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BRITISH COLUMBIA
LAW INSTITUTE UNFAIR CONTRACTS RELIEF PROJECT

Backgrounder

Consultation Paper on Proposals for Unfair Contracts Relief

Date: 14 December 2010

INTRODUCTION

The Unfair Contracts Relief Project is a two-year law-reform project. The project's focus is on general concepts in the law of contracts that address the problem of contractual unfairness. Its goal is to produce a final report that considers draft legislation containing reforms to these general concepts. The consultation paper sets out tentative recommendations for reform. These tentative recommendations contain policy positions that may form the foundation for a proposed *Contract Fairness Act* for the project's final report. The BCLI invites public comment on these tentative recommendations, to help shape the final recommendations for the project.

The Unfair Contracts Relief Project has been made possible by funding from the Law Foundation of British Columbia.

UNFAIR CONTRACTS RELIEF PROJECT COMMITTEE

The Unfair Contracts Relief Project is being carried out with the assistance of an all-volunteer project committee. The project committee was formed shortly after the commencement of the project, and it has met regularly since November 2009. The members of the committee are:

Prof. Joost Blom, Q.C.—chair
*(professor, Faculty of Law,
University of British Columbia)*

Russell Getz
*(legal counsel, Ministry of Attorney
General for British Columbia)*

Allan Parker, Q.C.
*(associate executive director, Access
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Margaret Easton
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Peter Rubin
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Tony Wilson
*(associate counsel, Boughton Law
Corporation)*

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

THE STRUCTURE OF THE CONSULTATION PAPER

The consultation paper focusses on five general concepts in contract law and one type of contract term that has caused ongoing problems for contractual fairness. These topics are: (1) unconscionability; (2) duress; (3) undue influence; (4) good faith; (5) misrepresentation; and (6) exclusion clauses. These concepts were selected from among the many that could have been addressed in the consultation paper for three reasons. First, they were seen as best representing how legal doctrine grapples with the idea of fairness in contracting. Second, they were amenable to analysis as a group, in relation to one another. Third, they were seen to be ripe for consolidation and modernization.

The bulk of the consultation paper is taken up with considering issues for reform for these six topics. Many of these issues are complex. Many of them have attracted numerous, thoughtful proposals for reform. In order to do the issues justice, the committee has pursued them in some detail. This detailed approach is also necessary to lay the foundations for the draft legislation that may emerge from this project.

This backgrounder is intended to give readers a brief description of the issues and options that faced the committee. Integrated with this summary is a list of the committee's tentative recommendations for reform. After each tentative recommendation, boldface numbers are set out to direct readers who wish to examine the issue in full to the pages in the consultation paper where the issue is considered. A copy of the consultation paper may be downloaded from the BCLI website at www.bcli.org/bclrg/projects/unfair-contracts-relief.

GENERAL CONSIDERATIONS & THE NEED FOR LEGISLATION

The consultation paper begins with a chapter that covers a range of topics. This chapter provides a historical overview of the role fairness plays in the law of contracts. It also explains the committee's approach to reform, which is focussed on the general rules of contract law. This discussion leads into the first issue for reform, which is the overarching issue of whether reform should be pursued in this area of the law at all.

The committee approached this overarching issue by analyzing it in two steps. First, it concluded that conflicting court decisions and uncertainty in practice justify reform aimed at clarifying or consolidating the law. Second, it considered whether the courts or the legislature are better placed to deliver the needed reforms, concluding that the needed reforms are of such a scale as to require legislative action, because they would be difficult to implement via case-by-case litigation.

1. British Columbia should enact a Contract Fairness Act. (20–23)

UNCONSCIONABILITY

Unconscionability is one of the major concepts that contract law has developed to control contractual unfairness. But courts and commentators have had some difficulty in defining the precise nature of this concept. The British Columbia Court of Appeal has issued two landmark decisions on unconscionability. One described the concept as combining procedural and substantive elements. In this view, unconscionability occurs when a contracting party exploits an inequality of bargaining power arising from the ignorance, need, or distress of the other contracting party in order to produce a substantively one-sided contract. The other judgment said that unconscionability is found whenever there is a marked departure from standards of commercial morality in contracting. This conception of unconscionability is more attuned to judicial discretion and potentially more far-reaching than the first.

The committee began its consideration of unconscionability with the basic issue of whether the *Contract Fairness Act* should include legislation on unconscionability. The advantages of such legislation are that it could clarify the basic requirements for unconscionability, fill in gaps in the existing law, and deal comprehensively with issues such as remedies. In the committee's view, these advantages outweighed the potential disadvantages of freezing development of the law and promoting unmeritorious litigation.

2. The Contract Fairness Act should contain an unconscionability provision. (32–34)

As noted earlier, there are two basic approaches to unconscionability that are found throughout the jurisprudence and the commentary. In the first approach, courts consider the case at issue by reviewing the procedural and substantive elements of a test of unconscionability. In the second, courts take a more expansive and discretionary approach to the issues. The committee favours legislation based on the first approach. In its view, this approach better captures the dominant current of the jurisprudence in British Columbia and other Canadian jurisdictions and helps to clarify the law. It also promotes certainty and ease of administration.

3. The Contract Fairness Act should require both an inequality between the parties and substantive unfairness as elements of a test of unconscionability. (34–36)

A series of consequences flow from the decision to structure the unconscionability provision in this manner. The first is that a litigant cannot obtain a remedy under the proposed unconscionability provision for substantive unfairness alone. Some form of exploitation must also be present. This requirement limits the danger of courts simply reviewing transactions to determine whether they were bad deals for the contracting parties.

4. The Contract Fairness Act should not permit a remedy for cases of substantive unconscionability alone. (36–38)

Implicit in the element of procedural unfairness is the idea that the stronger contracting party know that it is taking advantage of the weaker contracting party. The committee proposes making this point explicit in the legislation. This would help to clarify the law. But the committee would not go so far as to impose any duty of inquiry on stronger contracting parties.

5. The Contract Fairness Act should require that a defendant know of a plaintiff's material disadvantage in order for the plaintiff to obtain a remedy for an unconscionable contract. Knowledge in this context includes actual knowledge, recklessness, and willful blindness. (38-39)

An issue related to the previous one has caused some uncertainty in the jurisprudence in British Columbia. This issue concerns the time when unconscionability should be assessed. Some courts have taken an expansive view, looking at developments that occur after the agreement is made. The committee favours limiting this review to facts that were known to the parties at the time the contract was made. This approach is consistent with the leading view in British Columbia. It enhances certainty in contracting relationships. And it ensures that unconscionability does not expand to the point where it could crowd out other concepts, such as good faith.

6. The Contract Fairness Act should contain a timing element that limits review of a contract on the ground of unconscionability to facts that were known by the parties at the time the contract was made. Knowledge in this context includes actual knowledge, recklessness, and willful blindness. (39-41)

In the committee's view, adding a non-exclusive list of factors to the legislation helps to clarify the application of the unconscionability provision. There are numerous examples of such lists in the case law and commentary. They run the gamut from terse instructions to consider a contracting party's "ignorance, need, or distress" to more expansive enumerations of factors to no list of factors at all. The committee reviewed these proposals and decided that the New Zealand Law Commission had come up with the best list. It fits well with existing British Columbia case law and with the committee's vision of integrating unconscionability, duress, and undue influence.

7. The Contract Fairness Act should contain the following non-exclusive list of factors proposed by the New Zealand Law Commission for use by the court in applying the unconscionability provision: (a) a contracting party's material disadvantage due to being unable to appreciate adequately the provisions or the implications of the contract by reason of age, sickness, mental, educational or linguistic disability, emotional distress, or ignorance of business affairs; (b) a contracting party's material disadvantage due to being in need of the benefits for which he or she has contracted to such a degree as to have no real choice whether or not to enter into the contract; (c) any other reason in the opinion of the court that puts a contracting party at a material disadvantage. (41-45)

Legal or other professional advice is often a key factor in unconscionability cases. It is hard to characterize a contract as exploitative if the weaker party received advice before enter-

ing into it. Consistent with earlier law-reform studies, the committee favours including a factor in the legislation relating to professional advice. The committee does not favour making the existence of professional advice a bar to obtaining a remedy in unconscionability.

8. The Contract Fairness Act should direct the court to consider legal or other professional advice as a factor in deciding unconscionability cases. (45–46)

Some commentators have suggested that consideration of contracting parties' insurance arrangements should be a factor in determining the outcome of an unconscionability case. But in the committee's view, consideration of insurance should not become a factor to be routinely considered. Insurance arrangements are fact-specific and often complex. Even if the legislation is silent on this matter, courts can still address it in appropriate cases.

9. The Contract Fairness Act should not direct the court to consider the parties insurance arrangements as a factor in deciding unconscionability cases. (46)

There is a view in British Columbia's unconscionability jurisprudence that holds that, once a plaintiff has demonstrated procedural and substantive unfairness, the burden shifts to the defendant to prove that the bargain was fair, just, and reasonable. Consumer-protection legislation goes even further, requiring defendants to disprove allegations of unconscionability. These extraordinary measures appear to be justified by the imbalance in power and resources between the parties. But the committee concluded that this was not a sufficient public-policy rationale to justify distorting the civil-litigation process outside the consumer realm.

10. The Contract Fairness Act should not shift the burden of proof in unconscionability cases. (47–48)

Under traditional rules, courts were limited to rescission as the sole remedy for unconscionability. Rescission is a dramatic remedy, essentially undoing a contract and putting the parties back into the positions they occupied before the contract came into being. In recent years, courts have chafed against this lack of flexibility and have begun to use less sweeping remedies in appropriate cases. The committee supports this development, and proposes legislation that gives courts a broad range of remedies.

11. The Contract Fairness Act should allow the court to make any order that it thinks is just, including any of the following orders on the list recommended by the New Zealand Law Commission: (a) declaring the contract to be valid and enforceable in whole or in part or for any particular purpose; (b) rescinding the contract; (c) declaring that a term of the contract is of no effect; (d) varying the contract; (e) awarding restitution or compensation to any party to the contract; (f) vesting any property in any party to the proceedings, or direct any party to transfer or assign any property to any other party to the proceedings; (g) ordering that an account be taken, and reopening any account already taken, in respect of any transaction between the parties. (49–50)

For the sake of clarity, the *Contract Fairness Act* should take a position on whether contracting parties can modify or exclude its unconscionability provisions. A permissive approach could be seen as consistent with the general freedom contracting parties have to shape their contracts. But the committee found it difficult to reconcile this position with the level of protection that the unconscionability provision is intended to provide. The liberal approach leaves weaker contracting parties open to abuse.

12. The Contract Fairness Act should not allow parties to modify or exclude its legislative rules relating to unconscionability in their contract. (50–51)

The committee gave consideration to whether certain types of contracts should be excluded from the scope of unconscionability legislation. The rationale for such an approach would be that certain contracting parties may value finality over legislative protection. There are many ways to achieve such a result. The legislation could be limited to transactions under a certain monetary value or involving non-corporate contracting parties. The committee concluded that no such limit could compete with the clearer and more direct approach of simply providing that the unconscionability rules apply to all contracts. Highly sophisticated contracting parties would not likely feel much of a constraint from this approach, for the common-sense reason that it is very unlikely such a contracting party could frame a successful unconscionability case.

13. The Contract Fairness Act's unconscionability provision should apply to all types of contracts and contracting parties. (51–52)

DURESS

Duress guards against a person being coerced against his or her will into agreeing to a contract or a modification of a contract. It has traditionally been concerned with the use of violence or threats of violence in the bargaining process. Within the last generation, the courts have expanded its scope to include the misuse of economic power.

This recent advent of economic duress has prompted a rethinking of the fundamental principles of the concept. There has been a series of important appellate-level decisions in the United Kingdom and Canada. These decisions have tackled some major issues and have clarified key aspects of the law of duress. But they have also sown some uncertainty by articulating a number of different approaches to duress which are inconsistent with one another. In the committee's view, it is time to consolidate and clarify the law of duress by enacting legislation.

14. The Contract Fairness Act should contain a duress provision. (60–61)

Pressure on a person to submit to a contract is a key concern of duress. A major issue that courts have tried to resolve is when ordinary hard bargaining crosses the line and becomes duress. Early economic duress cases said that this occurred when one contracting party's will was totally overborne by another. This standard originated in the United Kingdom, where it has been overtaken by subsequent developments. But it still has some support in

Canadian jurisprudence. The committee considered adopting it as an element of duress but ultimately declined to take this step. This decision was made in view of concerns that this standard is too vague. It could set the bar too high. It could also be ignored in practice, as it seems to direct a court to inquire into a contracting party's subjective state of mind.

15. The Contract Fairness Act should not require a contracting party to show that its will was overborne in order to obtain a remedy for duress. (61–63)

The other leading approach to pressure has been to examine whether or not it is illegitimate. As the law of duress has developed, the illegitimate-pressure standard has overtaken the overborne-will standard as the major element of duress. Its now-dominant position in the case law was a factor in the committee's proposal to adopt it as part of its duress provision. This standard also avoids diverting the court's attention to a subjective inquiry and is better suited to the committee's overall legislative framework.

16. The Contract Fairness Act should require a contracting party to show that it was induced into a contract by illegitimate pressure in order to obtain a remedy in duress. (63–66)

Many of the leading duress cases have endorsed a list of factors for courts to consider in determining whether the pressure applied to a contracting party resulted in a severe limitation on that contracting party's will. The key factor on this list is whether or not the contracting party had a practical alternative to submission to the other party's will. In the committee's view, there is a practical benefit in providing courts with this form of guidance on the resolution of duress cases.

17. The Contract Fairness Act should contain the following list of factors for duress cases: (a) whether the victim protested; (b) whether, at the time the victim was being coerced, the victim had a practical alternative course open to pursue; (c) whether, after entering into the contract, the victim took steps to avoid it. (66–67)

Typically, the list of factors has included a consideration of whether the victimized contracting party received independent legal advice. The committee favours excluding this factor from its legislative list. The factor has been criticized as providing little to no helpful information. If a contracting party were really confronted with no practical alternative but to submit to illegitimate pressure, then independent legal advice would simply confirm that this is the case.

18. The Contract Fairness Act should not include independent legal advice as a factor for consideration in duress cases. (67–68)

One of the concerns about economic duress is that its standard of illegitimate pressure may be too vague to assist courts and litigants in actual disputes. A proposed solution is to adopt a legislative list of actions that would amount to illegitimate pressure for the purposes of the statute. There is an American precedent for such a list. While the committee is sympathetic to this idea, it found that it was unworkable in practice. Simply adopting the American list would not work, because it relies on concepts that are specific to American law. The

range of fact patterns in which illegitimate pressure may arise makes it difficult to impossible to craft a list that is neither overly restrictive nor couched in unhelpful generalities.

19. The Contract Fairness Act should not include a list of actions that amount to illegitimate pressure. (68–71)

A recent case from New Brunswick has raised the possibility of creating a special standard of duress that would be applicable only to cases involving contractual modifications. The impetus for the New Brunswick court's revised approach to duress was concern about the doctrine of consideration, but the court framed its proposal in terms broad enough to encompass duress generally. In examining this issue the committee considered the New Brunswick decision both in its specific and its general aspect. It concluded that a special rule for contractual modifications would represent an unacceptable fragmentation of duress. And the committee was reluctant to endorse a wide-ranging change in the law of duress that was at odds with the law outside New Brunswick.

20. The Contract Fairness Act should not adopt a special standard for duress in cases of contractual modifications. (71–74)

The traditional remedy for duress is rescission. As is the case for unconscionability, the remedial rules applying to duress are somewhat restrictive. In the committee's view, it is beneficial for the courts to have a wider range of tools to address issues that may arise in the course of a duress case.

21. The Contract Fairness Act should allow the court to make any order that it thinks is just, including any of the following orders on the list recommended by the New Zealand Law Commission: (a) declaring the contract to be valid and enforceable in whole or in part or for any particular purpose; (b) rescinding the contract; (c) declaring that a term of the contract is of no effect; (d) varying the contract; (e) awarding restitution or compensation to any party to the contract; (f) vesting any property in any party to the proceedings, or direct any party to transfer or assign any property to any other party to the proceedings; (g) ordering that an account be taken, and reopening any account already taken, in respect of any transaction between the parties. (74–76)

Currently, duress applies to all types of contracts. Its all-embracing nature has not attracted negative commentary. The committee sees no need to change the law to restrict the scope of duress. Retaining duress as a general principle is in better harmony with the committee's proposals on unconscionability and undue influence.

22. The duress provision in the Contract Fairness Act should apply to all types of contracts and contracting parties. (76)

UNDUE INFLUENCE

Like duress, undue influence is concerned with whether a person freely consented to a contract. Unlike duress, undue influence protects against the subtle exercise of pressure that

may occur in a special relationship that leaves one party vulnerable to the manipulation of the other. Some examples of special relationships that may bring undue influence into play include lawyer–client, physician–patient, and parent–child.

The law on undue influence is complex. Despite a leading Supreme Court of Canada decision, it still contains uncertainties and loose ends. Legislation on undue influence provides an opportunity to clarify the law and to develop it in a coherent fashion.

23. The Contract Fairness Act should contain an undue-influence provision. (84–85)

Undue influence operates primarily by presumptions. If the contract at issue is between individuals in certain types of relationships (which are marked by heightened trust and the potential for domination), then the court presumes that undue influence has occurred. Recent case law has developed a complex classification scheme for managing undue-influence presumptions. The committee wrestled with this issue. It was reluctant to propose a change to the law that could have the effect of reducing the protection afforded to vulnerable people. But it could not get past the complex and often out-of-date nature of the law as it stands. The committee did not see a clear and straightforward way to craft a rational set of presumptions. Other jurisdictions and other areas of the law have operated successfully without presumptions. Doing away with these presumptions will make undue influence clearer and more accessible.

24. The Contract Fairness Act should not provide that undue influence is presumed in any cases. (85–91)

A major unresolved issue in undue influence is whether a contract that is not disadvantageous to the weaker party can in any event be set aside because it was obtained by the exercise of undue influence. In the committee’s view, it would be undesirable to enact an undue-influence provision without a substantive-unfairness component. It would potentially create a far-reaching jurisdiction to set aside contracts, even in cases that an outside observer would find difficult to classify as unfair. Including a substantive-unfairness element also assists in integrating undue influence with unconscionability and duress.

25. The Contract Fairness Act should provide that proof of substantive unfairness in the transaction is necessary to obtain a remedy for undue influence. (92–96)

Similar to cases of unconscionability or duress, undue-influence cases have traditionally featured one remedy—rescission. The committee favours expanding the scope of the remedies that the legislation extends to the courts. This approach will give the courts more flexibility in resolving disputes.

26. The Contract Fairness Act should allow the court to make any order that it thinks is just, including any of the following orders on the list recommended by the New Zealand Law Commission: (a) declaring the contract to be valid and enforceable in whole or in part or for any particular purpose; (b) rescinding the contract; (c) declaring that a term of the contract is of no effect; (d) varying the contract; (e) awarding restitution or compensation to any party to

the contract; (f) vesting any property in any party to the proceedings, or direct any party to transfer or assign any property to any other party to the proceedings; (g) ordering that an account be taken, and reopening any account already taken, in respect of any transaction between the parties. (96–98)

There may be a rationale to excluding certain types of contracts, such as high-dollar-value agreements between sophisticated commercial parties, from the scope of undue influence. The difficulty inherent in this approach lies in finding an appropriate dividing line. In the committee's view, there is no obvious legislative standard that clearly excludes only those contracting parties that should not be subject to undue influence and does not also end up excluding parties that should benefit from the legislation's protection. The rules will be clearer if undue influence is treated as a general principle.

27. The undue-influence provision in the Contract Fairness Act should apply to all types of contracts and contracting parties. (98)

INTEGRATION OF UNCONSCIONABILITY, DURESS, AND UNDUE INFLUENCE

Unconscionability, duress, and undue influence apply to related, though distinct, sets of circumstances that may be present at the formation of a contract. The committee examined two earlier law-reform proposals for the integration of the three concepts. The first proposal involved greatly expanding the scope of unconscionability to the point that it embraces fact patterns that are now covered by duress and undue influence. The second involved combining the three concepts as distinct components of a single statutory provision. This approach would preserve the substantive distinctions among unconscionability, duress, and undue influence, but would allow for integration at the level of procedure and remedies. The committee also considered a third approach, which would treat unconscionability, duress, and undue influence as completely separate concepts for the purposes of the *Contract Fairness Act*.

The committee favours the second approach, which is essentially a compromise between the first and third approaches. This approach provides some consolidation and simplification, but retains consistency with established concepts.

28. The Contract Fairness Act should contain a general test of unfairness that embraces unconscionability, duress, and undue influence as its component parts. The draft legislation should integrate unconscionability, duress, and undue influence with respect to remedies, procedure, burden of proof, and limiting factors. (100–09)

GOOD FAITH

With good faith, the focus shifts from looking just at the events leading up to a contract to looking at the course of a contractual relationship. Good faith is traditionally a consideration at three points in a contract's lifespan: (1) the negotiations that take place before a contract is formed; (2) the performance of rights and obligations under a contract; and (3) the enforcement of remedies on a contract breaking down. The current law requires a

complex analysis be performed to determine whether a contract is subject to a duty of good faith.

The lion's share of the case law on good faith in Canada has focussed on good faith performance. Many of these cases have applied the traditional rules governing when the courts may imply a term in a contract and have ended up implying a duty of good faith performance in the contracts at issue. The committee has concluded that the time has come to make the duty to perform a contract in good faith the default starting point. In its view, this reform would clarify and simplify the law, bringing it more into line with the expectations of contracting parties and moving it closer to the position of major trading partners, such as the United States.

29. The Contract Fairness Act should provide for an implied duty of good faith in the performance of contracts. (128-31)

The committee examined good faith enforcement as a duty in its own right and not (as it is typically analyzed) as an adjunct of good faith performance. There is a significant difference between applying a duty of good faith to the performance of a contract and applying that duty after contractual relations have broken down. The committee concluded that Canadian law has not yet established a foundation for an implied duty of good faith enforcement. Adopting such a duty in the *Contract Fairness Act* would run too great a risk of creating uncertainty and mischief.

30. The Contract Fairness Act should not provide for an implied duty of good faith in the enforcement of contracts. (132-34)

Good faith negotiation has attracted a large amount of commentary, but there are few examples of the duty being applied in Canadian jurisprudence. Past law-reform studies that have examined the idea of implying a general duty of good faith in contract negotiation have rejected it. The reasons for this decision include the concept's intrusiveness, potential to spawn unmeritorious litigation, and overlap with other contract-law and tort-law concepts. The committee agrees with these points.

31. The Contract Fairness Act should not provide for an implied duty of good faith in the negotiation of contracts. (134-36)

The committee considered three options for crafting the scope of the implied duty of good faith performance. The first was to apply the duty to all contracts and contracting parties. The second involved restating the current law, so that the statutory duty would only apply to contracts that the case law had already identified as attracting an implied duty of good faith performance. The third was to identify a broader range of contracts than currently attract the duty of good faith performance but stopping short of general application of the duty. In the committee's view, the second and third approaches are too complex and are apt to be overtaken by events. The first approach is the clearest and most direct.

32. The Contract Fairness Act should provide for a duty of good faith as an implied term in the performance of all types of contracts. (136–37)

Defining good faith in contractual performance is a longstanding issue in the jurisprudence and commentary. The committee examined four options: (1) a purely subjective definition; (2) a definition that combines subjective and objective elements; (3) a three-part definition that a law professor synthesized from the leading Canadian cases; and (4) adopting no legislative definition at all. The committee favoured option (3). In its view, this option was the best of the four in promoting clarity and commercial certainty.

33. The Contract Fairness Act should define good faith as the duty (a) to exercise discretionary powers conferred by contract reasonably and for the intended purpose, (b) to cooperate in securing performance of the main objects of the contract, and (c) to refrain from strategic behaviour designed to evade contractual obligations. (138–41)

The current law on whether the duty of good faith performance can be modified or excluded by contract is somewhat uncertain. Some commentators say that contracting parties have a free hand to modify or exclude the duty; others argue that the courts will impose limitations in a contested case. The committee examined this issue from first principles and settled on a proposal that falls between these two extremes. In its view, a too-liberal approach to contracting out would be an invitation to strong contracting parties to routinely oust the duty. But, since the duty is an implied term of a contract, some scope has to be left to contracting parties to structure that duty by spelling out its content in the express terms of a contract.

34. The Contract Fairness Act should provide that contracting parties may not modify or exclude the duty to perform a contract in good faith, but the parties may, by agreement, determine the standards by which performance of their good-faith obligations is to be measured if such standards are not manifestly unreasonable. (141–43)

In some cases, formalities are used as an added level of protection for weaker contracting parties confronted with the possibility of bargaining away beneficial statutory provisions. The category *formalities* is rather open-ended, encompassing, for example, writing and witnessing requirements. The committee favours not imposing any formalities in these circumstances. It does not want to create a situation in which a formal breach has occurred, but no abuse has been taken of the weaker contracting party.

35. The Contract Fairness Act should not impose any formalities on how contracting parties determine the standards by which performance of their good-faith obligations is to be measured. (143–44)

MISREPRESENTATION

Misrepresentation is a complex area of the law, which straddles the boundaries of the law of contracts and the law of torts. The committee's focus was strictly on the contractual aspects of misrepresentation. In order to yield a remedy in the law of contracts, a misrepre-

sentation must be a false statement of a past or present fact that induces a contracting party to enter into a contract. The misrepresentation takes place before the contract is entered into and does not itself form part of the contract. The law of misrepresentation suffers from many uncertainties and frustrating limitations, particularly in the areas of its scope and the remedies it offers.

The first issue considered was whether to expand the scope of misrepresentation to include statements of law. The main rationale for excluding statements of law is that they are a type of opinion, and as such cannot be proved true or false. Another rationale occasionally advanced is the proposition that everyone should be taken to know the law, so no one should have to rely on another person's statement of law. The committee was not persuaded by these points. It noted that, in practice, it can be difficult to draw the line between statements of fact and statements of law. Misrepresentation would be clearer and easier to apply if this distinction were removed. This approach is also consistent with the recommendations of all previous Canadian law-reform agencies that have examined the issue.

36. The Contract Fairness Act should provide that a misrepresentation includes a misrepresentation of law. (157–58)

Some commentators have proposed expanding the scope of misrepresentation even more, to take in all types of opinions and sales talk. Sometimes this proposal is qualified by requiring that a contracting party at least rely on the opinion or sales talk in circumstances in which it was reasonable to do so. The committee does not favour expanding the scope of misrepresentation to this degree. It could become a trap to the unwary, actually breeding unfairness in its own way. It is also straining the concept of misrepresentation to apply it to opinions, which by definition can be neither true nor false.

37. The Contract Fairness Act should not provide that a misrepresentation includes a misstatement of opinion or any misstatement that has the capacity to induce reasonable reliance and that did induce such reliance in the misrepresentee. (158–59)

An especially vexing area of misrepresentation involves when non-disclosure of information amounts to an actionable misrepresentation. The basic rule is that parties negotiating a contract are not obliged to disclose information to one another. But this rule is subject to a long list of common-law exceptions. The committee examined three options for reform. The first involved attempting to rationalize the common-law exceptions by using broadly based principles. This option has a basis in American law. The committee found this approach to be too close for comfort to creating a duty of good faith negotiation. The second option would be simply not to address this area of the law. The committee found this to be an undesirable approach. It favoured a third option, which is to restate the common-law exceptions in the *Contract Fairness Act*. This approach would not change the law, but it would make it clearer and more accessible.

38. The Contract Fairness Act should contain a restatement of the current common-law position on when the courts may treat non-disclosure as a misrepresentation. (160–63)

For remedial purposes, the law of misrepresentation distinguishes among fraudulent, negligent, and innocent misrepresentations. Traditionally, a victim of innocent misrepresentation has not been able to obtain an award of damages. Due to the vagaries of the law of rescission, this traditional position has sometimes left such a victim without a remedy at all. The inflexibility of the traditional position has been questioned by the courts. The committee supports this development, and proposes legislation to encourage flexibility.

39. The Contract Fairness Act should enable courts to award damages to a representee who was induced to enter into a contract by a misrepresentation in lieu of rescission. (163–65)

There is a general consensus among law-reform agencies on the desirability of extending a remedy in damages to victims of innocent misrepresentation. There is also a surprising level of divergence on the means to be used to implement this policy. The committee examined the following four options taken from previous law-reform reports: (1) take a limited approach and simply fix the problem for innocent misrepresentation by creating a supplemental damages remedy; (2) go somewhat farther and address problems with rescission as well as giving the courts the scope to award damages for innocent misrepresentation; (3) effect a major change in contract law by abolishing the distinction between misrepresentations and contract terms for the purpose of remedies; and (4) abolish the distinction between misrepresentations and contract terms for the purpose of remedies and give the courts the power to award damages on a reliance or restitutionary measure. The committee favours option (2). It provides for constructive changes. Its modesty in comparison to options (3) and (4) is actually a strength, as the sweeping changes proposed by those two options would have effects beyond the law of contracts.

40. The Contract Fairness Act should create an enhanced right of rescission coupled with a discretionary damages remedy for non-fraudulent misrepresentation. (165–69)

Another area in which remedial inflexibility has been a problem is in connection with rescission. Traditional rules create so-called bars to rescission in a number of circumstances. Some of these bars are necessary in view of the sweeping nature of rescission. One that has been questioned is the bar created once a contract has been executed, or performed. This rule has its roots in contracts involving the sale of land, but Canadian law has expanded it to cover other types of contracts. Consistent with past law-reform reports and legislation in other jurisdictions, the committee proposes doing away with this rule. This approach will give the courts enhanced remedial flexibility.

41. The Contract Fairness Act should allow a representee to rescind a contract that has been induced by misrepresentation even though the contract has been wholly or partially performed and even though, in the case of a contract for the sale of an interest in land, the interest has been conveyed to the representee. (169–72)

Another traditional rule creates a bar to rescission when the misrepresentation becomes a term of the contract. When this occurs, something that would have formed the basis for rescission of the agreement now will, in all likelihood, yield a remedy in damages. In the committee's view, the rigid application of this rule can lead to anomalous results. The law

would be better served by giving the courts the flexibility to grant rescission in appropriate cases.

42. The Contract Fairness Act should allow a representee to rescind a contract that has been induced by misrepresentation even though the misrepresentation has become a term of the contract. (172–73)

The committee considered whether to allow contracting parties to modify or exclude its proposed statutory provisions on misrepresentation. Such a rule would give contracting parties more flexibility in shaping their agreements, which is a desirable goal. But it could only be achieved here at the risk of opening up weaker contracting parties to abuse. Further, it seemed counterintuitive to allow contracting parties to vary a legislative regime that is primarily directed at enhancing remedial flexibility for the courts.

43. The Contract Fairness Act should not allow contracting parties to modify or exclude the misrepresentation provisions in the draft legislation. (174–75)

SPECIAL LEGISLATIVE PROVISIONS FOR EXCLUSION CLAUSES

In addition to addressing broad, general concepts in the law of contracts, the committee considered a specific type of contract term—the exclusion clause. An exclusion clause is a contract term designed to exclude or limit a contracting party's liability for damages for which, in the absence of the clause, the party would have been liable. A chapter on exclusion clauses has been included in the consultation paper because such clauses have for a long time posed special problems for the law of contracts.

The committee reviewed the rise and fall of the doctrine of fundamental breach in Canadian jurisprudence. This doctrine has been considered in a stream of Supreme Court of Canada cases, including one from earlier this year. That case concluded that the doctrine should be laid to rest and replaced with a three-stage test. The committee also examined legislation in the United Kingdom that was enacted specifically to regulate exclusion clauses. The committee decided not to propose specific reforms tailored to exclusion clauses. In its view, the timing is not right. The latest Supreme Court of Canada decision should be given some time to operate, to see if it will have a beneficial impact on the law. In addition, the committee's general proposals in relation to unconscionability and good faith performance may ameliorate many of the problems caused by unfair exclusion clauses.

44. The Contract Fairness Act should not contain provisions focussed on exclusion clauses. (187–90)

MISCELLANEOUS ISSUES

If it were enacted, the proposed *Contract Fairness Act* would not be the only legislation in British Columbia to address contractual unfairness. British Columbia has a large number of statutory provisions that articulate rules touching on unfairness for specific types of contracts or contracting parties. The committee considered how its proposals should relate to

these other enactments. It examined two options. First, it could have the *Contract Fairness Act* provide that any conflict between its provisions and those of another enactment should be resolved in favour of the other enactment. Second, it could propose that the *Contract Fairness Act* should prevail over any other enactment in the event of a conflict. In the committee's view, the first option is the better option. It represents the more cautious approach, which will limit the possibility of the *Contract Fairness Act* having any unintended consequences.

45. The Contract Fairness Act should provide that in the event of a conflict between a provision of the draft legislation and a provision of any other act or a regulation the provision of that other act or regulation prevails to the extent of the conflict. (191–94)

Transitional issues always arise when new legislation is brought into force. Should the legislation apply just to transactions that occur after the date on which it comes into force, or should it reach back and also cover transactions occurring before the coming-into-force date? The committee proposes resolving this issue by having the *Contract Fairness Act* only apply to contracts entered into after its date of coming into force. This rule promotes predictability and certainty in the law. It also affords people an opportunity to plan for the changes to be introduced by the *Contract Fairness Act*.

46. The Contract Fairness Act should apply only to contracts entered into after it comes into force. (194–96)

CONCLUSION AND CALL FOR RESPONSES

The committee is interested in receiving the public's views on its tentative recommendations. These comments will be considered in preparing the final report for the Unfair Contracts Relief Project.

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
 1822 East Mall
 University of British Columbia
 Vancouver, BC V6T 1Z1
 Attention: Kevin Zakreski

by fax: (604) 822-0144

by email: ucr@bcli.org

If you want your response to be considered by the committee as it prepares the final report for the Unfair Contracts Relief Project, then we must receive it by **31 May 2011**.