to month rate shall be 130% of the rate at the end of the expired term.

30. TERM. The Owner hereby grants to the Advertiser a licence to use the Display at the said premises for the Term of the number of days the Display operates during the month of installation, plus 72 months thereafter (herein called the 'Said Term') plus 5 months, and the payment of the last 5 (five) months of the Term are the number of months the Advertiser shall pay upon execution of this Agreement, and the Owner shall not be obliged to commence construction of the Display until receipt thereof notwithstanding execution by a sales representative of the Owner.

In *Balmoral Investments* the plaintiff supplied an outdoor sign to the defendant. The two contract terms set out above appeared in the plaintiff's standard-form contract. These contract terms are rather complicated; however, their key point is that the original agreement is to last for approximately 72 months, after which the agreement will be automatically renewed for a further period (presumably also of 72 months) unless one of the parties gives a 30-day notice of termination.

Balmoral Investments turned on the interpretation of these two contract terms. During the original agreement, the defendant transferred its business to an arm's length purchaser. This purchaser operated the business for a while. It made the rent payments on the sign, but it did not obtain the plaintiff's consent to an assignment of the contract. Eventually, the defendant came back into possession of the business and purported to terminate the contract.

The plaintiff commenced an action to enforce an acceleration provision in its contract. It relied on the automatic renewal clause in order to argue that the agreement had not lapsed. The court strictly construed the two sections set out above and concluded that:¹³

"Faithful performance" in this context is at best ambiguous, and any ambiguity must be resolved against Sign-O-Lite [*i.e.* the plaintiff] under the *contra proferentem* rule. . . . In my view, the irregular substitution of Sierra Blanca [*i.e.* the purchaser of the defendant's business] for Balmoral [*i.e.* the defendant] in a manner not contemplated by the standard form terms and in breach of clause 24 is inconsistent with faithful performance and therefore the condition for automatic renewal was not met.

13. *Ibid.* at para. 14.

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The automatic renewal expressly applied only if the defendant faithfully performed the contract, but faithful performance was not defined. The defendant argued that there had not been faithful performance because the unauthorized assignment contravened the agreement. The court agreed that in the circumstances it could not be said that the defendant had faithfully performed the agreement, so the automatic renewal provision did not apply. Ironically, the defendant's non-compliance appears to have assisted the defendant in this case.

A simpler variation on the automatic renewal concept was employed in a contract considered in *AT & T Capital Canada, Inc. v. Globe Printers Ltd.*¹⁴ This case involved the lease of a photocopier pursuant to a standard-form contract. The photocopier proved to be defective. The lessee attempted to return the copier and terminate the lease. The lessor attempted to enforce the terms of the contract, which provided that it was “non-cancellable” and that the lessor would bear no responsibility for the equipment, even in the event of fundamental breach.¹⁵ The lessor sought to obtain payment of the remaining rent under the contract.

The court refused to enforce the contract for a number of reasons. First, the onerous provisions of the lease had not been expressly drawn to the lessee's attention.¹⁶ Second, the court strictly construed the terms of the contract and fastened onto an irregularity. The lessor had replaced the original photocopier with another one (which also proved to be defective). However, the contract was not amended to cover this replacement copier.¹⁷ Third, the court invoked the doctrine of fundamental breach and concluded that the lessor “. . . is unable to rely on the onerous terms of the lease on the ground that there was a fundamental breach of the terms of the lease.”¹⁸

C. Acceleration Clauses

An acceleration clause is a contract term that provides for the payment of money on the happening of an event, which is typically a pre-determined event in default of the contract. A simple example of such a term in operation appeared in *Balmoral Investments*, where the plaintiff “. . . demanded payment of \$203,297.53 plus interest at 26.4% *per annum* from 3 March 1994 based on a non-payment and acceleration clause in the standard-form con-

14. 2001 BCSC 1215, Loo J. [*Globe Printers*].

15. *Ibid.* at para. 12.

16. *Ibid.* at paras. 13–15.

17. *Ibid.* at para. 15.

18. *Ibid.*

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tract. . . .”¹⁹ The acceleration clause did not receive much consideration in *Balmoral Investments*; the court’s decision to uphold the trial judge’s conclusion that the contract had not been automatically renewed effectively dealt with it.

An identical acceleration clause was the primary focus of the Alberta Court of Appeal’s judgment in *32262 B.C. Ltd. v. See-Rite Optical Ltd.*²⁰ In *See-Rite Optical*, the automatic renewal of the standard-form contract was not an issue. The court concluded that the agreement was automatically renewed for a further 77-month period, by virtue of the defendant’s failure to notify the plaintiff that it did not wish to renew the contract.²¹ When the defendant subsequently requested that the plaintiff remove the sign, the plaintiff demanded payment of the remaining 70 months’ rent.

For both the trial and appeal courts the main issue for determination was whether the acceleration clause could be classified as a penalty. The trial judge ruled that the acceleration clause was “. . . oppressive and not a genuine pre-estimate of damages.”²² The trial judge based this conclusion on a finding that the rent paid during the renewal term would be almost entirely profit for the plaintiff, as it had recouped its costs and projected profit during the original term of the agreement.²³

The Court of Appeal allowed the plaintiff’s appeal. The court reviewed the leading authorities on the classification of contractual provisions as penalties and determined that “[a]n emphasis on the need to show oppression is apparent.”²⁴ Despite the fact that the damages the plaintiff would be awarded under the acceleration clause were “pure profit,” the court did not conclude that this case involved “oppression.”²⁵

19. *Supra* note 12 at para. 4.

20. [1998] 9 W.W.R. 442, 60 Alta. L.R. (3d) 223, 1998 ABCA 89 [*See-Rite Optical* cited to W.W.R.].

21. *Ibid.* at para. 3, Hunt J.A. (Hetherington J.A. concurring). The third judge on the panel, O’Leary J.A., wrote a separate decision concurring in the result but also allowing a cross-appeal concerning the calculation of pre-judgment interest.

22. *Ibid.* at para. 6.

23. *Ibid.* at paras. 5–6.

24. *Ibid.* at para. 13.

25. *Ibid.* at paras. 17–18.

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In coming to this conclusion, the court noticed that this contract term has been the subject of litigation in courts across Canada:²⁶

. . . this contract has been the subject of a great deal of litigation. Courts too numerous to mention have addressed the question of whether the acceleration clause should be treated as a penalty or as a pre-estimate of damages.

These cases have generated conflicting results.²⁷

D. Contract Terms that Exclude or Limit Liability

Disclaimers and clauses that exempt or limit the liability of suppliers of goods and services continue to be litigated. In many respects, these types of contract terms are the mirror image of acceleration clauses.²⁸

*Zhu v. Merrill Lynch HSBC*²⁹ provides an example of how the courts deal with some of the problems created by contract terms that exclude or limit liability in the context of services provided over the internet. The claimant in this case was a software engineer who used the defendant's internet securities trading facility. His use of this service was covered by a standard set of terms and conditions. The terms and conditions contained a number of disclaimers and clauses excluding the defendant's liability. One example may be quoted from the judgment:³⁰

26. *Ibid.* at para. 14.

27. See e.g. *Sign-O-Lite Signs Ltd. v. Windsor Plywood (Kelowna) Ltd.*, (1988) 61 Alta. L.R. (2d) 21, 88 A.R. 301 (Q.B.), McCallum J. (acceleration clause did not operate during renewal term of agreement); *Alwest Neon Signs Ltd. v. Henze*, (1989) 105 A.R. 343 (C.A.), Bracco J.A. (for the court) (trial judge correct in holding that the acceleration clause was a genuine pre-estimate of damages, not a penalty). See also *32262 British Columbia Ltd. v. Goldstein*, [1993] B.C.J. No. 2707 (Prov. Ct.) (QL), Stansfield Prov. Ct. J. (although using these contract terms in an agreement "with unsophisticated businesspersons is a regrettable practice," the acceleration clause is not a penalty and, under the law as it stands, should be enforced). *Goldstein* also contains a comprehensive review of the many cases involving disputes over the rental of signs.

28. See Stephen M. Waddams, "Unconscionability in Contracts" (1976) 39 Mod. L. Rev. 369 at 378: "[b]y a natural progression of thought one turns from unduly high liquidations (penalties) to unduly low liquidations (limitation and exclusion of liability)."

29. 2002 BCPC 535, Romilly Prov. Ct. J. [*Zhu*]. Although *Zhu* is a Small Claims Court decision, it has apparently attracted broad notice. In a note on the case, Elizabeth R. Edinger observed that "[p]ractitioners and legal scholars in Canada and abroad have already commented on the importance of this decision. The judgment is seen as a step toward better consumer protection and greater scrutiny by the courts over online brokerage services." See Case Notes (2003) 61 Advocate 633 at 635.

30. *Zhu, ibid.* at para. 9.

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The claimant used the facility to make a trade, selling a number of shares from his account. He immediately cancelled this trade, causing a message reading “cancelled” to appear on his computer screen. A short time later, and relying on the “cancelled” message, the claimant executed another trade, selling the same shares that were the subject of the first, apparently cancelled, trade. However, the first trade had not been actually cancelled. The defendant warned its customers of this danger in its terms and conditions.³¹ As a result, the claimant’s account went into a short position, which he was forced to remedy by purchasing the shares at a price higher than the price for the sale.

The case turned on whether the claimant received an adequate explanation of the possibility that his first trade may not have been cancelled before he executed the second trade. The court answered this question first by ruling that the disclaimers contained in the terms and conditions were unenforceable:³²

It strikes me that the Defendant’s Legal Disclaimer falls into the category of an agreement which “virtually eliminates liability for inaccuracy in the performance of the services contracted for by the customer” and can be construed as in fact “exonerating the broker from acts of . . . gross negligence” and in fact reserving “the right to be grossly negligent” to the broker.

After coming to this conclusion, the court noticed a number of defects in the online trading system.³³ In an unusual variation on traditional unconscionability jurisprudence the court

31. *Ibid.* at para. 10. The claimant apparently did not receive a copy of this document until after he had suffered his trading loss.

32. *Ibid.* at para. 18 [ellipsis in original]. The phrases quoted in this passage are from an Ontario decision, *Robet v. Versus Brokerage Services Inc.*, [2001] O.T.C. 232, 14 B.L.R. (3d) 72 at paras. 58, 62 (S.C.J.), Wilkins J.

33. *Zhu, ibid.* at paras. 20–25; 28–29. The court was particularly unimpressed with the defendant’s position that change orders should be confirmed by telephone: *see ibid.* at para. 29.

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pointed to the claimant's sophisticated knowledge of computer systems as one of the reasons that it found in his favour:³⁴

Further I find that if the Claimant, a Software Engineer, with knowledge of computer systems, had difficulty of [*sic*] comprehending this curious process by which the Defendant operated, it strikes me that there could not have been a meeting of the minds when the Claimant entered into an agreement with the Defendant and that it was only after the Claimant suffered a loss that the Defendant decided to explain their system to him. . . .

I find that if the system's prompt creates such confusion to a customer, especially one who is knowledgeable about computers as the Claimant was here, the system, in my opinion, is faulty.

E. Summary

The court cases discussed in this section begin to bring into focus the types of contract terms that may be considered unfair in areas outside the realm of consumer protection. The judgments show that it is difficult to characterize a particular contract term as being unfair. An automatic renewal may operate in a way that benefits the parties to a contract. An acceleration clause may be necessary if there is no resale market for an item of equipment.³⁵ Clauses that exclude or limit liability are often closely tied to the parties' insurance arrangements. However, these contract terms can also display elements of overreaching and one-sidedness that the courts were clearly reluctant to enforce. A discussion of the tools that the courts may use in these cases is the subject of the next section.

Court decisions, however, are not the only source of examples of unfair contract terms. The Law Commission of New Zealand described a number of other examples of unfair contract terms, in use in New Zealand, which have not been the subject of litigation:³⁶

Some of the clauses:

- gave an open-ended power to modify the contract unilaterally upon giving a month's notice (and even the month's notice could be abbreviated under the clause);
- imposed a duty on the consumer to give access to certain premises although they might not be the consumer's premises, the consumer therefore having no legal power to give access;

34. *Ibid.* at para. 26 and at para. 29. These comments are all the more curious given that the claimant was apparently not fluent in English (the court notes in passing at para. 2 that he required a translator to communicate at trial) and therefore could have been seen as being particularly vulnerable to the ambiguities of the defendant's trading facility.

35. See e.g. the trial judge in *See-Rite Optical*, *supra* note 20, who pointed out at para. 5 “. . . that there was little, if any, market for the re-leasing of the sign. . . .”

36. *Supra* note 10 at para. 76.

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- imposed a liability on the consumer to pay for all services that Telecom's³⁷ records purported to show were requested—in other words, one party's records were to be conclusive of the other's liability to pay;
- made the consumer liable to pay for charges after he or she had given notice of termination until the service was actually disconnected;
- required the consumer to pay all legal costs on a solicitor/client basis in the event of any breach of the contract . . .
- excluded all liability for loss or damage caused by Telecom or its employees or agents, with certain limited exceptions . . .
- imposed a duty on the consumer to indemnify Telecom from all loss damage liability or expense arising from anyone's use or attempted use of the consumer's network service . . .
- provided that any notice was effective against a consumer three days after its posting, whether or not it was delivered by them; there was no corresponding provision in respect of notices to Telecom.

Many of these examples expressly refer to “consumers,” who are protected under the British Columbia *Business Practices and Consumer Protection Act*.³⁸ However, variations on these examples—along with the automatic renewals, acceleration clauses, and exclusions or limitations of liability—could be in use in commercial contracts in this province, and would face only limited regulation under the existing judicial doctrines and legislation.

III. TOOLS CURRENTLY AVAILABLE IN BRITISH COLUMBIA TO DEAL WITH UNFAIR CONTRACT TERMS

A. Introduction

The British Columbia courts are not currently without tools to use in the face of unfair contract terms. Many of the cases referred to in the previous section resulted in a court refusing to enforce a contract or a contract term. These cases illustrate how the courts are currently dealing with unfair contract terms outside the ambit of consumer protection law. The question posed in this section is whether those tools are adequate to deal with unfair contract terms in a way that best serves the needs of British Columbians and best advances the goals of fairness and certainty.

37. The Law Commission of New Zealand's examples were drawn from an ombudsman's report on the standard-form contract used by New Zealand's telephone utility: *see ibid.* at para. 75.

38. *Supra* note 6.

B. Unconscionability

Unconscionability is the judicial doctrine that is probably most closely associated with the review of contracts on the basis of their fairness. Unconscionability arose in equity. It is by no means a novel doctrine.³⁹

There are two leading British Columbia cases on the unconscionability doctrine: *Morrison v. Coast Finance Ltd.*⁴⁰ and *Harry v. Kreutziger*.⁴¹

Morrison is a classic example of when the courts will intervene and rescind a contract under the unconscionability doctrine. The plaintiff in *Morrison* was “. . . an old woman 79 years of age, and a widow of meagre means. . . .”⁴² Although she had extremely limited sources of income, she was convinced by Kitley and Lowe (a boarder in her house and his friend) to borrow money from a finance company.⁴³ The plaintiff immediately handed over the proceeds of this loan to Kitley and Lowe. The plaintiff received no independent advice on this transaction, or on the mortgage that she granted to the finance company to secure the loan.⁴⁴

It was common ground that Kitley and Lowe would repay the loan to the finance company, even though the documents underlying the transaction made no mention of that arrangement.⁴⁵ Kitley and Lowe failed to make any payments. The finance company began to pressure the plaintiff for repayment. She commenced an action to set aside the mortgage.

39. The roots of the doctrine can be traced back to the seventeenth century: *Berney v. Pitt*, (1686) 2 Vern. 14 at 15–16, 23 E.R. 620 (Ch.) (“ . . . and though there was not in this case any proof of any practice used by the defendant, or anyone on his behalf, to draw the plaintiff into this security; yet in respect merely of the unconscionableness of the bargain, the Lord Chancellor discharged the Lord Nottingham’s decree . . .”). An important English case applying the doctrine dates from the eighteenth century: *Evans v. Llewellyn*, (1787) 1 Cox 333 at 340, 29 E.R. 1191 (Ch.), Sir Lloyd Kenyon M.R. (“ . . . if the party is in a situation, in which he is not a *free agent*, and is not *equal to protecting himself*, this Court will protect him” [emphasis in original]); a leading Ontario judgment was decided in the nineteenth century: *Waters v. Donnelly*, (1884) 9 O.R. 391 (Ch.).

40. (1965) 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.) [*Morrison* cited to D.L.R.].

41. (1978) 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.) [*Harry* cited to B.C.L.R.].

42. *Morrison*, *supra* note 40 at 712.

43. *Ibid.* Kitley and Lowe were apparently not joined as defendants in the action for practical reasons: when the plaintiff commenced the action Lowe was imprisoned and Kitley’s whereabouts were unknown: *ibid.* at 720.

44. *Ibid.* at 717–718.

45. *Ibid.* at 712.

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Her action was dismissed at trial. The Court of Appeal allowed her appeal. Davey J.A. (for himself and Bull J.A.) concluded that:⁴⁶

. . . a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable . . . or perhaps by showing that no advantage was taken. . . .

The other leading British Columbia decision, *Harry*, did not present such a clear-cut case for relief.⁴⁷ Unlike *Morrison*, *Harry* involved the application of the unconscionability doctrine in a commercial setting. Nevertheless, like the plaintiff in *Morrison*, the plaintiff in *Harry* presented a very sympathetic figure to the court. The trial judge described him as “. . . a mild, inarticulate, retiring person . . .”; the Court of Appeal added that he was “. . . not widely experienced in business matters.”⁴⁸

The plaintiff wished to sell his commercial fishing boat. This boat was old and of little value. However, it had a commercial fishing license attributable to it. This license had gained considerable value in the years preceding the sale. The plaintiff apparently failed to appreciate this fact. The defendant, though, was fully aware of it.⁴⁹ He drove a bargain for the purchase of the boat and the license at a substantial discount.⁵⁰

The plaintiff commenced an action to rescind the contract of purchase and sale. He was unsuccessful at trial, but he succeeded on appeal. Two judges in the Court of Appeal provided written reasons for judgment. McIntyre J.A. reviewed the leading authorities and described the law as follows:⁵¹

46. *Ibid.* at 713. The other judge on the panel, Sheppard J.A., also allowed the appeal, but he arrived at this result by finding constructive fraud and applying fiduciary principles.

47. *Harry*, *supra* note 41 at 173.

48. *Ibid.* at 167.

49. *Ibid.* at 169–170.

50. *Ibid.* at 169–171. The purchase price was \$4500, which the defendant unilaterally reduced by \$570 after the contract was signed. The court estimated the actual value of the boat and the license to be \$16 000, of which at least \$15 000 was attributable to the license.

51. *Ibid.* at 173.

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Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

McIntyre J.A.'s formulation of unconscionability is closely related to Davey J.A.'s articulation of the doctrine in *Morrison*. Lambert J.A. conceived of the doctrine in somewhat different terms:⁵²

In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired . . . are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.

Lambert J.A. saw his formulation of the test as a supplement to, rather than a replacement of, the formulation of it by Davey J.A. and McIntyre J.A.⁵³ Later decisions show that the courts apply both versions of the test, without a note of disharmony.

Both *Morrison* and *Harry* show that review of contract terms for substantive fairness is an important part of the unconscionability doctrine. *Harry* shows that the doctrine applies outside the traditional consumer protection context. Nevertheless, unconscionability appears to have had little impact on the two areas that are the focus of this Report. The cases discussed in the previous section, for example, do not cite *Morrison* or *Harry*. They were decided with reference to different principles.

Unconscionability is a notably vague doctrine. Since it may apply to any contract term, it is not always clear that it should apply when a specific contract term is at issue. Further, the test set out in *Morrison* and *Harry* focusses largely on the bargaining (or lack of it) that led up to the formation of the contract and on the character of the parties. This reasoning leaves the impression that the doctrine is best applied to contracts involving particularly vulnerable consumers (such as elderly widows and poorly-educated workers) and that it

52. *Ibid.* at 176. The third judge on the panel, Craig J.A., concurred in both judgments: *ibid.* at 175.

53. *Ibid.* at 178 (“I do not believe that the process of reasoning that I have adopted is in any way different from the process of reasoning adopted by McIntyre J.A. in this case or by Davey J.A. in the *Morrison* case . . .”).

cannot be usefully applied outside that setting. This impression is somewhat inaccurate,⁵⁴ but it may nevertheless have hampered development of the doctrine outside the consumer protection area.

C. Inequality of Bargaining Power

Inequality of bargaining power is not a defense or ground for relief. Rather, it is a concept that is said to unite a number of defenses and grounds for relief that have been historically kept apart. This understanding of inequality of bargaining power finds its origin in the judgment of Lord Denning in the English Court of Appeal decision in *Lloyds Bank Ltd. v. Bundy*.⁵⁵ In *Bundy* an elderly farmer agreed to guarantee the debts of his son's business. He granted a mortgage to the lender of the business.⁵⁶ The business defaulted on the loan. The bank sought to enforce its security by foreclosing on Mr. Bundy's only asset, his farm. Mr. Bundy raised a number of defences. He succeeded in the Court of Appeal, which set aside the mortgage.

Although all three judges on the panel reached the same result, only Lord Denning addressed the idea of inequality of bargaining power as the rationale for this decision.⁵⁷ Lord Denning described this concept as being an organizing principle that unites several recognized exceptions to the general rule that valid contracts are enforceable. He set out the general principle that unites these cases as follows:⁵⁸

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54. One of the leading cases, *Harry, ibid.*, involved what may broadly be called a commercial contract. See also *Graham v. Voth Brothers Construction (1974) Ltd.*, (1982) 39 B.C.L.R. 305, [1982] 6 W.W.R. 365 (Co. Ct.), *Wetmore Co. Ct. J.* (plaintiff entered into trucking contract with defendant—on completion, defendant, knowing that plaintiff was in financial difficulty, refused to pay unless plaintiff reduced the amount of its invoices—court held that plaintiff entitled to balance due, as the new bargain was reached by undue influence or unconscionable conduct); *Dusik v. Newton*, (1985) 62 B.C.L.R. 1 (C.A.), *per curiam* (plaintiff owned 10% of the issued shares of a company—individual defendant owned remaining shares through a holding company—individual defendant agreed to sell his shares to defendant purchaser—the two agree on a plan involving the defendant purchaser offering plaintiff an amount for his shares that was dramatically below market value—court finds that defendant purchaser took advantage of plaintiff's weak financial position and lack of knowledge of the whole scope of defendant purchaser's dealings—court awards plaintiff damages for “unconscionable bargain”).
55. [1975] 1 Q.B. 326, [1974] 3 W.L.R. 501, [1974] 3 All E.R. 757 (C.A.) [*Bundy* cited to Q.B.].
56. The lender was a bank at which Mr. Bundy and his son had been customers for many years.
57. The other two judges—Cairns L.J. and Sir Eric Sachs—set aside the mortgage solely on the basis of undue influence.
58. *Bundy, supra* note 55 at 339. The categories discussed in Lord Denning's judgment at 337–339 are: (1) duress of goods; (2) unconscionable transactions; (3) undue influence; (4) “undue pressure”; and (5) salvage agreements.
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Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on “inequality of bargaining power.” By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

This idea is related to the unconscionability doctrine. However, inequality of bargaining power is broader in scope than unconscionability. Lord Denning expressly said that the concept covers a larger variety of cases than unconscionability.

The concept of inequality of bargaining power appears to be part of the law of British Columbia.⁵⁹ However, like the unconscionability doctrine, inequality of bargaining power does not squarely address the issues that are the focus of this Report. The concept emphasizes problems that arise during the bargaining process that leads up to the formation of the contract. Like unconscionability, inequality of bargaining power is couched in terms of personal characteristics (“ignorance or infirmity”) and circumstances (“needs or desires”) that do not transfer well to situations beyond those encountered by an individual consumer.

D. Adverse Construction

1. INTRODUCTION

Adverse construction refers to a number of judicial doctrines of contractual interpretation. Although none of these doctrines explicitly concerns itself with the fairness of a particular

59. There is some uncertainty on this point. The United Kingdom House of Lords has stated its disapproval of the concept of inequality of bargaining power: *see National Westminster Bank Plc. v. Morgan*, [1985] A.C. 686 at 708 (U.K.H.L.), Lord Scarman. The concept, therefore, appears to form no part of the law of the United Kingdom. However, Lord Denning’s judgment was taken up more enthusiastically in Canada: *see* Fridman, *supra* note 2 at 347 (“It is in Canada, however, where the principle enunciated by Lord Denning has enjoyed greater esteem and enjoyment. . . . However, it should be noted that subsequent Canadian decisions have not always applied the principle of ‘inequality of bargaining power’, even though some have adopted and utilized it in place of older ideas of what is and what is not unconscionable.”) For an example of a recent case that refers to Lord Denning’s judgment in *Bundy* and implies that inequality of bargaining power continues to be part of the law in this province *see* *Royal Bank v. Ironmonger*, (1999) 28 R.P.R. (3d) 311 at para. 33, para. 37 (S.C.), Melnick J. (application by bank to set aside discharge of mortgage—mortgagors arguing that mortgage was unconscionable because they never obtained independent legal advice—court refers to *Bundy* and distinguishes this case). For an example of a recent case that applies the concept of inequality of bargaining power without citing the *Bundy* case *see* *Braut v. Stec*, 2002 BCSC 1554, Kirkpatrick J. (application to set aside equity sharing agreement for unconscionability—proof of inequality of bargaining power part of the test of unconscionability). For an extension of the concept into an area not contemplated by Lord Denning in *Bundy* *see* *Carrier Lumber Ltd. v. British Columbia*, (1999) 47 B.L.R. (2d) 50 at paras. 176–178, para. 426, (1999) 30 C.E.L.R. (N.S.) 219 (B.C.S.C.), Parrett J. (cancellation of forest license—described as a “textbook example” of inequality of bargaining power).

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contract term, the courts often employ adverse construction in cases where the fairness of a contract term appears to be the underlying issue.⁶⁰ Some examples of adverse construction doctrines, together with references to the parts of the cases discussed in the previous section that touch on them, follow.

2. *CONTRA PROFERENTEM*

Contra proferentem is the name of doctrine that operates when one party to a contract has controlled the process of drafting the contract. This situation most often occurs when the contract is one party's standard form. The doctrine allows a court to resolve any ambiguities in the language of the contract in favour of the other party.

The court in *Balmoral Investments*, for example, relied on *contra proferentem* in interpreting the words "faithful performance."⁶¹ The parties entered into an agreement that had been prepared by the plaintiff. It provided that the agreement renewed automatically if there was "faithful performance" by the defendant. The defendant, who had assigned the agreement without observing the requirements of the agreement, argued that there had not, therefore, been faithful performance. The plaintiff argued that there had still been "faithful performance," notwithstanding the assignment. The court decided that there had not been faithful performance on several grounds, one of which was the doctrine of *contra proferentem*, strictly construing the words in favour of the party who had not drafted the contract.

3. NOTICE REQUIREMENTS

The courts have held that onerous contract terms in a standard-form contract must be specifically drawn to the attention of a contracting party. The party who has prepared and presented the standard-form contract cannot merely rely on the other party's signature as a sign of assent to such contract terms. Placing such contract terms in a bold typeface, in capital letters, in a larger font, or in a different colour would, in most cases, meet the notice requirement.

The leading case on notice requirements in Canada is the judgment of the Ontario Court of Appeal in *Tilden Rent-A-Car Co. v. Clendenning*.⁶² *Clendenning* involved a contract for

60. See Waddams, *supra* note 28, who takes a negative view of this approach at 379: "It is tempting for courts wishing to grant relief, but unwilling to state the reason, to 'construe' the contract in such a way as to reach the result desired."

61. *Supra* note 12 at para. 14.

62. (1978) 18 O.R. (2d) 601 at 609, 83 D.L.R. (3d) 400 at 408–409 (C.A.), Dubin J.A. (Zuber J.A. concurring) [*Clendenning* cited to D.L.R.] ("In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous

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the rental of a car. The defendant elected to purchase collision insurance for the rental period. The lengthy standard-form insurance contract contained a contract term that denied insurance coverage to any driver “. . . who has drunk or consumed any intoxicating liquor, whatever be the quantity. . . .”⁶³ The defendant was involved in an accident in the car. Before the accident he had consumed alcohol, though apparently not to the point of legal intoxication. The plaintiff denied the defendant insurance coverage. It sought to hold him personally liable for the damage to the car. The court refused to allow the plaintiff to enforce the contract term in its standard-form contract because it had not been specifically drawn to the plaintiff’s attention before he signed the contract.

Globe Printers provides a British Columbia example of the application of this rule.⁶⁴ The defendant did not have sufficient notice because the defendant did not have a copy of the entire contract when it was signed. The court also observed that the rule applies when a party attempts to rely on “unusual or onerous provisions.”⁶⁵

4. *CONSENSUS AD IDEM*

Consensus ad idem refers to one of the fundamental principles of the law of contracts. It translates into English as “a meeting of the minds.” *Consensus ad idem* designates the idea that there must be an agreement between contracting parties to the same thing in order for a contract to be formed.

Ordinarily, it would not be difficult to find such a meeting of the minds if the parties have prepared a written agreement. The courts look at the document from the standpoint of an objective reasonable bystander. If it is clear from that standpoint that the parties have recorded their intention to enter into a contract, then they have entered into a contract despite what a party may subjectively believe.⁶⁶

However, the courts have occasionally said that a meeting of the minds may not have occurred, even in the face of a written agreement, if it contains particularly onerous terms.

provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.”).

63. *Clendinning, ibid.* at 402.

64. *Supra* note 14 at paras. 13–15.

65. *Ibid.* at para. 15.

66. *See* Fridman, *supra* note 2 at 16–17.

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Zhu provides an example of this approach.⁶⁷ In *Zhu* the court found that the defendant's online trading facility operated in a manner that was confusing. The online trading facility did not meet the reasonable expectations of the user. The court relied on this failure to determine that the claimant and the defendant could not have had a "meeting of the minds."

5. SUMMARY

Some commentators have argued that adverse construction is an effective, though limited, way to manage unfair contract terms and maintain the value of contractual certainty.⁶⁸ But, there are costs to dealing with unfair contract terms in this limited manner. The deterrent effect of judgments based on adverse construction is low. Parties will often slightly redraft the contract terms in issue and put them back into circulation.⁶⁹ As a result, litigation is encouraged, since the scope of the original ruling is unclear. This cycle has occurred in British Columbia in relation to the contract that was at issue in *Balmoral Investments*. It was the subject of 150 actions in the Supreme Court between 1990 and 1996.⁷⁰ Such a result serves neither the goal of contractual fairness nor the goal of contractual certainty particularly well.

E. Fundamental Breach

Fundamental breach is a judicial doctrine that regulates the enforcement of contract terms that limit or exclude liability by preventing a party who breaches a contract from relying on those contract terms.⁷¹ It properly belongs in the preceding section, as one of the doctrines

67. *Supra* note 29 at paras. 26–28.

68. *See* Robert Flannigan, "Hunter Engineering: The Judicial Regulation of Exculpatory Clauses" (1990) 69 Can. Bar Rev. 514 at 529–536; Vern W. DaRe, "Atlas Unchartered: When Unconscionability 'Says it All' " (1996) 27 Can. Bus. L.J. 426 at 444–445.

69. *See* Waddams, *supra* note 28 at 390–391.

70. *See Balmoral Investments, supra* note 12 at para. 8.

71. *See* Flannigan, *supra* note 68 at 514:

A contract may be breached in different ways. The breach may be ordinary or it may be fundamental. The distinction between these types of breach is important. Judges have attached special consequences to a breach that is fundamental. One consequence is uncontroversial. Where a breach is fundamental, the innocent party becomes entitled to elect to terminate his or her further obligations under the contract. The second special consequence is, or was, highly controversial. The supposed consequence was that a party who committed a "fundamental" breach could not rely on an exculpatory clause in the contract to reduce or eliminate liability. The controversy has now been resolved, in both Britain and Canada, in favour of the party protected by the clause..

The distinction between an ordinary and a fundamental breach can be a difficult one to draw. Fridman,

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grouped together under adverse construction. Fundamental breach has been singled out for a more extended discussion here because its precise nature is complex. It has also turned up repeatedly in the cases discussed in the previous section, which indicates that fundamental breach has an important place in the judicial regulation of unfair contract terms.

The leading Canadian case on fundamental breach is the Supreme Court of Canada decision in *Hunter Engineering Co. v. Syncrude Canada Inc.*⁷² *Hunter Engineering* involved, in part, a contract for the supply of a gearbox to an industrial project. The contract contained contract terms that excluded the effect of certain implied warranties under the Ontario *Sale of Goods Act*.⁷³ The gearbox proved to be defective. The buyer commenced an action against the seller. It argued that the seller could not rely on the exclusion clause in the contract because the supply of a defective gearbox was a fundamental breach of the contract.

The Supreme Court of Canada unanimously rejected the buyer's argument. However, two judges delivered two judgments that set out two different formulations of the doctrine of fundamental breach. Dickson C.J. (La Forest J. concurring) concluded that the doctrine of fundamental breach should be replaced with a rule that holds parties to the terms of their contracts, provided that the contract is not unconscionable.⁷⁴ This position effectively assimilates fundamental breach to the unconscionability doctrine. Wilson J. (L'Heureux-Dubé J. concurring) preferred retaining the doctrine as a rule of contractual interpretation, so long as the doctrine is modified to include a requirement that the reviewing court is to

supra note 2 at 599 says that “[a] fundamental breach occurs ‘where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract.’” The phrase that Prof. Fridman quotes is taken from Lord Diplock's judgment in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 at 849, [1980] 1 All E.R. 556 (U.K.H.L.) [*Photo Production* cited to A.C.], which is the leading English case.

72. [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321, 35 B.C.L.R. (2d) 145 [*Hunter Engineering* cited to S.C.R.].

73. R.S.O 1970, c. 421, section 15 (1) (now R.S.O. 1990, c. S.1, section 15 (1)). Section 18 (a) of the British Columbia *Sale of Goods Act*, R.S.B.C. 1996, c. 410 is similar to the Ontario provision.

74. *Hunter Engineering*, *supra* note 72 at 450–464; *see especially* at 455–456 and 460–462.

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assess the reasonableness of any contract term at issue after a breach has occurred.⁷⁵ The fifth judge on the panel expressly refused to address this issue.⁷⁶

There is a considerable difference between these two conceptions of fundamental breach. Subsequent judgments have not resolved this difference.⁷⁷ Unfortunately, a third option also has to be considered here. An older conception of fundamental breach described it as a rule of law.⁷⁸ Whenever a court determined that a fundamental breach had occurred, the contract would be “brought to an end” and the rule of law would operate. As a result, the party in breach would be unable to rely on any clauses excluding or limiting liability, no matter how clearly the contract terms are drafted. Under the rule of law approach, the court would not even attempt to construe the contract term to see whether it would apply in the circumstances of the breach.

75. *Ibid.* at 499–518; *see especially* at 508–510. Wilson J. correctly observes that assessing the reasonableness of the exclusion clause at issue after the breach has occurred is a simpler task for the courts than making that assessment as of the time when the contract is negotiated. But, this approach to the relevant time for the determination of the reasonableness of the contract term creates considerable uncertainties and difficulties for the parties to the contract, who do not have the benefit of knowing how events will play out. For this reason, other decisions that discuss the timing element tend strongly to favour making such assessments as of the time that the parties entered into the contract: *see e.g. Cogle v. Maricevic*, (1983) 64 B.C.L.R. (2d) 105 at para. 18, [1992] 3 W.W.R. 475 (C.A.), Hinkson J.A. In addition, statutory provisions that give the courts the discretion to review the fairness of a contract or a contract term also tend to make it applicable as of the time the contract is negotiated: *see e.g. the American Uniform Commercial Code, infra* note 113, § 2–302.

76. *Hunter Engineering, ibid.* at 481, McIntyre J.

77. *See DaRe, supra* note 68 at 430–437, commenting on *Atlas Supply Co. of Canada v. Yarmouth Equipment Ltd.*, (1991) 103 N.S.R. (2d) 1, 37 C.P.R. (3d) 38 (C.A.), *leave to appeal to S.C.C. granted*, (*sub nom. Murphy v. Atlas Supply Co. of Canada*), [1991] 3 S.C.R. ix (a notice of discontinuance of the appeal to the Supreme Court of Canada was filed on 1 April 1992). The British Columbia Court of Appeal, however, seems to have clearly endorsed the unconscionability analysis in *Waldron, infra* note 82.

78. *See* the judgments of Lord Denning in *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 at 940–941, [1956] 2 All E.R. 866 (C.A.) and *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*, [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.). In the latter decision Lord Denning described the theoretical basis for this rule of law at 466 (Q.B.):

Such, then, is established as law when there is a “fundamental breach accepted by the innocent party” that is, when the innocent party has an *election* to treat the contract as at an end and does so. The position must, I think, be the same when the defendant has been guilty of such a fundamental breach that the contract is *automatically* at an end without the innocent party having an election. The innocent party is entitled to sue for damages for the breach, and the guilty party cannot rely on the exclusion or limitation clause: for the simple reason that he, by his own breach, has brought the contract to an end; with the result that he cannot rely on the clause to exempt or limit his liability for that breach. [Emphasis in original.]

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The rule of law approach has been criticized as being extremely vague.⁷⁹ It was firmly rejected by the Supreme Court of Canada in *Hunter Engineering*.⁸⁰ Nevertheless, this approach continues to appear in lower court judgments. An example of it may be seen in *Globe Printers*, where the court concluded simply that the plaintiff could not rely on the exclusion clause in its lease because there had been a fundamental breach of its terms. The court came to this conclusion despite the fact that the contract term clearly excluded liability even “in the event of fundamental breach.”⁸¹ This conclusion was not supported by a discussion of unconscionability or of the reasonableness of the contract term at issue. It is in accord with the rule of law approach, though. In light of the *Hunter Engineering* decision, on this issue *Globe Printers* must be regarded as wrongly decided.

None of the formulations of fundamental breach directly addresses the question of the inherent fairness of a particular contract term. Instead, the conduct of the parties to the contract—after the contract has been signed, in this case—remains the focus. In addition, the multiple formulations of the doctrine do not advance the goal of certainty.⁸²

F. Legislation

In addition to these judicial doctrines, the British Columbia legislature has been active in this area. The statutes enacted fall into two broad categories. These categories are legislation designed to protect consumers and statutory provisions of general application designed to address specific issues.

79. See *Photo Production*, *supra* note 71 at 847 where Lord Diplock criticized this “rule of law” and rejected its further application under English law:

The “rule of law” theory which the Court of Appeal has adopted in the last decade to defeat exclusion clauses is at first sight attractive in the simplicity of its logic. A fundamental breach is one which entitles the party not in default to elect to terminate the contract. Upon his doing so the contract comes to an end. The exclusion clause is part of the contract, so it comes to an end too; the party in default can no longer rely on it. . . .

The fallacy in the reasoning and what I venture to think is the disarray into which the common law about breaches of contract has fallen, is due to the use in many of the leading judgments on this subject of ambiguous or imprecise expressions without defining the sense in which they are used.

80. *Hunter Engineering*, *supra* note 72 at 455 (Dickson C.J.) and 503–508 (Wilson J.).

81. *Supra* note 14 at para. 12.

82. See also *Waldron v. Royal Bank*, (1991) 53 B.C.L.R. (2d) 294 at 302, (*sub nom. Waldron v. Royal Bank of Canada*), 78 D.L.R. (4th) 1 (C.A.), Lambert J.A. (“ . . . the rules about ‘fundamental breach’ are a poor foundation for a principle about not enforcing exclusion clauses, and . . . it is preferable to apply the direct legal principle of unconscionability to avoid the application of exclusion clauses rather than going through the roundabout route of ‘fundamental breach’ ”).

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1. CONSUMER PROTECTION LEGISLATION

The major British Columbia consumer protection statute is the *Business Practices and Consumer Protection Act*.⁸³ The statute only applies to consumers, who are defined as individuals who participate in a consumer transaction.⁸⁴ Consumer transaction is also a defined term under the legislation; it means:⁸⁵

- (a) a supply of goods or services or real property by a supplier to a consumer for purpose that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a). . . .

The substantive provisions of the *Business Practices and Consumer Protection Act* that address unfair contract terms are, in large part, a restatement of the law as it was set out in the province's two former consumer protection statutes, the *Trade Practice Act*⁸⁶ and the *Consumer Protection Act*.⁸⁷ The innovations found in the *Business Practices and Consumer Protection Act* relate to consolidation and regulatory structure, rather than the substantive law.

The *Business Practices and Consumer Protection Act* adopts the approach of the *Trade Practice Act*, which contained a provision that was intended to be a statutory embodiment of the judicial doctrine of unconscionability.⁸⁸ Since it relies on the common law, section 8 has the weaknesses of the common law.⁸⁹ Nevertheless, the section does expressly direct a

83. *Supra* note 6.

84. *Ibid.*, section 1 (1) "consumer."

85. *Ibid.*, section (1) "consumer transaction." The *Trade Practice Act*, *supra* note 6, which was formerly the leading consumer protection statute in British Columbia, incorporated "first time business opportunity schemes" within its definition of "consumer transaction." This limited approach to including business activity within the scope of consumer protection law has not been continued under the *Business Practices and Consumer Protection Act*.

86. *Ibid.*

87. *Supra* note 6.

88. *See Business Practices and Consumer Protection Act*, *supra* note 6, section 8. Section 8 is almost an exact reproduction of *Trade Practice Act*, *supra* note 6, section 4 (1)–(3) and (5). The only differences appear to be stylistic ones. *Business Practices and Consumer Protection Act*, section 10 (1), which provides remedies for unconscionable acts or practices does expand the number of remedies available in cases of unconscionability from the one set out in *Trade Practice Act*, section 4 (4) by incorporating provisions similar to those currently located in *Consumer Protection Act*, *ibid.*, section 61.

89. *See e.g. British Columbia (Director of Trade Practices) v. Van City Construction Ltd.*, [1999] B.C.J. No.

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reviewing court's attention to the substance of a contract term that is at issue.⁹⁰ Elsewhere, the *Business Practices and Consumer Protection Act* addresses evidentiary issues that may arise during a review of an unfair contract term⁹¹ and provides for a wider range of remedies than may be available in the absence of such statutory language.⁹²

The *Business Practices and Consumer Protection Act* also carries forward a device used in the *Consumer Protection Act*—identifying specific contracts that have caused concerns for consumers.⁹³ The statute provides rights and remedies for consumers that may not be spelled out in these contracts. This approach comes close to the regulation of specific contract terms on the basis of their fairness. It suggests that new provisions dealing with unfair contract terms could be located in the *Business Practices and Consumer Protection Act*; but, the statute's strict focus on individual consumers could limit its utility as a vehicle for reform.

2. OTHER STATUTORY PROVISIONS

British Columbia has a number of legislative provisions of general application that target specific contract terms or transactions. The most familiar examples of this type of legisla-

2033 at paras. 103–108 (S.C.), online: QL (BCJ), Ralph J. for an example of a decision that relied on the judicial unconscionability doctrine in applying section 4 of the *Trade Practice Act*, *ibid.*

90. See *Business Practices and Consumer Act*, *supra* note 6, section 8 (3) (e). The provision reads as follows:

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

...

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable. . . .

91. See *e.g.* *Business Practices and Consumer Protection Act*, *ibid.*, section 187, which permits the use of parol evidence in proceedings under the statute, despite any agreement or rule of law to the contrary.

92. See *e.g.* *Business Practices and Consumer Protection Act*, *ibid.*, section 10 (1), which provides that a consumer transaction is not binding on a consumer or a guarantor if an unconscionable act or practice occurred in respect of that consumer transaction.

93. See *Business Practices and Consumer Protection Act*, *ibid.*, part 4 (consumer contracts), which regulates direct sales contracts, future performance contracts, time share contracts, funeral and interment right contracts, and distance sales contracts. Part 4 of the *Business Practices and Consumer Protection Act* takes a more general approach and provides more expanded coverage than was previously employed in the *Consumer Protection Act*, *supra* note 6.

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tion are the implied warranties found in the *Sale of Goods Act*.⁹⁴ Sections 16–19 of that statute set out a number of implied warranties and conditions, which apply in specified situations encountered in sale contracts. Section 20 limits the use of exemption clauses that “negative or diminish” any of the implied warranties or conditions.

The *Law and Equity Act*⁹⁵ contains a number of provisions that attempt to regulate specific contract terms. Section 24 provides for relief from penalties and forfeitures. This section addresses one of the contract terms discussed in the previous section of this Interim Report. However, it does not appear to be anything more than a restatement of the common law. The cases discussed in the previous section do not deal with this provision;⁹⁶ instead, they directly engage the common law precedents. Other sections of the *Law and Equity Act* similarly attempt to regulate specific contract terms in mortgages.⁹⁷

Finally, there is one statute that adopts a different approach. Section 65 of the *Family Relations Act*⁹⁸ gives the courts broad jurisdiction to review marriage agreements and separation agreements for their fairness. Opinions differ concerning the extent to which

94. *Supra* note 73, sections 16–19 (implied warranties and conditions) and section 20.

95. R.S.B.C. 1996, c. 253.

96. The Alberta equivalent of section 24, which would have been relevant in *See-Rite Optical*, *supra* note 20, is section 10 of the *Judicature Act*, R.S.A. 2000, c. J-2.

97. *See Law and Equity Act*, *supra* note 95, section 25 (relief against acceleration provisions in mortgages of land and agreements for the sale of land), and section 26 (relief against forfeiture for breach of covenant to insure).

It is also worthwhile to notice that federal legislation tends to resemble the *Law and Equity Act*, *ibid.* approach rather than the more comprehensive approach of the *Business Practices and Consumer Protection Act*, *supra* note 6: *see e.g.* the *Interest Act*, R.S.C. 1985, c. I-15, section 4 (annual rate of interest must be stipulated in an agreement, other than a mortgage of land), section 6 (rate of interest calculated yearly or half yearly must be stated in mortgage of land requiring blended repayments of principal and interest, payments under a sinking fund plan, or any plan that involves an allowance of interest on stipulated payments), and section 8 (no fine, penalty, or higher rate of interest permitted when payments on account of mortgage of land fall into arrears); the *Competition Act*, R.S.C. 1985, c. 34, part 7.1 (regulates a broad variety of deceptive marketing practices, and provides for administrative penalties); the *Bank Act*, S.C. 1991, c. 46, Part XIV (provides for the regulation of banks by the Commissioner of the Financial Consumer Agency of Canada); and the *Canada Transportation Act*, S.C. 1996, c. 10, in connection with air transportation, section 66 (unreasonable fares and rates) and section 67.2 (unreasonable or unduly discriminatory terms and conditions).

98. R.S.B.C. 1996, c. 128.

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this approach has been successful in ensuring both fairness and certainty in that area of the law.⁹⁹

G. Summary

There are a variety of tools available to the courts in reviewing unfair contract terms. However, many of them are concentrated on protecting particularly vulnerable individuals from harsh bargaining practices. Judicial doctrines such as unconscionability and inequality of bargaining power and statutes such as the *Business Practices and Consumer Protection Act* fall into this category.

When it comes to reviewing a specific contract term for its fairness, particularly in a contract involving parties who are not individual consumers, the courts largely rely on applying a number of interpretive rules. These rules may be applied in creative ways to relieve against the harshness of certain unfair contract terms. The cases reviewed in the previous section provide some examples of this process. However, there are limits to this type of development of the law. Fundamental breach and the manipulation of contract formation by focussing on *consensus ad idem*, in particular, are showing some strain. Leaving development of the law on unfair contract terms solely to the courts is likely not the best way to advance the goals of fairness and certainty.

IV. OPTIONS FOR REFORM

A. Introduction

Reform of the law through the enactment of legislation could adopt a variety of approaches. Legislation could restrict the use of specific unfair contract terms, provide the courts with a general discretion to strike down unfair contract terms, or institute a broadly-based standard of conduct in contracts. Each of these approaches has strengths and weaknesses.

Several of these approaches have been implemented in jurisdictions outside British Columbia. Legislation in these jurisdictions should not be adopted wholesale in British Columbia. The classification of a particular contract term as unfair depends, in part, on local commercial norms. However, legislation in force outside British Columbia can provide ideas that could be adapted for use in British Columbia.¹⁰⁰

99. See *Report on Spousal Agreements*, *supra* note 3, which examines and criticizes both section 65 and the way in which the courts have exercised their jurisdiction under that provision. However the Report was issued in 1986 and analyzed cases decided in the first six years of the operation of the *Family Relations Act*. In the ensuing years, the courts developed principles that significantly helped in the exercise of the general discretion.

100. For selected passages taken from legislation in force outside British Columbia and referred to in this Report, see the Appendix to this Report, below at 39*ff*. It is worthwhile to notice that the United States, the United Kingdom, Australia, and the European Union have all attempted to deal with at least some of

B. Enacting Legislation to Restrict the Use of Unfair Contract Terms

1. CONTRACT TERMS

The major challenge in crafting new legislation to deal with specific unfair contract terms is identifying the contract terms to be covered by it. In order to be effective, the legislation must include contract terms that are widely perceived to be unfair. Legislation that is too narrow or too broad will fail to be effective.

The simplest and most direct way to craft this type of legislation would be to spell out, in as much detail as possible, the types of contract terms that deserve the label unfair. This approach animates the United Kingdom *Unfair Contract Terms Act 1977*.¹⁰¹ Section 2 of that statute identifies a specific type of contract term—one that “excludes or restricts liability” for death, bodily harm, or negligence—and restricts it from use.

This type of legislation provides for a high level of certainty. The type or types of contract terms covered need not be the same as in the *Unfair Contract Terms Act*. Examples could be drawn from the other contract terms discussed in this Report, or from other sources. Defining unfair contract terms with a high level of specificity brings to light the fact that a determination of what is a fair or an unfair contract term is ultimately a social policy decision. It is a decision that can only be usefully taken after a great deal of consultation and discussion, and finally in the presence of wide agreement.¹⁰²

The disadvantage of defining unfair contract terms with a high degree of specificity appears when the legislation is to be enforced. In a dispute, a court would have to determine whether a specific contract term is an unfair contract term within the scope of the legislation. There is a tendency to interpret highly-specific legislation strictly. Narrow interpretation of the governing legislation leaves open the possibility that contract terms may be drafted in a way that puts them outside the scope of the enactment, yet would still be considered unfair. This problem already occurs in British Columbia under the judicial doctrines discussed above under the heading “adverse construction.”¹⁰³

This disadvantage could be overcome by adopting a different way of identifying the unfair contract terms to be regulated under the legislation. Courts and academic commentators

the issues arising from unfair contract terms by enacting (or, in the case of the European Union, recommending its member states enact) legislation of general application.

101. (U.K.), 1977, c. 50.

102. Another advantage here is that this approach already exists, in a limited way, in British Columbia legislation. See e.g. *Law and Equity Act*, *supra* note 95, sections 24–26.

103. See part III.D. of this Report, above, at 18ff.

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have on occasion observed that unfair contract terms are not usually subtle or intricate; instead, they tend to be blatant examples of overreaching by one party. An approach to dealing with unfair contract terms could be designed around using such adjectives of moral disapproval as a means to identifying the contract terms to be caught by the legislation.

One existing British Columbia statute—the *Business Practices and Consumer Protection Act*—contains a limited example of this approach to identifying the nature of the contract terms to be restrained.¹⁰⁴ Another legislative example of it appears in section 15 of Ontario’s new *Consumer Protection Act, 2002*,¹⁰⁵ which is not yet in force. Section 15 deals with unconscionable representations in consumer transactions. Among the factors that a reviewing court may take into account in determining whether or not a representation is unconscionable are the following:¹⁰⁶

- (e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;
- (f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable. . . .

A further example may be found in a proposal for discussion purposes made by the Law Commission of New Zealand. Unlike the provisions taken from the British Columbia and Ontario legislation, this provision does not treat unfair contract terms as one item in a general list of factors for the court to consider; rather, it stands alone to give the court jurisdiction to review and remedy unfair contract terms. The proposed section reads as follows:¹⁰⁷

Harsh and oppressive term

- (1) A term of a contract is also unfair if, in the context of the contract as a whole, it is oppressive.
- (2) A term of a contract is oppressive if it:
 - (a) imposes a burdensome obligation or liability which is not reasonably necessary to protect the interests of the other party; and
 - (b) is contrary to commonly accepted standards of fair dealing.

104. See *Business Practices and Consumer Protection Act*, *supra* note 6, section 8 (3) (e).

105. S.O. 2002, c. 30.

106. *Consumer Protection Act, 2002*, *ibid.*, section 15 (2) (e) and (f).

107. *Supra* note 10 at 37. See also paras. 108–110 for commentary on the proposed legislative text.

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- (3) A transaction that consists of two or more contracts is to be treated as a single contract if it is in substance and effect a single transaction.

The strength of this approach is that it is flexible enough to allow courts to enforce both the letter and the spirit of the law. Its weakness, however, derives from the same source. This flexibility comes at the expense of certainty. Since this provision relies on judicial discretion, contracting parties may not be certain before a dispute whether a particular contract term would be held to be unfair.

2. WHO BENEFITS FROM THE LEGISLATION?

Another issue to consider is the scope of protection offered by any legislation. The simplest approach to take would be to follow the example of the *Unfair Contract Terms Act* and extend protection to all persons and all types of contracts. This approach is clear and would effectively remove the issue from further consideration.

British Columbia legislation in this area, though, has tended to focus on individuals as consumers. Enacting legislation of general application could be seen as being out of step with this approach. A more limited scope for the legislation could be seen to be more appropriate.

The rationale for extending protection to consumers is that they are particularly vulnerable to procedural unfairness. One way to determine the scope of the new legislation would be to identify other entities that share this vulnerability. The legal form of the entity could serve as the criterion for inclusion in this class. Strata corporations,¹⁰⁸ for example, often share many of the vulnerabilities of consumers. Nonprofit organizations, such as corporations incorporated under the *Society Act*¹⁰⁹ or under Part II of the *Canada Corporations Act*¹¹⁰ or charitable trusts, may also form part of this class. Other entities could be evaluated and added.¹¹¹

108. "Strata corporations" should be understood in this Report as including strata corporations proper (*i.e.* those incorporated under the *Strata Property Act*, S.B.C. 1998, c. 43) and what have been termed "apartment corporations." The latter are ordinary British Columbia companies that have been incorporated to perform the functions of the modern strata corporation, either for historical reasons or because the land in question is located on an Indian reserve. See Law Reform Commission of British Columbia, *Report on Apartment Corporations* (LRC 120) (Vancouver: The Commission, 1991).

109. R.S.B.C. 1996, c. 433.

110. R.S.C. 1970, c. C-32.

111. For example, co-operative associations incorporated under the *Cooperative Association Act*, S.B.C. 1999, c. 28.

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The advantage of an approach based on the legal form of an entity is that it is immediately clear who receives the benefit of the legislation. The disadvantage of this approach is that the criterion of legal form does not correspond precisely to the rationale for protection. Societies, for example, may vary widely in terms of resources and sophistication. For the same reason, it would be very difficult to deal with entities that carry on business, such as business corporations or partnerships, under this approach. A catalogue of types of legal entities—such as corporations, partnerships, and co-operative associations, for example—is inflexible and fails to address important differences within each type of legal entity.

Flexibility may be achieved by identifying the quality that is deserving of protection. That quality is a combination of lack of resources and sophistication that leaves an entity particularly vulnerable to abuse in the marketplace. This quality may be addressed by extending protection to “small enterprises.” The phrase “small enterprise” has no precise legal meaning. This quality may be one of its strengths. It would allow courts to identify those entities that should benefit from protection under the legislation.

In place of a strict definition of “small enterprise,” a set of indicia would be more flexible and likely more helpful. The following indicia are offered as examples of the types of issues to consider in determining whether an enterprise is a small enterprise:

- Whether the enterprise has securities listed on a public exchange.
- The number of employees the enterprise has.
- Relevant financial information. In many respects, financial information is the most important information in determining whether or not an entity is a small enterprise. One approach to the issue as a whole would be to set out a bright line financial test, tied to, for example, the entity’s annual earnings or the size of the transaction. Such a bright line test, though, may not be flexible enough to cover all situations. In addition, an enterprise may want to keep its financial information private. This determination could be left to the enterprise seeking protection, on the understanding that not disclosing financial information could impair the enterprise’s chances of being found to be a small enterprise and receiving legislative protection.
- Other relevant information, such as the nature of the enterprise and whether it carries on business.

3. REMEDIES

It is also necessary to determine how unfair contract terms will be treated under the legislation. The *Unfair Contract Terms Act* provides examples of two approaches: certain terms are held to be void; others are subject to a requirement that they be reasonable. The first category includes only one type of contract term: clauses that exclude liability for injury or

death. The second category is made up of clauses that exclude liability for negligence. Under the *Unfair Contract Terms Act*, such contract terms may be employed if the party relying on them can demonstrate their reasonableness.

Holding specific terms to be void in all circumstances is the more certain approach. This approach also has the possibility of changing commercial behaviour without requiring repeated court challenges of contract terms. The specified terms would largely cease to be employed. The disadvantage of such an approach is that it would amount to a one-size-fits-all solution. This quality has the potential to cause unfairness itself.

The use of a standard of reasonableness would make the legislation more flexible. It would allow the courts to consider the context surrounding the specific contract term. Such a standard could also be combined with a range of remedies. For example, the legislation could provide for the unfair contract term to be severed from the contract, or even for damages in appropriate cases.

C. Enacting Legislation to Give the Courts a General Discretion to Remedy Unfair Contract Terms

1. INTRODUCTION

The approach described in the previous section of listing specified unfair contract terms and specified entities or types of entities which are to benefit from legislative protection is not typically in use in common law jurisdictions. Only the United Kingdom *Unfair Contract Terms Act* comes close to employing it. It is more common to find legislation that gives the courts a broad discretion to resolve issues related to both substantive and procedural unfairness. This legislation tends to rely heavily on the existing judicial unconscionability doctrine. It is seen to be more flexible than the approach described in the previous section. In addition, since it relies on an existing body of law, it is also seen to be more cautious, and less of a step into uncharted territory.

There is an existing British Columbia statute that already uses this approach in connection with consumer transactions. One option for reform based on this approach would be to extend its provisions to apply more generally. The other option for reform would be to follow American and Australian examples and enact new legislation.

2. EXTENDING EXISTING CONSUMER PROTECTION LEGISLATION

A statutory restatement of the judicial unconscionability doctrine appears in section 8 of the *Business Practices and Consumer Protection Act*.¹¹² Section 8 deals with unconscionable acts or practices. It could be expanded by removing its current limitation to unconscionable

112. *Supra* note 6.

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acts or practices committed by a supplier in relation to a consumer transaction. The protection offered in section 8 could be made subject to a new limit, restricting its scope to specified entities such as strata corporations, or to small enterprises. Section 8 could also be made a rule of general application.

A further refinement would involve revising subsection (3). It currently sets out a list of circumstances that a court must consider when reviewing a contract under section 8. It would be awkward to apply many of the items on this list to a commercial contract. The list could be reformulated as a set of indicia to assist the reviewing court. These changes could underscore the application of the unconscionability doctrine to contracts that fall outside the consumer context.

The difficulty with this approach is that it conflicts to some extent with the rationale underlying the *Business Practices and Consumer Protection Act*. The statute was meant to consolidate a wide variety of consumer protection statutes and to place the consumer protection field under the regulatory and enforcement authority of a new agency, the Business Practices and Consumer Protection Authority. As a result, the legislation contains many provisions that would not be applicable to an expanded approach to unfair contract terms. Many of these provisions contain the remedial and enforcement sections of the new statute. It could be difficult to accommodate an expanded approach to unfair contract terms within this integrated and self-contained consumer protection structure.

3. ENACTING NEW LEGISLATION

Rather than expanding existing consumer protection legislation, another approach is to create a new generally-applicable statutory provision. The most notable example of this approach is found in the American Uniform Commercial Code.¹¹³ Section 2–302 of the Uniform Commercial Code establishes a general discretion for the courts to review contracts on the basis of unconscionability.¹¹⁴ If a contract, or a contract term, is found to be unconscionable, then the court may set it aside.

Section 2–302 is a rather simple provision. The legislation does not give the courts much guidance in exercising their discretion. As a result, the American courts have tended to rely

113. The Uniform Commercial Code is a statute prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws for enactment by American states. It has been adopted, in whole or in part, by all American states. For information as to whether a particular provision is in force in a given state, *see*, online: Legal Information Institute <<http://www.law.cornell.edu/uniform/ucc.html>> (last modified: 24 March 2003).

114. *See Restatement (Second) of Contracts* § 208 (1979) (“Uniform Commercial Code § 2–302 is literally inapplicable to contracts not involving the sale of goods, but it has proven very influential in non-sale cases. It has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods.”).

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on previously-decided cases dealing with unconscionability in applying section 2–302. This approach helps to overcome some of the vagueness of the provision. It also tends to mean that section 2–302 has been applied conservatively.¹¹⁵ Taken in a British Columbia context, a provision like section 2–302 would simply emphasize the applicability of the judicial unconscionability doctrine to contracts.

A more ambitious approach is set out in the New South Wales *Contracts Review Act, 1980*.¹¹⁶ The *Contracts Review Act* attempts to provide a brief definition of “unjust.” The definition is inclusive. It incorporates “unconscionability, harshness, and oppression” into the concept of “unjust.”¹¹⁷ The legislation also sets out a lengthy list of factors for a reviewing court to consider in determining whether a contract is unjust.¹¹⁸ The legislation also contains a range of remedies.¹¹⁹

This approach has advantages over the one taken by section 2–302 of the Uniform Commercial Code. The broad list of factors is less vague than a simple statement that the unconscionability doctrine applies. The list also makes it clearer when the legislation does not apply, encouraging certainty. As a result, the courts may be able to take a less conservative approach in applying the statute. The remedial flexibility, as well, serves to encourage a less conservative approach. The legislation may be helpful in cases where rescission of a contract due to its incorporation of an unfair contract term is not appropriate.

4. SUMMARY

The strengths of this approach to reform may be summed up as flexibility and familiarity. The weaknesses may be a little less visible. These weaknesses flow from the approach’s strengths. The familiar part of this approach to reform is its connection to the existing unconscionability doctrine. However, the application of that doctrine in British Columbia has not proved effective in dealing with substantive unfairness. Its focus has been on

115. See e.g. Michael M. Greenfield & Linda J. Rasch, “Limits on Standard-Form Contracting in Revised Article 2” (1999) 32 U.C.C.L.J. 115 at 121:

... Section 2-302 empowers a court to refuse enforcement of contracts or terms that the court concludes are unconscionable. This section was controversial. ... But the past 30 years have revealed that unconscionability is not a wild card. Though the concept is vague courts can work with it, and merchants can live with it.

116. (N.S.W.), 1980, c. 16.

117. See *Contracts Review Act*, *ibid.*, section 1.

118. See *Contracts Review Act*, *ibid.*, section 9. Most of these factors relate to improprieties in negotiating the contract.

119. See *Contracts Review Act*, *ibid.*, section 7–8, Schedule 1.

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protecting vulnerable people from procedural unfairness. This approach may fall wide of the mark in dealing with the issues raised in this Report.

In addition, any reforms based on expanding judicial discretion likely will not advance the goal of certainty. The exercise of judicial discretion based on unconscionability is inherently vague, even if the legislation provides courts with a list of factors to consider in exercising that discretion. Further, this approach makes judges, rather than society at large or contracting parties, primarily responsible for determining what is an unfair contract term.¹²⁰

D. Enacting Legislation to Create a Standard of Conduct in Contracts

A third option for reform involves an approach based on making the attitudes of contracting parties the determining factor of whether a contract term is unfair. This approach would involve introducing a standard of conduct into commercial relations. Since the vast majority of commercial transactions will be fair, those that fall below the standard set by this majority would be unfair.

A simple version of this concept, applicable only to security agreements, is found in British Columbia's *Personal Property Security Act*.¹²¹ Commercial reasonableness may be understood as “. . . the actions of the reasonably prudent business person in similar circumstances.”¹²² This standard is meant to be both an objective and a flexible one that is capable of development by the courts. Commercial reasonableness under the *Personal Property Security Act* relates mainly to the performance of a contract. It most commonly arises as an issue when a secured creditor attempts to seize and sell a debtor's property.

120. See Leff, *supra* note 7 at 516, who makes this point in the course of discussing section 2–302 of the Uniform Commercial Code: “. . . the attitudes relevant under section 2–302 are not those of the parties but those of the judges. The pictures to be sought in the facts are not of the varieties of oppressive or surprising negotiations, nor of oppressive or surprising contracts, but rather of oppressed or surprised judges.”

121. R.S.B.C. 1996, c. 359, section 68 (2): “All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests must be exercised or discharged in good faith and in a commercially reasonable manner.” Section 68 (2) establishes a general duty to exercise or discharge rights, duties, or obligations arising from a security agreement in a commercially reasonable manner. See also *Personal Property Security Act*, section 16, which relates specifically to the enforcement of an acceleration clause in a security agreement.

122. Richard H. McLaren, *Personal Property Security: An Introductory Analysis*, 5th ed. (Toronto: Carswell, 1999) at § 7.02[1].

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Part IVA of Australia's *Trade Practices Act 1974*¹²³ contains an attempt to apply a standard of conduct to contracts generally. Much of Part IVA involves a restatement of the judicial unconscionability doctrine¹²⁴ and the application of the doctrine to commercial contracts.¹²⁵ In large measure, these aspects of Part IVA exceed the scope of the issues discussed in this Report. However, one feature of the extension of unconscionability to commercial contracts has relevance here. That feature is the decision to give what are called "industry codes" the force of law.¹²⁶

Industry codes are defined as a codes regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.¹²⁷ They can be mandatory or voluntary. The key point, for the purposes of this discussion, is that an industry code is developed by the participants in the industry itself, based on their understanding of what the standard of conduct for the industry should be.

Statutory enforcement of industry codes could be used in a more focussed way than is seen in the *Trade Practices Act*. An industry code could be used to spell out the types of contract terms that are considered to be unfair in a given industry. This approach to unfairness would have the advantage of shifting the determination of what is unfair from judges to participants in the industry. Of course, courts would still be responsible for enforcement of the legislation. However, if the standard of conduct for an industry is sufficiently detailed and well known, it could serve as a useful guide that could limit the need for recourse to the courts.

There are possible disadvantages to relying on industry codes. First among them is that the standards of conduct could vary widely among industries. This development could result in confusion for consumers and businesses that are not ordinarily participants in an industry. Industry codes may, initially, only be useful as a supplement to existing legislative standards, as in Australia's *Trade Practices Act*. Second, there could be disagreements within an industry as to what contract terms should be labeled unfair. Such disagreements could be protracted if different segments of an industry have considerably different interests.

123. (Cth.), 1974, c. 51. For a brief review of the history of Part IVA of the *Trade Practices Act* (which includes references to the relevant government reports), see *Australian Competition & Consumer Commission v. C G Berbatis Holdings Pty Ltd*, [2000] FCA 2 at paras. 5–8, French J., online: Australasian Legal Information Institute <[http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/2.html?query=title +%28+%22berbatis%22+%29](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/2.html?query=title+%28+%22berbatis%22+%29)>.

124. See *Trade Practices Act*, *ibid.*, section 51AA and section 51AB.

125. See *Trade Practices Act*, *ibid.*, section 51AC.

126. See *Trade Practices Act*, *ibid.*, section 51AC (3) (g) and (4) (g) and section 51AD.

127. See *Trade Practices Act*, *ibid.*, section 51ACA (1).

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Finally, the discussions in the previous sections regarding who receives the benefit of protection and the remedies available apply equally to this section.

V. CONCLUSION

The options to reform the law of unfair contract terms discussed in this Report remain starting points for discussion at this time. Tellingly, they were not engaged in any substantive way by the respondents to our consultation. Instead, other legal and social issues appear to be foremost in the public's attention. As a result, we do not have a firm base on which to ground a set for recommendations on legislative responses to unfair contract terms.

This document has been characterized as an interim report, however, to emphasize that the Law Institute will maintain its interest in unfair contract terms. If a more concrete case emerges in the future for a legislative response to unfair contract terms, the Law Institute will not hesitate to formulate recommendations.

APPENDIX

Selected Provisions Taken from Legislation in Force in Jurisdictions Outside British Columbia

1. *Unfair Contract Terms Act 1977*

Part I

Amendment of Law for England and Wales and Northern Ireland

1 Scope of Part I

- (1) For the purposes of this Part of this Act, “negligence” means the breach—
- (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
 - (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
 - (c) of the common duty of care imposed by the *Occupiers’ Liability Act 1957* or the *Occupiers’ Liability Act (Northern Ireland) 1957*.
- ...
- (3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6 (4)) only to business liability, that is liability for breach of obligations or duties arising—
- (a) from things done or to be done by a person in the course of a business (whether his own business or another’s); or
 - (b) from the occupation of premises used for business purposes of the occupier. . . .
- (4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

2 Negligence liability

- (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
- (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person’s agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

9 Effect of breach

- (1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.

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- (2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

11 The “reasonableness” test

- (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the *Misrepresentation Act 1967* and section 3 of the *Misrepresentation Act (Northern Ireland) 1967* is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

...

- (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.
- (4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—
- (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
 - (b) how far it was open to him to cover himself by insurance.
- (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

13 Varieties of exemption clause

- (1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—
- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
 - (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
 - (c) excluding or restricting rules of evidence or procedure;
- and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.
- (2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

SCHEDULE 1

SCOPE OF SECTIONS 2 TO 4 AND 7

Section 1 (2)

- 1 Sections 2 to 4 of this Act do not extend to—
-

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- (a) any contract of insurance (including a contract to pay an annuity on human life);
- (b) any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise;
- (c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;
- (d) any contract so far as it relates—
 - (i) to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or
 - (ii) to its constitution or the rights or obligations of its corporators or members;
- (e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.

...

2. Uniform Commercial Code

§ 2-106. Definitions.

- (1) In this Article unless the context otherwise requires “**contract**” and “**agreement**” are limited to those relating to the present or future sale of goods. “**Contract for sale**” includes both a present sale of goods and a contract to sell goods at a future time. A “**sale**” consists in the passing of title from the seller to the buyer for a price. A “**present sale**” means a sale which is accomplished by the making of the contract.

...

§ 2-302. Unconscionable Contract or Clause.

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

3. *Contracts Review Act, 1980*

4 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

...

“**unjust**” includes unconscionable, harsh or oppressive, and “**injustice**” shall be construed in a corresponding manner.

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7 Principal relief

- (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
 - (a) it may decide to refuse to enforce any or all of the provisions of the contract,
 - (b) it may make an order declaring the contract void, in whole or in part,
 - (c) it may make an order varying, in whole or in part, any provision of the contract,
 - (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
 - (i) varies, or has the effect of varying, the provisions of the land instrument, or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.
- (2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

...

8 Ancillary relief

Schedule 1 has effect with respect to the ancillary relief that may be granted by the Court in relation to an application for relief under this Act.

9 Matters to be considered by Court

- (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:
 - (a) compliance with any or all of the provisions of the contract, or
 - (b) non-compliance with, or contravention of, any or all of the provisions of the contract.
- (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
 - (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
 - (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
 - (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
 - (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,
 - (e) whether or not:
 - (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or

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- (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented, because of his or her age or the state of his or her physical or mental capacity,
- (f) the relative economic circumstances, educational background and literacy of:
 - (i) the parties to the contract (other than a corporation), and
 - (ii) any person who represented any of the parties to the contract,
- (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,
- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:
 - (i) by any other party to the contract,
 - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or
 - (iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,
- (k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and
- (l) the commercial or other setting, purpose and effect of the contract.

...

SCHEDULE 1

ANCILLARY RELIEF

(Section 8)

- 1** Where the Court makes a decision or order under section 7, it may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to:
- (a) the making of any disposition of property,
 - (b) the payment of money (whether or not by way of compensation) to a party to the contract,
 - (c) the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under this Act,
 - (d) the supply or repair of goods,
 - (e) the supply of services,

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- (f) the sale or other realisation of property,
 - (g) the disposal of the proceeds of sale or other realisation of property,
 - (h) the creation of a charge on property in favour of any person,
 - (i) the enforcement of a charge so created,
 - (j) the appointment and regulation of the proceedings of a receiver of property, and
 - (k) the rescission or variation of any order of the Court under this clause,
- and such orders in connection with the proceedings as may be just in the circumstances. . . .

4. *Trade Practices Act 1974*

Part 1—Preliminary

4 Interpretation

- (1) In this Act, unless the contrary intention appears:

...

“**business**” includes a business not carried on for profit.

...

“**Commission**” means the Australian Competition and Consumer Commission established by section 6A, and includes a member of the Commission or a Division of the Commission performing functions of the Commission.

...

“**corporation**” means a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

...

“**trade or commerce**” means trade or commerce within Australia or between Australia and places outside Australia.

...

5 Extended application of Parts IV, IVA, V, VB and VC

- (1) Part IV, Part IVA, Part V (other than Division 1AA), Part VB and Part VC extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

...

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Part IVA—Unconscionable Conduct

51AAB Part does not apply to financial services

- (1) Section 51AA does not apply to conduct engaged in in relation to financial services.
- (2) Section 51AB does not apply to the supply, or possible supply, of services that are financial services.

51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
- (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

51AB Unconscionable conduct

- (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the corporation and the consumer;
 - (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
 - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
- (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:
 - (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

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- (6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.
- (7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

51AC Unconscionable conduct in business transactions

- (1) A corporation must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (2) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the supplier) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the business consumer), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
 - (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
 - (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
 - (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
 - (i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

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- (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
 - (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and
 - (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
 - (k) the extent to which the supplier and the business consumer acted in good faith.
- (4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the acquirer) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the small business supplier), the Court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and
 - (b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
 - (c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
 - (e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
 - (f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and
 - (i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:
 - (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
 - (ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and
 - (j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and
 - (k) the extent to which the acquirer and the small business supplier acted in good faith.
- (5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

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- (a) the supply or possible supply of goods or services to another person; or
- (b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

- (6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):
 - (a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

...

- (9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of \$3,000,000, or such higher amount as is prescribed.
- (10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of \$3,000,000, or such higher amount as is prescribed.

...

Part IVB—Industry Codes

51ACA Definitions

- (1) In this Part:

“applicable industry code”, in relation to a corporation that is a participant in an industry, means:

- (a) the prescribed provisions of any mandatory industry code relating to the industry; and
- (b) the prescribed provisions of any voluntary industry code that binds the corporation.

“consumer”, in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.

“industry code” means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

“mandatory industry code” means an industry code that is declared by regulations under section 51AE to be mandatory.

“voluntary industry code” means an industry code that is declared by regulations under section 51AE to be voluntary.

- (2) For the purposes of this Part, a voluntary industry code binds a person who has agreed, as prescribed, to be bound by the code and who has not subsequently ceased, as prescribed, to be bound by it.
- (3) To avoid doubt, it is declared that:
 - (a) franchising is an industry for the purposes of this Part; and

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- (b) franchisors and franchisees are participants in the industry of franchising, whether or not they are also participants in another industry.

51AD Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

51AE Regulations relating to industry codes

The regulations may:

- (a) prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and
- (b) declare the industry code to be a mandatory industry code or a voluntary industry code; and
- (c) for a voluntary industry code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound (by reference to provisions of the code or otherwise).

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The British Columbia Law Institute wishes to thank all those individuals and firms who provided financial support in the past year.

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