

Report on Proposals for Unfair Contracts Relief

**A Report prepared for the British Columbia
Law Institute by the Members of the
Unfair Contracts Relief Project Committee**

British Columbia Law Institute

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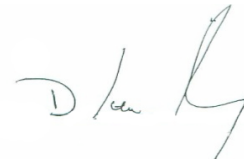
Report on Proposals for Unfair Contracts Relief

The basic purpose of the law of contracts is to ensure that promises made for consideration are enforced. Achieving this basic purpose offends the conscience of society in some cases. The courts have a longstanding jurisdiction to refuse to enforce contracts that are determined to be unfair.

This report recommends reforms to the leading concepts used by contract law to tackle the problem of unfairness. These concepts are unconscionability, duress, undue influence, good faith, and misrepresentation. Over the past years, they have been considered in an increasing number of court decisions. This has led to an expansion of, and a degree of confusion about, their scope. It is now timely to rationalize and consolidate these concepts.

This report presents its recommendations in the form of draft legislation, called the *Contract Fairness Act*. The *Contract Fairness Act* clarifies vexing ambiguities in the application of unconscionability, duress, and undue influence, creates a framework to integrate those concepts, includes a definition of “good faith,” provides for a duty of good faith in the performance of contracts, and addresses concerns about remedies for misrepresentation.

The Unfair Contracts Relief Project was carried out with the assistance of an eight-person, all-volunteer project committee and a public consultation. On behalf of the board of directors of the British Columbia Law Institute, I thank the committee and our staff for their work on this project. The BCLI fully supports the recommendations contained in this report.



D. Peter Ramsay, QC
Chair,
British Columbia Law Institute

September 2011

Unfair Contracts Relief Project Committee

The British Columbia Law Institute formed the Unfair Contracts Relief Project Committee in November 2009. The committee's mandate was to study how the law of contracts treats issues relating to unfairness, as made manifest in the concepts of unconscionability, duress, undue influence, good faith, and misrepresentation, to consider the leading options for reform of this body of law, and to make recommendations on whether legislation is needed to improve the law and, if so, what provisions should be included in that legislation. The committee's recommendations for reform are contained in this final report.

The members of the committee were:

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

Margaret Easton
*(principal, The Meridian Aging Project;
former credit-union executive)*

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

Do-Ellen Hansen
(partner, Borden Ladner Gervais LLP)

Allan Parker, QC
*(associate executive director, Access
Pro Bono Society of British Columbia)*

Lisa Peters
(partner, Lawson Lundell LLP)

Peter Rubin
*(partner, Blake, Cassels &
Graydon LLP)*

Tony Wilson
*(associate counsel, Boughton Law
Corporation)*

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

**For more information, visit us on the World Wide Web at:
<http://www.bcli.org/bclrg/projects/unfair-contracts-relief>**

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ACKNOWLEDGMENTS

The British Columbia Law Institute thanks the members of the Unfair Contracts Relief Project Committee. Committee members freely gave of their time and expertise, a substantial commitment that greatly helped to ensure the success of the project. A special thanks is due to Prof. Joost Blom, QC, who took on the added role of serving as committee chair.

This report was enriched by the participation of individuals and organizations in the project's public consultation. In particular, thanks are due to the respondents to the consultation paper, who are listed in an appendix to this report. The BCLI also thanks those organizations that hosted talks or presentations related to the project: the National Centre for Business Law, the business law section of the Canadian Bar Association—BC Branch, Boughton Law Corp., and the board of directors of the Greater Victoria Chamber of Commerce.

The Unfair Contracts Relief Project was made possible by a generous grant from the Law Foundation of British Columbia. The BCLI also received support from Boughton Law Corp., Lawson Lundell LLP, and Borden Ladner Gervais LLP, each of which hosted meetings of the project committee.

Finally, the staff of the BCLI played a key role in designing, managing, and executing this project. Jim Emmerton (executive director) provided executive planning and management for the project. He, Laura Watts (former national director, Canadian Centre for Elder Law), and Greg Blue, QC (senior staff lawyer) were all involved in the early design and planning of the project. Kevin Zakreski (staff lawyer) was the project manager, and was also responsible for drafting this report and the consultation paper that preceded it. And the following articulated students, research lawyers, research assistants, and administrative staff contributed to the research and administration of the project: Alex Blondin (research assistant), Heather Campbell (articled student), Kristine Chew (research lawyer), Kisa Macdonald (articled student), Andrew McIntosh (research lawyer), and Elizabeth Pinsent (office administrator).

EXECUTIVE SUMMARY

INTRODUCTION

This report is the culmination of the Unfair Contracts Relief Project, a major, two-year effort at law reform. The project began in fall 2009, with the selection of a project committee. At its early meetings in fall 2009 and winter 2010, the committee decided to focus the project on examining how the general law of contracts deals with unfairness. The general concepts selected for study were unconscionability, duress, undue influence, good faith, and misrepresentation. In a series of meetings held in 2010, the committee considered issues in the current law and options for reform. The outcome of these meetings was 46 tentative recommendations for reform of contract law, which were set out for public comment in the *Consultation Paper on Proposals for Unfair Contracts Relief* (published December 2010). After the end of the consultation period in May 2011, the committee held another series of meetings to consider the responses it received to its proposals and the formulation of its final recommendations. Those final recommendations are cast in the form of draft legislation, called the *Contract Fairness Act*, which makes up the largest part of this report.

The Unfair Contracts Relief Project was made possible by a grant from the Law Foundation of British Columbia.

THE UNFAIR CONTRACTS RELIEF PROJECT COMMITTEE

The members of the Unfair Contracts Relief Project Committee were:

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

Margaret Easton
*(principal, The Meridian Aging Project;
former credit-union executive)*

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

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Peter Rubin
*(partner, Blake, Cassels &
Graydon LLP)*

Tony Wilson
*(associate counsel, Boughton Law
Corporation)*

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

THE FORMAT OF THE REPORT

This report contains two parts. Part one sets out background information. It begins with an introduction to the project, discussing its broad objectives and goals. Then, part one provides an introduction to the draft legislation contained in part two of the report. This introduction explains how the committee decided to approach the problem of contractual unfairness and why legislation is necessary to deal with this problem. Part two contains the committee's recommendations for reform, which are embodied in the *Contract Fairness Act*. Part two also features detailed commentary on each of the provisions of the *Contract Fairness Act*.

PART ONE: BACKGROUND AND THE NEED FOR LEGISLATION

General

Part one of the report opens by describing the project committee and the consultation process for the project. Then, it provides an introduction to the *Contract Fairness Act*. This introduction covers three subjects. First, it describes the committee's approach to contractual unfairness. Second, it sets out the case for enacting legislation to deal with contractual unfairness. Third, it provides a brief overview of the committee's draft legislation, the *Contract Fairness Act*.

Approaches to Contractual Unfairness

There are a variety of ways to structure an examination of contractual unfairness. After introducing the concept of contractual unfairness with several examples drawn from the case law, part one reviews four leading approaches to the problem: (1) developing existing general concepts; (2) regulating specific contracts; (3) studying the needs of specific parties; (4) restricting the use of certain contract terms.

The committee chose the first approach and decided to structure this report around the general-law concepts of unconscionability, duress, undue influence, good faith, and misrepresentation. These concepts were selected because they best embody how the general law deals with contractual unfairness and they are amenable to study and reform in relation to one another.

Why Legislation?

The case for enacting legislation rests on the answers to two questions. First, is the state of the law unsatisfactory? While the current law is not fundamentally defective, it would benefit from modernization, consolidation, and fine-tuning. In particular, the jurisprudence contains issues and uncertainties related to the scope of each of unconscionability, duress, undue influence, good faith, and misrepresentation and how these concepts are to relate to one another, the tests applicable to each concept, and the remedies available for each concept.

Second, are these issues best addressed by the courts or the legislature? Historically, the courts have been responsible for the reform of these general concepts. But the range of needed reforms would be difficult, time-consuming, and costly to pursue through the courts. On balance, the committee determined that legislation is a more appropriate route for reform of this area of the law.

PART TWO: THE CONTRACT FAIRNESS ACT

Introduction

Part two contains the committee's draft legislation, the *Contract Fairness Act*. The draft act is not intended as a radical overhaul or complete codification of all of contract law's general rules dealing with unfairness. Instead, it is focussed on making targeted reforms to specific areas. In many cases, the committee had the benefit of existing overseas legislation or law-reform proposals as a starting place for its own reforms.

The *Contract Fairness Act* contains five parts: (1) interpretation and application; (2) unfairness; (3) good faith; (4) misrepresentation; and (5) transition and commencement.

Interpretation and Application

Part 1 of the *Contract Fairness Act* is similar to the first part of many other pieces of British Columbia legislation in that it addresses issues related to the scope of the act. These issues concern a variety of topics.

Part 1 begins by setting out the defined terms used in the act. Of particular note, this section includes a definition of "good faith." The definition focusses on a series of key issues raised in recent Canadian jurisprudence on good-faith performance of contracts. It is intended to address concerns about the vagueness of the duty of good faith.

Part 1 also contains a provision that declares that contracting parties cannot agree to vary or waive the provisions of the act, unless the act itself gives them express permission to do so. The part then sets out a rule governing conflicts between the *Contract Fairness Act* and other enactments. This rule is the traditional rule, which holds that, in the event of a conflict between two enactments, the specific enactment prevails over the general enactment (which, in this case, would be the *Contract Fairness Act*). The part concludes with a provision that makes it clear that the *Contract Fairness Act* only extends to contract law and is not intended to affect the law of torts, unjust enrichment, or fiduciary duty.

Unfairness: Unconscionability, Duress, and Undue Influence

Part 2 is the first of three parts that make up the substantive core of the *Contract Fairness Act*. It is intended to carry forward the concepts of unconscionability, duress, and undue influence in an integrated structure.

Part 2 begins by setting out a general test of unfairness. In brief, this test comprises two elements. A contract must be both procedurally and substantively unfair to meet the test. As a consequence of this approach, a contract cannot be found to be unfair under this part if it is solely procedurally or solely substantively unfair. This clarifies a point of contention in the jurisprudence and commentary.

Procedural unfairness is described in terms of the concepts of unconscionability, duress, and undue influence. Here the links to the current jurisprudence are clearest. The section on procedural unfairness contains a conception of unconscionability that is based on the main line of British Columbia jurisprudence. Its conception of duress incorporates economic duress and adopts the idea of illegitimate pressure. Its conception of undue influence is consistent with leading Canadian and English cases. Substantive unfairness is described by reference to the exchange of values or benefits received under the contract at issue.

Part 2 also clarifies vexing issues related to timing and knowledge. It expressly declares that a reviewing court may only consider facts and circumstances known by the parties before the contract was made. Knowledge is described as actual knowledge, recklessness, or willful blindness.

Finally, part 2 provides the court with a wide range of remedies for dealing with unfairness.

Good Faith

Part 3 provides that a duty of good faith is implied by the *Contract Fairness Act* in the performance of every contract. This clarifies the current situation in common-law Canada, which sees that duty applied only to certain types of contracts. Sorting out whether the duty applied to a specific contract required the application of one or more convoluted tests. Under part 3, it is clear that the duty applies to all contracts.

The contracting parties are not permitted to oust the duty of good faith, but part 3 does permit them to agree on the standards by which their performance of the duty is to be measured. This rule provides some flexibility for contracting parties who wish to negotiate a contract that sets out extensive performance standards, while ensuring that stronger contracting parties are not able to force weaker parties to agree to provisions that have the effect of nullifying the duty of good faith.

Part 3 is also noteworthy for what it leaves out. The statutory duty of good faith does not extend to the negotiation or enforcement of contracts. In the committee's view, the time is not ripe to propose legislation extending the duty into these two areas.

Misrepresentation

Part 4 is aimed at three distinct topics in the law of misrepresentation.

First, it enlarges the scope of misrepresentation to embrace misstatements of law. This approach—which is not as expansive as the approach often taken in consumer-protection legislation—is consistent with earlier law-reform reports. It simplifies the law by removing the need for courts to make an often-difficult distinction between statements of fact and statements of law.

Second, part 4 restates the existing law on when non-disclosure may be treated as a misrepresentation. This provision does not change the existing law, but restating it in legislation makes it clearer and more accessible.

Third, part 4 contains a series of provisions enhancing the remedial options available to courts in misrepresentation cases. These provisions remove two of the traditional bars to awarding rescission of a contract induced by misrepresentation, extend a right to victims of innocent or negligent misrepresentation to obtain damages instead of rescission, and grant the court the power to award damages in lieu of rescission in appropriate cases.

Transition and Commencement

Part 5 contains a transitional rule for the *Contract Fairness Act*. The act will only apply to contracts entered into after the date on which it comes into force. It is not intended to have retrospective or retroactive application.

CONCLUSION

In the committee's view, the package of reforms in the *Contract Fairness Act* would make the law clearer, more modern, and more accessible. It recommends that legislature enact the *Contract Fairness Act* at the earliest opportunity.

PART ONE—BACKGROUND

CHAPTER I. INTRODUCTION

A. Background on the Unfair Contracts Relief Project

In November 2009, the British Columbia Law Institute commenced a major law-reform project to study how the law of contracts deals with unfairness and to recommend reforms where they are needed. With the publication of this final report, the two-year term of the Unfair Contracts Relief Project is complete. This report contains the final recommendations of the Unfair Contracts Relief Project Committee, which are articulated in the form of draft legislation called the *Contract Fairness Act*.

The courts have long had a jurisdiction that permits them to refuse to enforce contracts for reasons related to unfairness. This jurisdiction embraces contract-law concepts that first emerged in the distant past and that made up part of British Columbia's legal inheritance from the common-law and equitable courts of England. Since appearing on the scene in British Columbia, these concepts have continued to grow and evolve, with both the province's courts and its legislature taking a hand in their development. They have now reached a stage where their rationalization and integration is desirable.

This report is concerned with the following contract-law concepts: (1) unconscionability; (2) duress; (3) undue influence; (4) good faith; and (5) misrepresentation. These concepts have been selected because they can usefully be employed as themes for organizing consideration of more highly specific issues concerning contractual unfairness. They also serve to connect problems that are currently encountered by contracting parties with a longstanding body of jurisprudence and commentary.

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

B. The Unfair Contracts Relief Project Committee

This project was carried out with the assistance of an all-volunteer project committee. The members of the committee were Joost Blom, QC (who was the committee chair), Margaret Easton, Russell Getz, Do-Ellen Hansen, Allan Parker, QC, Lisa Peters, Peter Rubin, and Tony Wilson.

Report on Proposals for Unfair Contracts Relief

Prof. Blom has been a member of the Faculty of Law, University of British Columbia, since 1972, serving as associate dean from 1982 to 1985 and as dean from 1997 to 2003. He has published numerous scholarly articles on subjects ranging from the law of contracts to the law of torts to private international law.¹ Prof. Blom's volunteer positions include currently serving as a benchler of the Law Society of British Columbia and a member of the British Columbia Law Institute.

Ms. Easton is currently the principal of the Meridian Aging Project. Previously, she worked in the financial-services industry. Among the positions she held were branch manager and assistant vice president, operations, for Westminster Savings Credit Union. Ms. Easton also has an interest in law-and-aging issues.

Mr. Getz is legal counsel in the Justice Services Branch of the British Columbia Ministry of Attorney General. His area of practice is civil-law policy and legislation, and he is the ministry's representative on the federal Advisory Group on Private International Law. Mr. Getz has also been active in law-reform endeavours in his volunteer work. These commitments include serving as the jurisdictional representative for British Columbia to the Uniform Law Conference of Canada. He was chair of the conference's civil section in 2006, and president of the conference in 2009–10. Mr. Getz has contributed to the development of a number of Uniform Law Conference statutes, and has been chair or co-chair of various initiatives, including the current project respecting a *Uniform Trustee Act*, the *Uniform Prevention of Abuse of Process Act* (2010),² the *Uniform Apology Act* (2007),³ and the *Uniform Unclaimed Intangible Property Act* (2003).⁴

Ms. Hansen is a partner with the law firm Borden Ladner Gervais LLP. Her practice focusses on legal research, primarily in the corporate-commercial area. She is an active member of the legal research section of the Canadian Bar Association—BC

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1. See, e.g., Joost Blom, "Canadian Cases in Private International Law in 2004–05" (2005) 43 Can. YB Int'l Law 636; Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 UBC L. Rev. 373; Joost Blom, "Whither Choice of Law? A Look at Canada and Australia" (2004) 12 Willamette J. Int'l L. & Dip. Resol. 211; Joost Blom, "Public Policy in International Law and its Evolution in Time" (2003) 50 Nethl. Int'l L. Rev. 373; Joost Blom, "Tort, Contract and Allocation of Risk" (2002) 17 Sup. Ct. L. Rev. 289.
 2. See online: Uniform Law Conference of Canada <<http://www.ulcc.ca>>.
 3. See Uniform Law Conference of Canada, *Proceedings of the Eighty-ninth Annual Meeting* (Ottawa: The Conference, 2007) 267, online: Uniform Law Conference of Canada <<http://www.ulcc.ca>>.
 4. See Uniform Law Conference of Canada, *Proceedings of the Eighty-fifth Annual Meeting* (Ottawa: The Conference, 2003) 266, online: Uniform Law Conference of Canada <<http://www.ulcc.ca>>.
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Report on Proposals for Unfair Contracts Relief

Branch, has presented at legal conferences and continuing legal education seminars,⁵ and is the author of a number of law-review articles.⁶

Mr. Parker is associate executive director of the Access Pro Bono Society of British Columbia and is a part-time mediator. He has served in various capacities with the social justice section of the Canadian Bar Association—BC Branch, and as an elected member of the Provincial Council. He has written and edited various legal materials including for the Legal Services Society and the Continuing Legal Education Society of British Columbia.⁷

Ms. Peters is a partner with Lawson Lundell LLP, and is head of that law firm's legal research and opinions department. She is the author of a number of publications on legal research and private law generally.⁸ She has also served as a member of the British Columbia delegation to the Uniform Law Conference of Canada and as chair of the Legislation and Law Reform Committee of the Canadian Bar Association—BC Branch.

Mr. Rubin is a partner with the law firm Blake, Cassels & Graydon LLP. He practices with the firm's litigation and restructuring and insolvency groups. Mr. Rubin has

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5. See Do-Ellen S. Hansen & Susan E. MacFarlane, "The Legal Research Plan: A Tool for Effective Legal Research," in Lisa A. Peters, Marko Vesely, *et al.*, eds., *Legal Research 2004: Materials Prepared for the Continuing Legal Education Seminar, Legal Research, Held in Vancouver, B.C. on December 10, 2004* (Vancouver: Continuing Legal Education Society of British Columbia, 2004) 1.1.
 6. See Shelley-Mae Mitchell & Do-Ellen S. Hansen, "Simply Confused or Deliberately Non-compliant? A Review of How Courts Are Applying *Honda v. Keays*" [2010] Annual Review of Civil Litigation 617; Do-Ellen Hansen, D. Bruce Garow & Meredith Parkes, "Damages for Personal Injury or Wrongful Death in Canada" (2004) 69 J. Air L. & Com. 233; Do-Ellen Hansen, "Developments in Commercial Agency Law in Canada" [1992] Comparative Law Yearbook of International Business 231.
 7. See, *e.g.*, Allan A. Parker, *Consumer Law and Credit/Debt Law* (Vancouver: Legal Services Society of British Columbia, 2009), online: Legal Services Society <<http://www.lss.bc.ca/>>; Allan Parker *et al.*, "Poverty Law, Public Interest Law, and Access to Justice," in Susan Munro *et al.*, eds., *Annual Review of Law and Practice: Current to 1 January 2007* (Vancouver: Continuing Legal Education Society of British Columbia, 2007) 467.
 8. See, *e.g.*, Lisa A. Peters, "Contract Law Update: Developments of Note" (October 2010), online: Lawson Lundell <<http://www.lawsonlundell.com/>>; Lisa A. Peters, "Contract Law Update: Developments of Note" (April 2009), online: Lawson Lundell <<http://www.lawsonlundell.com/>>; Lisa Peters, "Contract Damages for Loss of Opportunity or Chance," in D. Bruce Gleig, Mark D. Andrews, *et al.*, eds., *Contract Damages: Materials Prepared for the Continuing Legal Education Seminar, Contract Damages '96, Held in Vancouver, B.C. on November 29, 1996* (Vancouver: Continuing Legal Education Society of British Columbia, 1996) 5.1.

contributed to continuing legal education seminars and legal textbooks.⁹ He was until recently an elected member of the Provincial Council of the Canadian Bar Association—BC Branch.

Mr. Wilson is an associate counsel with Boughton Law Corporation, where his practice focusses on franchising, licensing, and intellectual-property law. He is the author of numerous articles and a book on franchise law.¹⁰ Mr. Wilson is also an adjunct professor at the School of Criminology, Simon Fraser University.

The committee met 15 times since its formation in November 2009. After two meetings concerned with organizing the project and surveying the field, the committee held 10 meetings that were focussed on the substantive issues addressed in the tentative recommendations set out in its consultation paper, which was published in December 2010. The remaining three meetings were concerned with the final recommendations set out in the draft legislation found in this report.

C. The Consultation Process

The committee began its efforts to engage with the public right from the start of the project. In December 2009, a webpage for the project was created on the BCLI website.¹¹ At that time, the initial documents created for the project (a media release and a backgrounder announcing the project's goals) were posted to the project webpage. The webpage continues as a repository of all documents published over the course of the project.

The major milestone in the project's consultation process occurred with the publication of the committee's *Consultation Paper on Proposals for Unfair Contracts Relief*.¹² The consultation paper contained a detailed examination of the current law of and the options for reform for the five areas that were the focus of this project. It also

9. See, e.g., Peter Rubin & Jeff Langlois, "Insolvency Issues and Partnerships," in William S. MacLagan et al., eds., *Working with Partnerships: Materials Prepared for the Continuing Legal Education Seminar, Working with Partnerships, Held in Vancouver, BC, on June 18, 2009* (Vancouver: Continuing Legal Education Society of British Columbia, 2009) 7.1; Peter L. Rubin & James Sullivan, "Procedure and Remedies Against the Crown," in Karen Horsman & Gareth Morely, eds., *Government Liability: Law and Practice*, looseleaf (consulted on 7 April 2011) (Aurora, ON: Canada Law Book, 2007) 12-1.

10. See Tony Wilson, *Buying a Franchise in Canada: Understanding and Negotiating Your Franchise Agreement*, 2d ed. (North Vancouver, BC: Self-Counsel Press, 2009).

11. See, online: British Columbia Law Institute <<http://www.bcli.org/bclrg/projects/unfair-contracts-relief>>.

12. (Vancouver: The Institute, 2010), online: British Columbia Law Institute <<http://www.bcli.org>>.

presented the committee's 46 tentative recommendations for reform, for public review and comment.

The consultation paper was given wide circulation, with paper copies being sent to 175 individuals and organizations with an interest in contract law. The consultation paper was also posted on the BCLI website and publicized with the issuance of a media release. The paper provided for a period to respond to its tentative recommendations of slightly less than six months. During this consultation period the committee chair and BCLI project staff gave a number of public presentations on the project.

The committee thanks all those who took part in the consultation process. In particular, it is grateful to those individuals and organizations who took the time to provide written submissions.¹³ Although the responses were not high in number, they were high in quality and in their level of engagement with the committee's proposals. Several respondents provided alternative ideas or proposals on the issues for reform. Even though the committee did not necessarily agree to adopt all of these ideas and proposals, they were considered thoroughly and helped the committee in formulating its final recommendations in this report.

The committee also thanks attendees at meetings of the National Centre for Business Law, the business law section of the Canadian Bar Association—BC Branch, and the board of directors of the Greater Victoria Chamber of Commerce. A number of individuals at these meetings provided oral comments to committee members. Their comments are appreciated, and were taken into account in the drafting of this final report.

D. The Structure of this Report

This report contains two parts. Part one describes the project, sets out some general background on contract law and unfairness, explains why the committee thinks legislative reform is necessary, and summarizes the draft legislation. Part two contains the proposed *Contract Fairness Act* (the draft legislation that embodies the committee's final recommendations for reform) along with commentary on each of the draft act's provisions.

13. See Appendix A, below, at 53 for a list of respondents to the consultation paper.

CHAPTER II. AN INTRODUCTION TO THE CONTRACT FAIRNESS ACT

A. Introduction

“The basic animating principle of the law of contracts,” a leading textbook explains, is that “as a matter of general principle, promises ought to be performed.”¹⁴ Another way of saying this is that contract law protects the expectation interest.¹⁵ When a contracting party fails to make good on its promises, the law provides the other contracting party with a remedy. This remedy is typically money damages, calculated in such a way as “to place the victim of a breach of contract in as good a position as he or she would have been in if the contract had been performed.”¹⁶

Yet, there are examples of courts refusing to enforce otherwise-valid contracts for reasons that relate to one or more of the fundamental principles of justice and the law. The *Contract Fairness Act* is focussed on one of those areas, contracts that are not enforceable because they are seen to be unfair. For some examples of this category, consider the following fact patterns (which are drawn from some of the leading Canadian cases):

- a commercial fisher with a modest educational background and little experience in business matters sells a fishing boat and its associated fishing licence for about one-quarter of their value to a buyer “of greater business experience, greater education and with full knowledge of the value attributable . . . to a commercial fishing licence, [who] took advantage of his general superiority and prevailed upon the [seller] to enter into this bargain against his best interests”;¹⁷
- a corporation with the exclusive right to provide aviation services and equipment at an airport refuses to relocate its navigation equipment to accommodate the construction of a new runway unless the airport authority agrees to pay for new equipment for its use, which the airport authority ul-

14. John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 14 [McCamus, *Law of Contracts*].

15. See generally L. L. Fuller & William R. Perdue Jr., “The Reliance Interest in Contract Damages” (1936) 46 *Yale LJ* 52 & 46 *Yale LJ* 373.

16. *Supra* note 14 at 14.

17. *Harry v. Kreutziger* (1978), 95 DLR (3d) 231 at 239, 9 BCLR 166 (CA), McIntyre JA [*Harry* cited to DLR].

timately decides to pay for under protest to keep its expansion plans on track;¹⁸

- an elderly and infirm farmer makes two transfers of his landholdings at the behest of his children, who are embroiled in a bitter dispute, with “[e]ach side [having] determined to bring about a division of the worldly goods and possessions of [him] that would benefit them most”;¹⁹
- the owners of a shopping centre induce the anchor tenant of a nearby rival shopping centre to leave the rival and enter into a new long-term lease at their shopping centre, take an assignment of the remaining 17 years of the former anchor tenant’s lease with the rival, enter into an agreement with the rival to use their best efforts to locate a suitable replacement tenant, and then make little to no effort to do this, hobbling the rival centre’s business.²⁰

There is an enduring fascination to these types of cases, as they touch on fundamental questions of how contract law should operate to the benefit of society.²¹

B. The Committee’s Approach to Contractual Unfairness

The word *unfair* is not a legal term of art. It is a word used in everyday speech, meaning “[n]ot equitable, unjust; not according to the rules. . . .”²² As may be expected, there is a great deal of case law and commentary on aspects of contractual unfairness. These two factors—the key term’s vagueness and the diversity of the jurisprudence—lend a good deal of elasticity to the concept of contractual unfairness. As a result, the committee was faced at the start of its work with a decision on exactly how to pursue a project on contractual unfairness.

At an early point in the project the committee considered its options for structuring the project and, ultimately, the draft legislation that was the project’s main goal. And

18. *Greater Fredericton Airport Authority v. Nav Canada*, 2008 NBCA 28, 290 DLR (4th) 405 [*Nav Canada* cited to DLR].

19. *Lato v. Lato Estate* (1982), 19 Sask. R. 271 at para. 22, 16 ACWS (2d) 154 (QB), *aff’d* (1985), 42 Sask. R. 204, 33 ACWS (2d) 383 (CA).

20. *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 NSR (2d) 180, 29 ACWS (3d) 262 (SC (TD)) [*Gateway Realty* cited to NSR], *aff’d on other grounds* (1992), 112 NSR (2d) 180, 32 ACWS 1161 (SC (AD)).

21. See Bradley E. Crawford, Case Comment on *Morrison v. Coast Finance Ltd.* (1966) 44 Can. Bar Rev. 143 at 143 (“The fascinating and exasperating feature of these cases is their refusal to be harmoniously integrated into a general theory of the enforceability of promises given for good consideration. . . .”).

22. *The New Shorter Oxford English Dictionary*, *sub verbo* “unfair.”

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the committee found that a project on contractual unfairness could focus on one or more of the following topics:

- developing existing general contract-law concepts;
- regulating specific types of contracts;
- studying the needs of specific types of contracting parties;
- restricting the use of specific types of contract terms.

As a result of its initial review, the committee decided to focus on the first option, developing existing general contract-law concepts.

This decision immediately imposed the need to make another decision on the scope of the project. There is some flexibility in determining the number and type of general concepts that could be included in a study of contractual unfairness. For example, a leading English contract-law textbook discusses unconscionability, duress, undue influence, and misrepresentation under the heading “factors tending to defeat contractual liability,” and also includes the concepts of incapacity, mistake, and illegality.²³ Other topics could also conceivably be included, such as public policy, penalties, forfeiture, and promissory estoppel.²⁴

In the end, the committee decided to direct its attention to the concepts of unconscionability, duress, undue influence, good faith, and misrepresentation. Unconscionability, duress, undue influence, and misrepresentation all apply to activities that take place during the formation of a contract. Unconscionability is concerned with abuses of the bargaining process that result in dramatically one-sided contracts. Duress and undue influence both have to do with ensuring that a contracting party’s consent to enter into a contract has been freely given. Whereas duress focusses on threats of physical violence or the damaging use of economic power, undue influence guards against the subtler use of pressure by a person in a position of trust with a contracting party. Misrepresentation is concerned with misstatements of fact in the bargaining leading up to a contract. Good faith, in contrast, typically arises in connection with a contract that creates a long-term relationship between

23. See Sir Jack Beatson, Andrew Burrows & John Cartwright, eds., *Anson’s Law of Contract*, 29th ed. (Oxford: Oxford University Press, 2002) 217–438.

24. See *Black’s Law Dictionary*, 9th ed., *sub verbo* “estoppel” (“[Promissory estoppel is the] principle that a promise made without consideration may nevertheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.”).

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the contracting parties without defining the standards of behaviour that are to apply over the course of that relationship.

The committee had three reasons for selecting these concepts as the focus of this project. First, these concepts best represent how legal doctrine contends with the broader idea of unfairness in contracting. Unconscionability is so closely connected with unfairness that it is occasionally taken as being synonymous with it.²⁵ Duress, undue influence, and misrepresentation each have a bearing on the free exercise of individual consent, which is a core idea both for the law of contracts and everyday notions of fairness. Good faith gives an important new dimension to this inquiry by directing attention to ongoing contractual relationships, as opposed to events occurring just in the period of formation of a contract.

In addition to the individual characteristics of these concepts, collectively they are amenable to consideration in relation to one another in a way that can be managed within a project to be carried out over a limited time. The development of a number of these concepts has also led to some overlapping areas of coverage. These overlaps provide an opportunity to consider possibilities for integrating and rationalizing the law.

Finally, these concepts have generated a sizable body of jurisprudence and have been the subject of legislation²⁶ in other common-law jurisdictions.²⁷ This body of case law is ripe for rationalization in British Columbia, and the legislation in other jurisdictions provides models for reform for this province, each with a practical track record for evaluation.

25. See, e.g., Stephen M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, ON: Canada Law Book, 2010) at paras. 542–44 (arguing for judicial recognition of a general ground of relief from unfair bargains uniting the disparate strands of relief currently found in the jurisprudence under the name *unconscionability*).

26. See, e.g., UCC §§ 1-304, 2-302; *Contracts Review Act 1980* (NSW); *Trade Practices Act 1974* (Cth.), ss. 51AA–51AC.

27. Although the committee's focus throughout this project has been on common-law jurisdictions, it is worthy of brief notice here that many of the concepts considered in this report are also well established in civil-law jurisdictions as fundamental principles held in common in the legal systems that make up the civil-law world. For example, the UNIDROIT principles published by the International Institute for Unification of Private Law touch on many of these concepts. See Art. 1.7 UNIDROIT Principles 2004 (good faith and fair dealing); Art. 2.1.20 UNIDROIT Principles 2004 (surprising terms); Art. 3.10 UNIDROIT Principles 2004 (gross disparity). See also E. Allan Farnsworth, *Farnsworth on Contracts*, 3d ed., vol. 1 (New York: Aspen Publishers, 2004) at § 1.8a (further discussion of UNIDROIT principles).

C. The Need for Legislation

The case for enacting the *Contract Fairness Act* turns on the resolution of two questions. First, is the law as it stands unsatisfactory? And, if the answer to this first question is “yes,” then should these problems be addressed by the legislature?

In assessing the first question, it would be an exaggeration to say that the current law is wholly inadequate or radically defective. But the committee did note the following problems cropping up in the jurisprudence and commentary over and over again:

- there is confusion over the scope of the various concepts relating to unfairness, making it difficult to predict when they will apply;
- the legal tests used to determine whether certain concepts are applicable in a given case are often complex;
- even when it is clear that a given concept does apply in a specific case, there is uncertainty over the content of the rules that should be brought to bear on that case; and
- there is often no clear sense of how concepts related to unfairness are supposed to work together, leading to overlaps and confusion.

These problems are canvassed at length in the discussion of specific issues in the consultation paper. So, it’s only necessary to provide a few examples of each here.

There continue to be disputes over whether or to what extent unconscionability should apply to commercial contracts.²⁸ The application of misrepresentation can turn on a tricky distinction between statements of fact and statements of law. And the treatment of good faith in common-law Canada is a striking example of both points one and two. Whether or not a contract is subject to the duty of good faith performance turns on whether the contract meets several complex tests for implying a term, which take pages to explain.²⁹

28. See, e.g., Vern W. DaRe, “Atlas Uncharted: When Unconscionability ‘Says It All’ ” (1996) 27 Can. Bus. LJ 426 at 456–57 (“The court’s implicit invitation in *Atlas Supply* to other courts . . . to resort more often in the future to unconscionability in commercial contracts, should be rejected.”).

29. See *Consultation Paper on Proposals for Unfair Contracts Relief*, supra note 12 at 116–21.

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Unconscionability, duress, and undue influence have each been the subject of elemental disputes. In British Columbia, one leading case³⁰ has ruled that deciding an unconscionability case involves working, step by step, through an analysis of whether there was inequality of bargaining power between the parties, the stronger party took advantage of that inequality, and a substantially unfair contract was the result. But another influential judgment holds that this can all be swept away in favour of asking one question about whether the contract “is sufficiently divergent from community standards of commercial morality that it should be rescinded.”³¹ Courts and commentators continue to debate the place of the overborne will and illegitimate pressure in duress.³² And the status of the various classes of presumptions of undue influence under Canadian law is far from clear, as is the question of whether undue influence has a substantive-unfairness component.³³

There continue to be disputes over the reach of unconscionability. This has led to some doctrinal confusion over the relationship of unconscionability, duress, and undue influence.³⁴ A very expansive conception of unconscionability, which is sometimes promoted,³⁵ can also effectively crowd out good faith in the performance of contracts.

30. *Morrison v. Coast Finance Ltd.* (1965), 55 DLR (2d) 710, 54 WWR 257 (BCCA) [*Morrison* cited to DLR].

31. *Harry*, *supra* note 17 at 241, Lambert JA.

32. *See, e.g.*, Hamish Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 366 (“The theory of the overborne will seems either to restrict the scope of duress to a very small group of situations or to be aimed at the wrong target.” [footnote omitted]); Rick Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 UTLJ 201 at 207 (“Certainly, the rejection of the overborne will theory has been pivotal to the articulation of a sound conceptual rationale for the modern law of duress. . . .”); *Nav Canada*, *supra* note 18 at para. 47 (“In my view, the criterion of illegitimate pressure adds unnecessary complexity to the law of economic duress. . . .”).

33. *See, e.g.*, M. H. Ogilvie, “No Special Tenderness for Sexually Contracted Debt? Undue Influence and the Lending Banker” (1996) 27 Can. Bus. LJ 365 at 399 (arguing that leading Canadian case has left the law of undue influence confused across a range of topics, including the existence of a substantive-unfairness requirement).

34. *See ibid.* at 395 (describing “doctrinal confusion” among “breach of fiduciary duty, unequal bargaining power, unconscionability, and undue influence”).

35. *See, e.g.*, Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987) at 129–30.

Finally, there is a clear need for greater remedial flexibility in unconscionability, duress, undue influence, and misrepresentation.³⁶ The courts have begun to respond to this need,³⁷ but it would still be worthwhile to encourage and support reforms leading to enhanced remedial options.

Taken together, these points make a persuasive case for clarifying and consolidating these concepts. This conclusion leads into the second question, whether the legislature or the courts are in the better position to deliver on the desired reforms.

The historical approach has been to leave reform to the courts. “The general principles and the detailed rules,” that make up the law of contracts, “are derived from the reasons for decision given by judges in the adjudication of contract disputes.”³⁸ This approach continues to prevail in common-law Canada.³⁹ Although there are numerous examples of legislation addressing specific types of contracts or contract terms, legislation addressing the general principles of contract law remains rare in British Columbia.⁴⁰ In addition to historical consistency, another argument in favour of leaving reform of this area to the courts is that the courts are perceived to be better able to craft flexible solutions that can apply in a broad range of situations.⁴¹

The committee has considered these points and decided that, on balance, legislation is necessary to address the concerns identified in this project. The courts are well positioned to resolve individual disputes, and, under the committee’s recommendations, the courts would continue to play the lead role in the resolution of contracts cases. But the courts are not well positioned to deliver comprehensive reforms to longstanding legal rules. Court-generated reforms would have to be worked up case by case, as it is highly unlikely that a single case would present all the issues that are

36. See, e.g., P. D. Finn, “The Fiduciary Principle,” in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1 at 56.

37. See, e.g., *Dusik v. Newton* (1985), 62 BCLR 1 at 48, 31 ACWS (2d) 199 (CA), *per curiam* (“Since the agreement between Dusik and the board has been found to be unconscionable, and since rescission is not available in the circumstances, it is open to this court to shape an appropriate remedy.”); *415703 B.C. Ltd. v. JEL Investments Ltd.*, 2010 BCSC 202, [2010] BCJ No. 261 (QL) at paras. 181–221 (discussing remedial flexibility in the context of a complex case involving fraudulent misrepresentation).

38. McCamus, *Law of Contracts*, *supra* note 14 at 8.

39. See *ibid.* (“In Canada, provincial legislators are possessed of a constitutional authority to enact legislation setting forth or amending the general principles of the law of contract. With very few exceptions, however, they have refrained from doing so.”).

40. See, e.g., *Frustrated Contract Act*, RSBC 1996, c. 166.

41. See McCamus, *Law of Contracts*, *supra* note 14 at 22.

being taken up in this project. This process can result in uneven and piecemeal progress. Court proceedings lack many of the tools for modern policy development and courts themselves cannot easily lay hold of some of these tools (such as comparative research and public consultation) because the courts' foremost institutional role is the resolution of disputes between litigants. All of these points make court-based reform one of the slowest, costliest, and most uncertain avenues to achieving law reform.⁴²

Further, the Supreme Court of Canada, in a recent decision⁴³ that reviewed "the principles which govern judicial reform of the common law,"⁴⁴ has articulated a rather modest and restrictive position on when the courts should intervene to reform the law.⁴⁵ The court expressed a preference for retaining even archaic rules, to avoid the perception that the court's judgment had a broader basis than the limited issue at play between the litigants.⁴⁶ Such views from the top court in Canada serve to underscore the committee's judgment that the types of reforms needed to improve how contract law deals with unfairness are best delivered by the legislature.

42. See *Report on Amendment of the Law of Contract*, *supra* note 35 at 2–3 ("[T]here are important branches of contract law where the rules have ceased to keep pace with changing needs and perceptions and where remedial legislation is a more certain cure than the unpredictable and uneven path of judicial self-correction."). See also McCamus, *Law of Contracts*, *ibid.* at 18–19 ("[T]he fact that judicial responsibilities are being discharged by unelected judges in adjudicative processes that are not well suited to public policy formulation is likely to lead courts to be somewhat circumspect in exercising their undoubted capacity to reformulate and modify prior doctrine." [footnote omitted]).

43. *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 SCR 842 [cited to SCR].

44. *Ibid.* at para. 42, Bastarache J. (for the court).

45. *Ibid.* ("A change in the common law must be necessary to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency. In addition, the change should be incremental, and its consequences must be capable of assessment." [citations omitted]).

46. *Ibid.* at para. 48 ("In my view, to abolish one of the rules within this system because there no longer appears to be a rationale for it would necessarily call into question the validity of the other rules. For example, were this Court to abolish the rule that only the parties to a sealed contract can sue or be sued on such a contract, on the ground that it does not appear to have a rationale, the enforceability of a sealed contract without consideration could certainly be questioned for the same reason. The abolition of the sealed contract rule would thus amount to a fundamental reform of the common law rather than an incremental change.").

D. Summary of the Contract Fairness Act

The commentary to the draft legislation in part two of this report discusses finer points of detail and drafting, so it is only necessary to give a brief overview of the *Contract Fairness Act* here. As a general matter, the proposed act does not attempt a radical overhaul of contract law's existing rules dealing with unfairness. Rather, it seeks to consolidate, clarify, and fine-tune those rules. In attending to this task, the committee was aided by legislation in force in other jurisdictions and law-reform proposals from other law reform agencies. In particular, legislation in force in Australia,⁴⁷ the American *Restatement*,⁴⁸ and the New Zealand Law Commission's proposed "unfair contracts scheme"⁴⁹ have provided inspiration for the *Contract Fairness Act*.

The proposed act consists of five parts. Parts 1 and 5 deal with matters such as interpretation, application, and transition. Parts 2, 3, and 4 contain the substantive provisions of the act.

Part 2 implements the committee's recommendation to integrate the concepts of unconscionability, duress, and undue influence. Its centrepiece is a general test of unfairness. This test draws together the fundamental elements of the committee's proposed reforms to unconscionability, duress, and undue influence. It calls for a focus on both procedural and substantive elements of unfairness. This approach allows for consistency of treatment of secondary issues relating to these concepts. These secondary issues include matters such as presumptions, the burden of proof, and the remedies that a court may order. Part 2 also implements committee recommendations on knowledge and timing. It makes it clear that a stronger party must actually know of a weaker party's material disadvantage, or must recklessly disregard or be willfully blind to the facts that constitute this disadvantage. And it also clarifies that, in reviewing a contract and the circumstances surrounding it for unfairness, the court must only look to facts and events in existence before or at the time the contract was formed.

Part 3 is relatively short. It sets out the duty of good faith in contract performance. And it provides that, while the duty cannot be excluded or modified, contracting parties are free to set out reasonable standards of performance of the duty in their agreement.

47. See *Misrepresentation Act 1972* (SA); *Civil Law (Wrongs) Act 2002* (ACT), ss. 172–79.

48. *Restatement (Second) of Contracts* (1979).

49. See New Zealand Law Commission, "Unfair" Contracts: A Discussion Paper (NZLC PP11) (Wellington: The Commission, 1990) at 28–56.

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Part 4 deals with misrepresentation. Its main focus is on expanding the remedies available for innocent and negligent misrepresentations. This is done by removing two of the traditional bars to rescission and by giving the courts the power to award damages under contract law for innocent or negligent misrepresentation cases.

PART TWO—DRAFT LEGISLATION

Contract Fairness Act

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 – INTERPRETATION AND APPLICATION

Definitions

1 In this Act:

“**court**” means, in relation to any matter, the court, tribunal or arbitrator by or before which the matter falls to be determined;

Comment: This provision defines *court* in expansive terms. The rationale for such a definition is based on the fundamental character of the *Contract Fairness Act*. The *Contract Fairness Act* is intended to be remedial. That is, it cures defects in the common law. It also expands the court’s powers in awarding remedies. In the committee’s view, the *Contract Fairness Act* should have a broad reach to give effect to these worthwhile purposes.

So, *court* as defined here includes both the superior courts of the province (*i.e.*, the British Columbia Supreme Court and the Court of Appeal for British Columbia) and the provincial court. But it also includes bodies that may not be considered “courts” in everyday speech. The definition expressly includes administrative tribunals and arbitrators. Administrative tribunals play an important role in adjudication in British Columbia, hearing a wide array of matters. While their influence on contract law is not as significant as the courts’, they do hear contract cases and apply contract law. Arbitration is an increasingly popular means for resolving commercial and consumer disputes. It is important to ensure that the reforms in the *Contract Fairness Act* can be applied by these bodies.

The word *court* appears in a number of sections in the *Contract Fairness Act*, but special attention should be paid to section 9. That section sets out the powers of the court to award remedies for an unfair contract under the provisions of part 2 of the act. The court is given wide powers to “grant such relief as it thinks just.” The intent of this definition and section 9 is to not to create the impression that the provincial court, tribunals, or arbitrators are empowered to award all the remedies that are available to a superior court. Each of these bodies would be empowered to award remedies up to the existing limits on their remedial powers.

This definition is based on a similar definition in New Zealand’s *Contractual Remedies Act*.⁵⁰

“**good faith**” means the duty to

50. *Contractual Remedies Act 1979* (NZ), 1979/11, s. 2.

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- (a) exercise discretionary powers conferred by a contract reasonably and for their intended purpose,
- (b) cooperate in securing performance of the main objects of the contract, and
- (c) refrain from strategic behaviour designed to evade contractual obligations.

Comment: One of the most common criticisms of the duty of good faith in contract law is that *good faith* is “too vague a term,”⁵¹ one that “is incapable of precise definition.”⁵² This definition of *good faith* is intended to address these criticisms. Part 3 of the *Contract Fairness Act*⁵³ establishes a duty of good faith in the performance of all contracts as a baseline obligation under the law. By including a definition of *good faith* in the draft legislation, the nature and scope of that duty is more readily grasped.

This statutory definition adopts a proposal made by Canadian law professor John D. McCamus. Prof. McCamus’s proposal was intended to capture the leading elements of the Canadian jurisprudence on good faith performance.⁵⁴ He formulated this definition expressly in opposition to the “abstract and generalized statement of the duty” of good faith found in the Uniform Commercial Code.⁵⁵ In his view, his definition does a better job both at “captur[ing] the richness” of the case law⁵⁶ and at avoiding the pitfall of “vagueness or uncertainty”⁵⁷ than the Uniform Commercial Code definition. It should also be noted that Prof. McCamus’s analysis has found some support in a recent court decision.⁵⁸

51. E. Allan Farnsworth, “Good Faith in Contract Performance,” in Jack Beatson & Daniel Friedman, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) 153 at 161.

52. *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 at para. 98, 152 DLR (4th) 1, Iacobucci J. [*Wallace* cited to SCR].

53. See, below, at 35.

54. See John D. McCamus, “Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance” (2004) 29 *Advocates’ Q.* 72 [McCamus, “Duty of Good Faith”] at 97 (describing his method as “stitching together the existing rules of the common law which appear to implement the good faith duty”).

55. *Ibid.*

56. *Ibid.*

57. *Ibid.* at 101.

58. See *Ceapro Inc. v. Saskatchewan*, 2008 SKQB 237, 45 BLR (4th) 35 at paras. 209–10, Popescul J.

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In the committee's view, this definition captures the main characteristics of the duty and promotes clarity and certainty. Prof. McCamus helpfully cites the leading cases that support and flesh out this duty in his article.⁵⁹

Paragraph (a) incorporates a series of cases⁶⁰ that “establish . . . the proposition that where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred.”⁶¹

Paragraph (b) is analogous to contractual terms obliging parties to use their best efforts to attain some object. As Prof. McCamus notes, certain cases⁶² have found this to be an instance of an implied duty of good faith: “[w]here, for example, performance of the contract is subject to a condition precedent, the fulfilment of which requires the cooperation of one of the parties, an undertaking to provide such cooperation will be readily implied.”⁶³

Paragraph (c) integrates into the definition cases⁶⁴ in which contracting parties “have attempted to evade contractual duties by engaging in conduct that they considered was not strictly precluded by the letter of the terms of their agreement.”⁶⁵ As Prof. McCamus notes, “[t]he underlying idea is a not unfamiliar one in the law of contractual interpretation—one cannot do indirectly what one has covenanted not to do directly.”⁶⁶ Paragraph (c) conveys this idea, in part, by using the word *strategic*. The committee decided that it was important to retain this word in paragraph (c), because without it the provision would appear only to be directed at a breach of a contract term. But the committee did observe that the word is often used to refer to long-term planning. Its use in this definition

59. See McCamus, “Duty of Good Faith,” *supra* note 54 at 77–90.

60. See, e.g., *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.* (1994) 19 Alta. LR (3d) 38, 13 BLR (2d) 310 (CA) [Mesa cited to BLR], *leave to appeal to SCC refused* (1994), 21 Alta. LR (3d) xxxvii (SCC); *LeMesurier v. Andrus* (1986), 54 OR (2d) 1, 25 DLR (4th) 424 (CA), *leave to appeal to SCC dismissed*, [1986] 2 SCR v; *Greenberg v. Meffert* (1985), 50 OR (2d) 755, 18 DLR (4th) 548 (CA), *leave to appeal to SCC dismissed*, [1985] 2 SCR ix.

61. McCamus, “Duty of Good Faith,” *supra* note 54 at 83.

62. See, e.g., *Gateway Realty*, *supra* note 20; *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [1994] 5 WWR 719, 89 BCLR (2d) 356 (SC).

63. McCamus, “Duty of Good Faith,” *supra* note 54 at 79.

64. See, e.g., *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 1 OTC 322, 27 BLR (2d) 251 (Gen. Div.); *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.* (1994), 12 BLR (2d) 209, 55 CPR (3d) 360 (Ont. Gen. Div.).

65. McCamus, “Duty of Good Faith,” *supra* note 54 at 83.

66. *Ibid.* at 84.

is not intended to draw a distinction between long-term and short-term behaviour. Although there is not a ready synonym to draw on that would convey the concept underlying paragraph (c) and also avoid any potentially distracting connotations, legislative counsel may wish to explore using another word in place of *strategic*.

No variation or waiver

- 2 Except to the extent that a variation or waiver is expressly permitted by this Act, no person may vary or waive the provisions of this Act and any contract term that purports to do so is void.

Comment: Much of the *Contract Fairness Act* is made up of provisions that guard against exploitation. It would be counterintuitive and counterproductive if those provisions could be avoided simply by contracting parties' agreement to modify or exclude them. A liberal approach to this issue would invite abuse by stronger contracting parties, who could use their superior bargaining position to impose a variation or waiver of the provisions of the draft legislation. This section does allow for a variation if the *Contract Fairness Act* expressly permits it. This exception is relevant for section 11, which affirms the power of contracting parties to define the standards of performance of their good-faith duties.

This section is based on a similar section found in the *Business Practices and Consumer Protection Act*.⁶⁷

Application of this Act

- 3 If there is a conflict between a provision of this Act and a provision of any other enactment, the provision of the other enactment prevails.

Comment: British Columbia has a large number of acts that touch on specific aspects of the subjects covered by the *Contract Fairness Act*. For example, the *Business Practices and Consumer Protection Act* contains provisions relating to deceptive acts and practices and unconscionable acts and practices in consumer transactions.⁶⁸ The *Family Relations Act* grants the courts the jurisdiction to review marriage agreements for their fairness in dividing family property.⁶⁹ The *Legal Profession Act* authorizes a registrar of the British Columbia Supreme Court to examine an agreement between a lawyer and a client for its fairness and reasonableness.⁷⁰ And the *Securities Act* contains extensive provi-

67. SBC 2004, c. 2, s. 3.

68. *Ibid.*, ss. 4–10.

69. RSBC 1996, c. 128, s. 65.

70. SBC 1998, c. 9, s. 68.

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sions on initial and continuous disclosure of information and a provision on liability for misrepresentation.⁷¹

The existence of these other statutes sets up the possibility that the *Contract Fairness Act* may come into conflict with one or more of them. This is a perennial issue for new legislation, so statutes typically contain a rule on their relation to other enactments, as this section does. There are essentially two ways to formulate such a rule for a statute like the *Contract Fairness Act*, which is largely made up of provisions that address the general law, rather than specific issues or persons. The first way would be to subordinate the provisions of the *Contract Fairness Act* to those of other enactments. This approach would mirror the traditional approach taken by the courts when they are faced with a conflict between two enactments, one containing (like the *Contract Fairness Act*) general provisions and the other made up of specific rules, and no express rule in them for managing a conflict.⁷² The second way would be to provide that the general standards found in the *Contract Fairness Act* prevail over other enactments, including those that regulate specific legal issues.

The committee gave this issue extensive consideration, even delving into approaches that would achieve a compromise between the two approaches mentioned in the preceding paragraph. In the end, the committee was reluctant to endorse an untested approach, and decided that the best way to resolve this issue would be to apply the traditional rule.

Other legal doctrines preserved

- 4 Nothing in this Act limits or affects the law relating to torts, unjust enrichment or breach of fiduciary duty.

Comment: Some of the subjects addressed in the draft legislation have some overlap with other bodies of law. For example, misrepresentation (which is the subject of part 4) has both a contract-law component and a tort-law component. This section is meant to ensure that the provisions of the *Contract Fairness Act* only apply to contract law. This decision flows from the fundamental orientation of the Unfair Contracts Relief Project as a project focussed on contract law. Since other bodies of law were not considered in the project, it is important to emphasize that the draft legislation is not intended to affect anything in those other areas of the law.

71. RSBC 1996, c. 418, ss. 61–72 (prospectus), 85–91 (continuous disclosure), 132.1 (liability for misrepresentation).

72. See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at 358–62.

This section refers to the major categories that, along with contract law, comprise the law of obligations.⁷³ Its use of the expression *unjust enrichment* to describe one of these categories calls for some further comment. There is a scholarly dispute over the name of this category. Some scholars prefer the name *restitution*; others favor *unjust enrichment*.⁷⁴ This dispute has not carried over into the broader community. In practice, it appears that most lawyers “use the terms interchangeably.”⁷⁵ But this is a luxury that cannot be afforded to statutory drafting. A statute must use its terms consistently. So, for the purposes of this section, *unjust enrichment* was preferred for reasons touched on in the forthcoming *Restatement (Third) of Restitution and Unjust Enrichment*, which adopted *unjust enrichment* in its title to “[emphasize] that the subject matter encompasses an independent and coherent body of law, the law of unjust enrichment, and not simply the remedy of restitution.”⁷⁶ When the *Contract Fairness Act* refers to remedies (*see*, below, section 9) as opposed to the general body of law, it uses the word *restitution*.

PART 2 – UNFAIRNESS

Introductory comment: Part 2 is concerned with the contract-law concepts of unconscionability, duress, and undue influence. The details of the specific reforms to each of these three concepts are discussed in the comments after each provision in this part. This introductory comment is concerned with the general design of this part.

Part 2 implements the committee’s recommendation to integrate unconscionability, duress, and undue influence. It is based largely on a model proposed by the New Zealand Law Commission.⁷⁷ This model combines the three concepts into a single statutory provision with each concept clearly making up its component parts. By using this approach, the *Contract Fairness Act* is able to achieve a measure of integration of the three concepts without sacrificing all of the links to the existing jurisprudence on unconscionability, duress, and undue influence. The important qualities of this jurisprudence can be preserved by retaining the specific tests for the three concepts as elements of the general test of unfairness. The model then integrates these concepts at the level of remedies and

73. See Stephen M. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003) at vi. There is some dispute over whether the law of fiduciary duty should be treated as a separate category or as a part of the law of unjust enrichment (*ibid.* at 11). For the sake of drafting clarity, this section treats fiduciary duty as a separate category.

74. See Peter Birks, *Unjust Enrichment*, 2d ed. (Oxford: Oxford University Press, 2005) at 277–81 (discussing the history of the name of this category and arguing for the use of *unjust enrichment*).

75. Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, looseleaf (consulted on 15 June 2011), vol. 1 (Aurora, ON: Canada Law Book, 2004) at § 3:200, n. 18.

76. Quoted in *ibid.* at § 1:400, n. 61.

77. See *supra* note 49.

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certain evidentiary matters, such as the degree of knowledge of a weaker party's material disadvantage that a stronger party must possess.

In the committee's view, this approach allows for some consolidation and simplification of the current law, but retains a desirable level of consistency with established concepts. An integrated provision also should make the law more accessible and easier to navigate.

General test of unfairness

- 5 (1) A contract is unfair if it is both procedurally unfair under section 6 and substantively unfair under section 7.
- (2) The question whether a contract is unfair must be decided in light of the circumstances known by the parties at the time the contract was made.
- (3) For the purposes of this Part, a party knows a fact if the party has actual knowledge of it or is reckless or willfully blind as to its existence.

Comment: Subsection (1) establishes the general test of unfairness, which is made up of both procedural and substantive components. The content of these components is fleshed out in the two sections that follow, but it is worthwhile to spend a moment here considering the terminology used in this section.

The section's key terms derive from early academic commentary on section 2-302 of the American Uniform Commercial Code, which restated the concept of unconscionability for the purposes of American commercial law. Of particular importance was a law-review article by Prof. Arthur Allen Leff,⁷⁸ which distinguished between procedural unconscionability (briefly described as "bargaining naughtiness") and substantive unconscionability ("evils in the resulting contract").⁷⁹ This terminology has become a fixture of academic writing on unconscionability,⁸⁰ and it has figured in previous law-reform studies on the topic.⁸¹ This distinction has also been adopted in Commonwealth jurisprudence in the Privy Council's decision in *Hart v. O'Connor*, using slightly different terminology:

78. "Unconscionability and the Code—The Emperor's New Clause" (1967) 115 U. Pa. L. Rev. 485.

79. *Ibid.* at 487.

80. See, e.g., M. P. Ellinghaus, "In Defense of Unconscionability" (1969) 78 Yale LJ 757; Anthony J. Duggan, "Stolen Goods, A Cruise Disaster and a Right of Way Gone Wrong: Three Unconscionable Contracts from a Law and Economics Perspective" (2004) 40 Can. Bus. LJ 3; McCamus, *Law of Contracts*, *supra* note 14 at 406.

81. See *Report on Amendment of the Law of Contract*, *supra* note 35 at 128 ("Procedural unconscionability would appear to refer to unconscionability in the process of making the contract. Substantive unconscionability would seem to refer to an unacceptable one-sidedness in the terms of the contract.").

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If a contract is stigmatised as “unfair,” it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this “procedural unfairness.” It may also, in some contexts, be described (accurately or inaccurately) as “unfair” by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this “unfairness” from procedural unfairness, it will be convenient to call it “contractual imbalance.”⁸²

The general test of unfairness extends this idea from unconscionability to cover unconscionability, duress, and undue influence. In order for a contract to be unfair under this part of the *Contract Fairness Act*, there must be both procedural and substantive unfairness. This approach does amount to taking positions on some live disputes in the jurisprudence on the three concepts. These positions are explained below.

Subsection (2) addresses a concern that occasionally crops up in connection with court review of contracts for their fairness. Some critics suggest that what the court is really doing in these cases is second guessing the contracting parties by using information that only comes to light after the contract has been formed. This section addresses that concern by clearly stating that the court’s review should only extend to circumstances that were known by the parties at the time the contract was formed. This rule is in accord with leading British Columbia court decisions⁸³ and with legislation in other jurisdictions.⁸⁴

Subsection (3) describes what *knowledge* means for the purposes of this part of the statute. It is especially relevant for section 6, below. The closing paragraph to that section holds that, in order for a contract to be found unfair under this part, the stronger party must know that the weaker party was materially disadvantaged at the time of the contract. This rule, which is intended to resolve an issue that is rather unclear in Canadian jurisprudence, is explained in more detail in the commentary to the closing paragraph of section 6.

Subsection (3) takes a position on another live issue that has not received much consideration in the jurisprudence. The issue is whether there should be an objective component to knowledge for the purposes of this part. In its proposed “unfair contracts scheme,” the New Zealand Law Commission favoured the inclusion of such an objective component. The operative language was built into the scheme’s general test of unfairness, which concluded with a requirement that the “other party knows or ought to know of the facts constituting [the weaker party’s] disadvantage, or of facts from which that

82. [1985] UKPC 1, [1985] 1 AC 1000 at 1017–18, Lord Brightman [*Hart* cited to AC].

83. See, e.g., *Cogle v. Maricevic* (1983), [1992] 3 WWR 475, 64 BCLR 105 (CA); *Gindis v. Brisbane*, 2000 BCCA 73, 72 BCLR (3d) 19.

84. See UCC § 2-302 (1); *Contracts Review Act 1980*, supra note 26, s. 9 (1).

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disadvantage can reasonably be inferred.”⁸⁵ The key references in this passage are to facts that a stronger party “ought to know” and to facts from which a weaker party’s disadvantage “can reasonably be inferred.” These words indicate that the standard is not just what a contracting party knew; it also includes what a reasonable person should know in the circumstances.

The advantage of this objective approach is that it allows the courts to draw on generally held notions of what a generic reasonable person would do in particular circumstances. In this way, a weaker party seeking relief is able to avoid the challenging task of showing what a stronger party actually knew and the court is spared having to make this difficult inquiry into a contracting party’s state of mind. The downside to this approach is that it moves the concept of contractual unfairness away from its foundation in exploitation of weakness and toward being a more open-ended, normative idea. Under this approach, a contract may be unfair if the stronger party fails to meet an objective standard of behaviour. A side effect of including an objective component to the description of *knowledge* is that it could also lead stronger contracting parties to act as if they were under a duty to make inquiries, to show at some later date that they had performed the due diligence required of a reasonable person to determine whether or not the other contracting party was under a material disadvantage. This would introduce uncertainty and additional costs to transactions. On balance, the committee decided not to follow the New Zealand Law Commission, and to clearly state that knowledge for the purposes of this party only consists of the subjective components of actual knowledge, recklessness, or willful blindness.⁸⁶

Procedural unfairness

- 6 A contract is procedurally unfair if a party to that contract is materially disadvantaged in relation to another party to the contract because the first party
 - (a) is 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,

Comment: This is the first of two paragraphs devoted to unconscionability. Paragraph (a) corresponds to the main line of unconscionability jurisprudence in British Co-

85. *Supra* note 49 at 33.

86. *See Economides v. Commercial Union Assurance Co. PLC*, [1997] EWCA Civ. 1754, [1998] QB 587 at 601–02, Brown LJ (“[Willful blindness], sometimes called Nelsonian blindness—the deliberate putting of the telescope to the blind eye—is equivalent to knowledge, a very different thing from imputing knowledge of a fact to someone who is in truth ignorant of it.”).

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lumbia, as it has been understood since the decision in *Morrison v. Coast Finance Ltd.*⁸⁷ Davey JA's judgment in *Morrison* spelled out a step-by-step approach to unconscionability. One of the steps involved demonstrating an "inequality in the positions of the parties arising out of the ignorance, need or distress of the weaker."⁸⁸ This step is preserved in this paragraph, which correlates material disadvantage to the conditions noted in the paragraph. These conditions are somewhat wider in scope than "ignorance, need, or distress." The language of the paragraph reflects developments in British Columbia's unconscionability jurisprudence since *Morrison*.⁸⁹

Note that although material disadvantage (as described under this paragraph or any of the following paragraphs) must be present if a plaintiff is to obtain a remedy under this part of the *Contract Fairness Act*, it is not a sufficient cause for a remedy. The stronger party must also know of the weaker party's material disadvantage, or recklessly or with willful blindness disregard the facts that establish that material disadvantage. See, above, section 5 and, below, section 6, closing paragraph. And the resulting contract must be substantially unfair. See, below, section 7.

(b) is in need of the benefits for which that party has contracted to such a degree as to have no real choice whether or not to enter into the contract,

Comment: Paragraph (a) was concerned with personal characteristics that may constitute a material disadvantage. Paragraph (b) describes when a material disadvantage may come about due to economic circumstances—or what Davey JA in *Morrison* simply referred to as "need."⁹⁰ This paragraph goes beyond that one-word criterion to describe the level of need that is actually required to constitute a material disadvantage. This approach should clarify the law and assist the courts in applying a difficult test. Paragraph (b) does set a high standard, but it is not one that cannot be reached.

(c) has been induced to enter into the contract by compulsion of the will, including threats, harassment or illegitimate pressure,

Comment: Paragraph (c) corresponds to the concept of duress. This paragraph departs somewhat from the model proposed by the New Zealand Law Commission.⁹¹ Where the earlier proposal used the words "oppressive means" and "improper pressure," this para-

87. *Supra* note 30

88. *Ibid.* at 713.

89. See, e.g., *Warman v. Adams*, 2004 BCSC 1305, 17 CCLI (4th) 123.

90. *Supra* note 87 at 713.

91. See *supra* note 49 at 33.

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graph uses “compulsion of the will” and “illegitimate pressure.” The words chosen for this paragraph were deliberately selected to mirror key terms in recent duress jurisprudence.

Traditionally, duress has been concerned with violence or threats of violence.⁹² This traditional conception of duress is reflected in the references in paragraph (c) to “threats” and “harassment.” These words are not used in any specialized way in this paragraph. Instead, they are to be understood in their ordinary senses.⁹³ Classic examples of threats and harassment would be acts or statements manifesting an intention to use violence, to inflict damage to property, or to make illegitimate use of the legal system.⁹⁴ These terms are not meant to cover legitimate negotiating tactics.⁹⁵

Since the 1970s, English and Canadian law have also recognized that the misuse of economic power can amount to duress.⁹⁶ The remainder of paragraph (c) addresses this development.

The key term for economic duress is “illegitimate pressure.” It, along with “compulsion of the will,” is taken from Lord Scarman’s leading judgment in *Universe Tankships Inc. of Monrovia v. International Transport Federation (The Universe Sentinel)*.⁹⁷ These stan-

92. See *Barton v. Armstrong*, [1973] UKPC 2, [1976] AC 104; *Byle v. Byle* (1990), 65 DLR (4th) 641, 46 BLR 292 (BCCA).

93. See *The New Oxford Shorter English Dictionary*, *sub verbo* “harass” (“trouble by repeated attacks, now freq., subject to constant molesting or persecution”); *sub verbo* “threat” (“a declaration of an intention to take some hostile action; *esp.* a declaration of an intention to inflict pain, injury, damage, or other punishment in retribution for something done or not done”).

94. See *Restatement (Second) of Contracts* § 176 comm. (1979).

95. See Stephen A. Smith, “Contracting Under Pressure: A Theory of Duress” (1997) 56 Cambridge LJ 343 at 346–50 (distinguishing threats from warnings, requests, and offers).

96. See *Occidental Worldwide Investment Corp. v. Skits A/S Aventi (The Siboen and the Sibotre)*, [1976] Lloyd’s Rep. 293 (Eng. QB); *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* (1978), [1979] QB 705, [1978] 3 All ER 1170 (QB); *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1979), 27 OR (2d) 168, 105 DLR (3d) 684 (CA), *rev’d on other grounds*, [1982] 1 SCR 726, 135 DLR (3d) 1.

97. [1981] UKHL 9, [1983] 1 AC 366 at 400 (“The authorities . . . reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiating of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realization that there is no other practical choice open to him.”).

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dards have been affirmed in subsequent English⁹⁸ and Canadian⁹⁹ cases. Arguably, they now form the main line of the courts' approach to economic duress in both countries.

But the jurisprudence on economic duress is not firmly settled. There have been other contenders to be the standard the courts use to evaluate duress claims. So what this paragraph leaves out is almost as noteworthy as what it includes. It does not include references to the materially disadvantaged party's will being "overborne." This word, which was commonly used in earlier economic-duress cases,¹⁰⁰ has been criticized as setting an impossibly high standard and diverting the courts into a difficult inquiry into a contracting party's state of mind.¹⁰¹ This paragraph also does not follow the recent decision of the New Brunswick Court of Appeal in the *Nav Canada* case and avoid reference to illegitimate pressure altogether.¹⁰²

As was the case for the previous two paragraphs dealing with unconscionability, this paragraph does not set out every element that has to be in place for a successful duress claim. The resulting contract must also be substantively unfair (*see*, below, section 7) and the factors set out in section 8 (2) must also be present.

(d) is legally or in fact dependent upon, or subject to the influence of, the other party or persons connected with the other party in deciding whether to enter into the contract, or

Comment: This paragraph deals with undue influence. Paragraph (d) covers cases in which a contracting party's material disadvantage flows from a relationship of dependence between that party and another party or person connected with that other party.

Undue influence is primarily concerned with the exercise of "improper persuasion" within a relationship that gives a contracting party "a special position to exercise such persua-

98. *See Dimskal Shipping Co. S.A. v. International Transport Workers Federation (The Evia Luck)* (1991), [1992] 2 AC 152, [1991] 4 All ER 871 (UKHL); *CTN Cash and Carry Ltd. v. Gallaher Ltd.*, [1993] EWCA Civ. 19, [1994] 4 All ER 714.

99. *See Gordon v. Roebuck* (1992) 9 OR (3d) 1, 92 DLR (4th) 670 (CA); *Techform Products Ltd. v. Wolda* (2001), 56 OR (3d) 1, 206 DLR (4th) 171 (CA).

100. *See, e.g., Pao On v. Lau Yiu Long*, [1979] UKPC 2, [1980] AC 614 [*Pao On* cited to AC].

101. *See, e.g., Stewart, supra* note 32 at 366 ("the theory suggests that the plea of duress cannot succeed unless [the contracting party advancing it] has been reduced to a state of automatism"); Rick Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 UTLJ 201 at 207 ("Certainly, the rejection of the overborne will theory has been pivotal to the articulation of a sound conceptual rationale for the modern law of duress. . .").

102. *Supra* note 18. *See also Process Automation Inc. v. Norstream Intertec Inc.*, 2010 ONSC 3987, 321 DLR (4th) 724 at para. 73, Harris J. (calling test in *Nav Canada* "compelling," but declining to apply it in the face of contrary authority from the Ontario Court of Appeal).

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sion.”¹⁰³ The courts have always been reluctant to spell out the exact nature and scope of undue influence.¹⁰⁴ This reluctance poses a challenge in drafting a statutory provision that captures the concept. Paragraph (d) focusses on relationships of dependence and susceptibility to influence. This approach follows the leading cases on undue influence.¹⁰⁵

As was the case with paragraphs (a), (b), and (c), it is important to notice that paragraph (d) operates as one part of a larger system. To advance a successful claim, a plaintiff must also show that the defendant knew that the plaintiff was materially disadvantaged (*see, below, the closing paragraph of section 6*) and that the resulting contract was substantially unfair (*see, above, section 5 and, below, section 7*).

Similar to paragraph (c) (duress), paragraph (d) is noteworthy as much for what is left out as for what is included. It does not adopt the complex series of presumptions that mark much of the jurisprudence on undue influence.¹⁰⁶

(e) is for any other reason in the opinion of the court at a material disadvantage

Comment: This paragraph vests the court with a residual discretion to give a remedy in other cases involving material disadvantage but which do not come within any of the preceding paragraphs. This discretion is needed because no one can predict the future. Cases may appear that fall between the cracks of paragraphs (a) to (d) but that any fair-minded observer would agree do constitute instances of unfairness deserving of a remedy. Paragraph (e) ensures that the court will be able to act in such cases.

and that other party knows of the facts constituting that material disadvantage.

Comment: The closing paragraph of this section requires that a contracting party know of the other party’s material disadvantage. This requirement is intended to provide a

103. *Farnsworth on Contracts, supra* note 27, vol. 1 at § 4.20.

104. *See, e.g., Tate v. Williamson* (1866), LR 2 Ch. App. 55 at 61, Lord Chelmsford LC (“the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise”); *Royal Bank of Scotland Plc. v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 AC 773 at para. 7, Lord Nicholls [*Etridge* cited to AC].

105. *See Allcard v. Skinner* (1887), 36 ChD 145 at 181, Lindley LJ (Eng. CA) (“some personal advantage obtained by a donee placed in some close and confidential relation to the donor”); *Etridge, supra* note 104 at para. 8 (“a relationship between two persons where one has acquired a measure of influence, or ascendancy”); *Geffen v. Goodman Estate*, [1991] 2 SCR 353 at 37–71, 81 DLR (4th) 211, Wilson J. [*Geffen* cited to SCR].

106. *See, e.g., Allcard v. Skinner, supra* note 105; *Etridge, supra* note 104; *Geffen, supra* note 105.

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clear resolution to an issue that has been shrouded in ambiguity.¹⁰⁷ There is some case authority for the proposition that knowledge is not a necessary element of unconscionability,¹⁰⁸ but there are also recent cases that support the opposing proposition.¹⁰⁹ The *Contract Fairness Act* comes down on the side of requiring knowledge. In the committee's view, it would strain the idea of contractual unfairness if it were expanded to cover cases in which a stronger party is not aware that it is exploiting a weaker party's disadvantage. Knowledge is described in section 5 (3), above, as actual knowledge, recklessness, or willful blindness.

Substantive unfairness

- 7 A contract is substantively unfair if in the context of the contract as a whole
- (a) it results in a substantially unequal exchange of values,
 - (b) the benefits received by a materially disadvantaged party are manifestly inappropriate to his or her circumstances, or
 - (c) the materially disadvantaged party was in a fiduciary relationship with the other party.

Comment: This section makes it clear that, to obtain a remedy under this part, the contract must be both the result of procedural unfairness and must also be substantively unfair.¹¹⁰ It is based on a proposal made by the New Zealand Law Commission.

There has never been much doubt that unconscionability and duress have a substantive component, but there has been considerable debate over whether substantive unfairness is a necessary part of undue influence.¹¹¹ The section resolves that debate in favour of

107. See *McCamus, Law of Contracts, supra* note 14 at 411 (“An important issue that has not received much discussion in the Canadian authorities is whether, for the doctrine [of unconscionability] to apply, the stronger party must be aware of the vulnerability of the other party.”).

108. See *Marshall v. Canada Permanent Trust Co.* (1968), 69 DLR (2d) 260 at 263 (Alta. SC (TD)), Kirby J. (“it is not material whether Marshall was aware of Walsh’s incapacity”). See also *McCamus, Law of Contracts, supra* note 14 at 411–12 (discussing *Marshall v. Canada Permanent Trust Co.*).

109. See *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, 284 DLR (4th) 734 at paras. 38, 51–52; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 263 DLR (4th) 368 at paras. 32, 72–73, Coté JA (listing among “elements which appear to be necessary for unconscionability . . . other party’s knowingly taking advantage of [the weaker party’s] vulnerability”).

110. See *Hart, supra* note 82 at 1017–18, Lord Brightman. See also *Leff, supra* note 78.

111. See *National Westminster Bank PLC v. Morgan*, [1985] UKHL 2, [1985] 1 AC 686 at 704, Lord Scarman; *C.I.B.C. Mortgages Plc. v. Pitt*, [1993] UKHL 7, [1994] 1 AC 200 at 209–09, Lord Browne-Wilkinson.

requiring substantive unfairness. This result brings undue influence into line with unconscionability and duress.

The section goes on to define what substantive unfairness means in this act. Paragraph (a) captures the everyday understanding of substantive unfairness in contracting. Paragraph (b) is intended to expand the concept somewhat, by bringing within its scope what the New Zealand Law Commission called “the more difficult case of a contract which may appear objectively to provide a reasonable exchange but which, given all the circumstances of one party as known to another, does not.”¹¹² Paragraph (c) operates “[b]y way of exception.”¹¹³ It “is intended to reflect the present law whereby in a fiduciary relationship it is not necessary to show that there was a disparity of result.”¹¹⁴

Court to consider circumstances of contract

- 8
- (1) In determining whether a contract is unfair under section 5, the court may consider all the surrounding circumstances of the contract.
 - (2) In relation to a contract that may be procedurally unfair under section 6 (a), (b), (d), or (e), the court must consider whether the disadvantaged party received appropriate legal or other professional advice.
 - (3) In relation to a contract that may be procedurally unfair under section 6 (c), the court must consider whether
 - (a) at the time the materially disadvantaged party was subject to compulsion of the will, he or she protested,
 - (b) at the time the materially disadvantaged party was subject to compulsion of the will, he or she had a practical alternative course open to pursue, and
 - (c) after the materially disadvantaged party entered into the contract, he or she took steps to avoid it.

Comment: Subsection (1) confirms that the court is able to consider all the surrounding circumstances of the contract in coming to its decision on whether the contract is unfair. This is an important point to make. Indeed, it confirms one of the fundamental principles of contractual interpretation. A textbook describes this principle in the following terms:

112. *Supra* note 49 at 36.

113. *Ibid.* at 37.

114. *Ibid.*

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Contractual interpretation is all about giving meaning to words in their proper context, including the surrounding circumstances in which a contract has arisen—usually referred to as the “factual matrix.” Because language always draws meaning from context, the factual matrix constitutes an essential element of contractual interpretation in all cases, even when there is no ambiguity in the language.¹¹⁵

It is common to find provisions similar to subsection (1) in other jurisdictions’ legislation dealing with contractual unfairness.¹¹⁶

Subsection (1) should be read in conjunction with the timing and knowledge rules set out, above, in section 5 (2) and (3). In reviewing all the surrounding circumstances of a contract a court would be limited by those rules to circumstances known by the parties at the time the contract was made. Knowledge, for the purposes of this part of the *Contract Fairness Act*, means actual knowledge, reckless, or willful blindness. This means that subsection (1) should not be used to introduce considerations that the contracting parties had no awareness of at the time of the contract, or that arose after the contract was entered into.

As a matter of drafting, the committee considered a number of approaches to making this policy clear. One alternative approach involved beginning subsection (1) with a cross-reference—“subject to section 5.” The committee ultimately did not pursue this approach, but it could be used in legislation implementing the *Contract Fairness Act*.

The purpose of subsection (2) is to “make it clear that the existence of independent advice (normally but not necessarily always legal advice) can be a relevant factor in deciding whether a contract is unfair.”¹¹⁷ In this way, subsection (2) follows the common law, which has long held independent advice to be an important factor in deciding unconscionability¹¹⁸ and undue-influence¹¹⁹ cases. (The committee has decided to take a different approach to the role of independent advice in duress cases; see the commentary to subsection (3), below.) The subsection also follows proposals for reform by the New

115. Geoff R. Hall, *Canadian Contractual Interpretation Law*, 1st ed. (Markham, ON: LexisNexis, 2007) at § 2.3.1.

116. See, e.g., UCC §2-302 (2) (providing that, in cases reviewing a contract or a contract term for unconscionability, “the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect”); *Contracts Review Act 1980*, supra note 26, s. 9 (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. . .”).

117. “Unfair” Contracts: A Discussion Paper, supra note 49 at 35.

118. See, e.g., *Canadian Imperial Bank of Commerce v. Ohlson* (1997), 154 DLR (4th) 33, 57 Alta. LR (3d) 213 (CA); *Bertolo v. Bank of Montreal* (1986), 57 OR (2d) 577, 33 DLR (4th) 610 (CA).

119. See, e.g., *Treadwell v. Martin* (1976), 67 DLR (3d) 493, 13 NBR (2d) 137 (CA); *Inche Noriah v. Shaik Allie Bin Omar*, [1928] UKPC 76, [1929] AC 127.

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Zealand Law Commission¹²⁰ and the Ontario Law Reform Commission.¹²¹ Subsection (2) does not make the presence or absence of independent advice determinative of whether or not a contract is unfair. It only goes so far as to require the court to consider this factor in each case, among the other factors that are to be considered.

Subsection (3) represents a departure from the New Zealand Law Commission's proposed act. It directs the court to consider three factors when dealing with a case involving duress. These factors first appeared in Lord Scarman's judgment in the *Pao On* case.¹²² Since then, they have been adopted in many of the leading Canadian duress cases.¹²³ They have been enshrined in the *Contract Fairness Act* because they will provide some guidance to the court in reviewing duress. The key factor on this list for most cases likely will be the one set out in paragraph (b)—whether or not the contracting party who was undergoing compulsion and pressure had any practical alternative but to submit.

Subsection (3) is also noteworthy for what it leaves out. The *Pao On* case¹²⁴ listed four factors, the fourth being whether the contracting party making the duress claim was independently advised at the time the pressure was exerted. (This independent advice has typically been taken to mean legal advice.) This factor has been subject to criticism in subsequent court decisions.¹²⁵ The gist of this criticism is that this factor adds little to nothing to the analysis of a duress claim. In most duress cases, the legal advice would simply confirm that the contracting party under pressure has no practical alternative but to submit. The committee agreed with this criticism, and decided that consideration of whether the contracting party at the focus of a duress case obtained legal or other advice should not become a factor that must be reviewed in each case. If the presence or absence of such advice is relevant in a given case, then the court would always be free to take this into account in making its decision.

Powers of court

- 9 (1) Upon determining that a contract is unfair under this Part, a court may grant such relief as it thinks just.

120. See *supra* note 49 at 35.

121. See *supra* note 35 at 137.

122. *Supra* note 100.

123. See, e.g., *Stott v. Merit Investment Corp.* (1988), 63 OR (2d) 545, 48 DLR (4th) 288 at 305–06 (CA), Finlayson JA; *Central 1 Credit Union v. John J. Stewart Restoration Services Inc.*, 2010 ONSC 7218, [2010] OJ No. 5840 at para. 30 (QL), Taylor J.

124. *Supra* note 100.

125. See *Nav Canada*, *supra* note 18 at para. 60, Robertson JA.

- (2) Without limiting the power of the court to grant relief, it may do one or more of the following things:
- (a) declare the contract to be valid and enforceable in whole or in part or for any particular purpose;
 - (b) rescind the contract;
 - (c) declare that a term of the contract is of no effect;
 - (d) vary the contract;
 - (e) award restitution or compensation to any party to the contract;
 - (f) vest 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) order that an account be taken, and reopen any account already taken, in respect of any transaction between the parties to the contract.

Comment: This section confirms that the court has broad powers to order a remedy in cases that meet the requirements of this part of the *Contract Fairness Act*. Subsection (1) makes it clear that the court has the power to order any remedy it thinks just in these circumstances. Subsection (2) is intended to underscore this point by listing examples of remedies that may be ordered in cases involving an unfair contract.

PART 3 – GOOD FAITH

Duty of good faith

- 10** Every contract imposes upon each party a duty of good faith in its performance.

Comment: This section implements the committee’s recommendation to give express legislative recognition to the duty of good faith in the performance of contracts. As the law now stands in British Columbia (and in common-law Canada generally), the duty of good faith applies to some contracts but not to others. Determining whether it applies to a specific contract turns on the application of the tests established for implying a term into a contract.¹²⁶ For certain types of contracts, a duty of good faith performance is al-

126. See, e.g., Shannon Kathleen O’Byrne, “The Implied Term of Good Faith and Fair Dealing: Recent Developments” (2007) 86 Can. Bar Rev. 193 [O’Byrne, “Implied Term of Good Faith”].

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ways implied in law.¹²⁷ But in some circumstances, the courts will imply in fact a duty of good faith performance in a given contract.¹²⁸

This section does away with the need to perform the complex analytical tasks required under the current law to determine whether a contract is subject to the duty of good faith performance. This brings the law of British Columbia into line with that of the United States,¹²⁹ Québec,¹³⁰ and continental Europe.¹³¹ What distinguishes the *Contract Fairness Act* from the law in those other jurisdictions is that this act contains a legislative definition of *good faith*.¹³² This legislative definition serves to focus the duty of good faith performance primarily on contracts that create an ongoing relationship between the parties or that grant one party a discretionary power.

Another significant aspect of this section is what it does not include. The duty of good faith set out here only relates to the performance of contracts. It does not extend to contract negotiation or to contract enforcement. Although these aspects of the duty of good faith have been recognized in some other jurisdictions, they do not have the level of support in common-law Canadian jurisprudence that the duty of good faith performance enjoys. Further, in the committee's view, the underlying policy rationales for extending the duty of good faith into these areas do not amount to a compelling argument at this time for legislative reform.

The wording of this section is based on an equivalent section in the American *Restatement*.¹³³

127. See, e.g., *Wallace*, *supra* note 52 (employment contract—only in the course of dismissing employees); *Shelanu v. Print Three Franchising Corp.* (2003), 64 OR (3d) 533, 226 DLR (4th) 577 (CA) (franchise contract); *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 SCR 3 (insurance contract).

128. See, e.g., *CivicLife.com Inc. v. Canada (AG)* (2006), 215 OAC 43, 149 ACWS (3d) 417 (CA); *Mesa*, *supra* note 60.

129. See *Restatement (Second) of Contracts* § 205 (1979) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”). See also UCC § 1-304 (2001) (“Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.”).

130. See art. 1375 CCQ (“The parties [to a contract] shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.”).

131. See *Principles of European Contract Law 2002*, art. 1:201.

132. See, above, section 1.

133. See *Restatement (Second) of Contracts* § 205 (1979).

Standards of performance

- 11** Parties to a contract may not modify or exclude the duty to perform a contract in good faith, but they may, by agreement, determine the standards by which performance of their good faith duty is to be measured, if such standards are not manifestly unreasonable.

Comment: This section addresses when contracting parties may modify the duty of good faith performance. The current law in British Columbia is uncertain on this point. The majority view is that contracting parties are free to modify the duty of good faith or even exclude it entirely (unless an enactment expressly prevents this for a specific type of contract).¹³⁴ Some academics dispute this view, suggesting that the courts can always find a way to ensure that the duty of good faith survives any contractual language intended to oust it.¹³⁵ This section establishes a clear rule for British Columbia law. The rule set out in this section departs from the majority view of the current law, which appears to take a liberal approach to modifying or excluding the duty of good faith performance. In the committee's view, establishing a liberal rule would run the risk of undercutting the duty of good faith performance. Stronger contracting parties could rely on such a rule and insist on contractual provisions designed to exclude or modify the duty. In this way, this section is similar to the approach taken earlier in the *Contract Fairness Act* to the general test of unfairness and the approach that is taken later in connection with misrepresentation.

But this section does differ from those other provisions in an important way. It does allow contracting parties the flexibility to define the standards by which the performance of their good-faith duty is to be measured. This somewhat different treatment of the issue reflects the fact that good faith differs from the other concepts addressed in the *Contract Fairness Act*. The duty of good faith operates as an implied term of the contract. So it makes sense to allow parties to supplement it with other contractual terms, so long as they are reasonable. This approach strikes a balance between protecting weak contracting parties and allowing equally matched, sophisticated parties to structure and refine the terms of their contractual relationship.

134. See O'Byrne, "Implied Term of Good Faith," *supra* note 126 at 237 ("The general default rule is that parties can contract out of good faith, regardless of the contract at issue.").

135. See David Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999) 62 Sask. L. Rev. 201 at 221 ("[A] general duty of good faith would serve the reliance approach brilliantly. It allows a result to be quickly reached for those who are not too concerned with how they got there. Under this rule, a court can ignore express terms, unilaterally amend the contract price, and do just about anything it deems fair and just.").

Section 11 is based on an American precedent,¹³⁶ which has also been endorsed by the Ontario Law Reform Commission.¹³⁷

PART 4 – MISREPRESENTATION

Introductory comment: Part 4 implements the committee’s reforms to misrepresentation in the law of contracts. At common law, “[a] misrepresentation is a misstatement of some fact which is material to the making or inducement of a contract.”¹³⁸ It is also worth noting that “[m]isrepresentations do not necessarily qualify as terms of a contract.”¹³⁹ In many cases they do not end up being terms of the contract, and this fact can have an impact on the remedies available in cases involving misrepresentations (and it can bring some complexity into the resolution of those cases, too).

Part 4 is not intended to be a complete code of the law of misrepresentation. Instead, it contains a series of discrete reforms. These reforms relate to three distinct areas. First, the scope of the concept of misrepresentation is enlarged to encompass misstatements of law. This reform is implemented by section 12. Second, section 13 restates the current law on when non-disclosure amounts to misrepresentation. Third, sections 14 to 16 enhance the remedial flexibility available to the court in misrepresentation cases.

A little background is necessary in order to grasp the rationale for the third set of reforms. It is particularly important to appreciate that, although a representor’s state of mind is not relevant to determining whether a representation is actually a misrepresentation,¹⁴⁰ it is relevant for determining the remedy that a representee who enters into a contract on the basis of a misrepresentation will be entitled to. The courts have the greatest remedial flexibility when they are dealing with a fraudulent misrepresentation. They are comparatively constrained when dealing with cases of negligent or innocent misrepresentation. The overarching goal of sections 14 to 16 is to place all of these cases on the same remedial footing.

This goal is relatively easy to state, but it has proved difficult to capture in statutory language. The first attempt to do so was the United Kingdom’s *Misrepresentation Act 1967*. But the framing of this act has been harshly criticized. Two of the United Kingdom’s leading contract-law scholars described its language as “quite extraordinarily tortuous and

136. See UCC § 1-302 (b) (2001).

137. See *supra* note 35 at 173.

138. G. H. L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 285 [footnote omitted].

139. *Ibid.*

140. See Michael Furmston, ed., *Cheshire, Fifoot & Furmston’s Law of Contract*, 15th ed. (Oxford: Oxford University Press, 2007) at 330.

obscure.”¹⁴¹ So, even though the *Misrepresentation Act 1967* inspired sections 14 to 16, it does not serve as the model for the language used in those sections. Instead, those sections are primarily based on provisions from an Australian statute.¹⁴² This legislation is somewhat more modern in its language, and, although it is still far from simple and direct, should nevertheless be clearer and more accessible to contemporary readers.

False representation of law

- 12** For all purposes of contract law, misrepresentation includes a false representation of law.

Comment: This section is intended to extend the common-law understanding of misrepresentation. At present, only misstatements of past or present facts can be considered misrepresentations. This excludes a whole host of other types of communications, such as opinions and sales talk. While the committee is not proposing to open up misrepresentation to the degree that it would embrace these communications, it has concluded that it is time to expand the boundaries of the concept to include misstatements of law.

The rationale for excluding misstatements of law from misrepresentation has always been somewhat murky. Some commentators have said that statements of law are essentially opinions,¹⁴³ which cannot be actionable misrepresentations because they are not falsifiable; others have said that their exclusion rests on the proposition that everyone should be taken to know the law.¹⁴⁴ These rationales rest, at least to some extent, on a distinction between fact and law that can be difficult to apply and that has been breaking down in other areas. There have been a number of law-reform proposals over the years to bring misstatements of law within the scope of misrepresentation.¹⁴⁵ Following this trend should make the law in British Columbia clearer and more coherent.

Non-disclosure as misrepresentation

- 13** In the following cases, non-disclosure by a person (the “**first person**”) of a material fact known to him or her before or at the time the first person

141. P. S. Atiyah & G. H. Treitel, “Misrepresentation Act 1967” (1967) 30 Mod. L. Rev. 869 at 869.

142. See *Civil Law (Wrongs) Act 2002* (ACT), ss. 172–79 (formerly *Law Reform (Misrepresentation) Act 1977* (ACT) (repealed)).

143. See Manitoba Law Reform Commission, *Report on Pre-contractual Misstatements* (Rep. No. 82) (Winnipeg: The Commission, 1994) at 5.

144. See McCamus, *Law of Contracts*, *supra* note 14 at 329 (also citing example of case involving “a vendor of a land warrant who misrepresented the legal effect of the document because he was unaware of a recent legislative change”).

145. See *Report on Amendment of the Law of Contract*, *supra* note 35 at 242; *Report on Pre-contractual Misstatements*, *supra* note 143 at 60.

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makes a contract with another person (the “**second person**”) is deemed to be a misrepresentation that the material fact does not exist:

- (a) if the first person knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation;
- (b) if the first person carries out acts intended to prevent the second person from learning a fact;
- (c) if the first person discloses the fact, or part of the fact, knowing that this disclosure creates a false impression of the fact to the second person;
- (d) if the first person knows that remaining silent creates a false impression of the fact to the second person;
- (e) if the first person is obliged by a rule of law to disclose all known material facts to the second person;
- (f) if the second person is entitled to know the fact because that person is in fiduciary relationship with the first person.

Comment: Most of the substantive provisions of the *Contract Fairness Act* are intended to change the law. This section has a different goal. Its purpose is to be a restatement of law relating to when non-disclosure of a material fact amounts to misrepresentation. So this section presents a snapshot of the law as it currently exists, rather than a reformed statement of the law. The rationale for this section is to give an obscure area of the law greater profile and to make it more accessible to the public.

Before discussing the details of this section, it is important to note its scope. This section is not concerned with situations in which the parties to a contract have agreed to disclose certain facts to one another. Instead, it is concerned with an area of the law where duties are imposed on persons negotiating to enter into a contract by virtue of their actions during negotiations or the type of contract they are planning to enter into. The leading textbook on this aspect of non-disclosure¹⁴⁶ does a good job of explaining the ground that this section intends to cover:

Such duties of disclosure do not depend on any legal *relationships* which exist at the moment of such negotiation between such persons; for they are not yet necessarily, or even usually, in any legal *relationship* one with the other. Nor are these duties created by the contract into which the parties are about to enter, nor do they form part of such contract, for the contract between the parties has not yet been concluded at the time *when* the duties first come into exist-

146. George Spencer Bower, *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence and Advantage*, 2d ed. by Alexander Kingcome Turner & Richard John Sutton (London: Butterworths, 1990).

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tence. They are duties which arise *in the negotiation of the contract*, and before it is entered into, having their source at common law in the *nature of the contract which is being negotiated*.¹⁴⁷

The consensus among commentators is that there is no general principle that unites all these cases.¹⁴⁸ There has been a movement in American law to recognize such a general principle based on the duty of good faith.¹⁴⁹ This approach has not been pursued in this section for two reasons. First, it would amount to a change in the law, which would undercut the explicit rationale of this section simply to restate (and not reform) the current law. Second, it would veer uncomfortably close to recognizing a duty of good faith in contract negotiation, which was a proposed reform that the committee expressly rejected.

As a consequence of this decision, this section has been structured as a list of the areas in which the common law treats non-disclosure as being a misrepresentation. The section is modelled on a similar provision found in the American *Restatement*,¹⁵⁰ leaving out the *Restatement* provision that implements the expanded role for the duty of good faith in American law.

Paragraph (a) embraces cases of “supervening falsification.”¹⁵¹ These are cases where “changing circumstances affect the truth of an earlier statement.”¹⁵² The classic example of supervening falsification is the English case *With v. O’Flanagan*.¹⁵³ This case involved a contract for the purchase of a medical practice. At the outset of negotiations, both the

147. *Ibid.* at 85 (emphasis in original).

148. See, e.g., Stephen M. Waddams, “Pre-contractual Duties of Disclosure,” in Peter Cane & Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991) 237 [Waddams, “Pre-contractual Duties of Disclosure”] at 237 (“duties of disclosure are in practice imposed by a variety of judicial techniques . . .”). But see Shannon Kathleen O’Byrne, “Culpable Silence: Liability for Non-disclosure in the Contractual Arena” (1998) 30 Can. Bus. LJ 239 at 241 (“It is difficult to extract from the case law a general set of principles establishing when the obligation to speak will arise. However . . . three common factors appear consistently in the cases where just such an obligation is found. They are: (1) a pronounced informational asymmetry between the parties; (2) silence by the party with the greater information which, while falling short of fraud, is profoundly misleading because the existence of undisclosed information is both consequential and unexpected; and (3) a concomitant and express judicial focus on equitable values as the referent against which that lesser party’s conduct is measured.”).

149. See, e.g., E. Allan Farnsworth, “Comments on Professor Waddams’ ‘Precontractual Duties of Disclosure’ ” (1991) 19 Can. Bus. LJ 351

150. See *Restatement (Second) of Contracts* § 161 (1979).

151. See Rick Bigwood, “Pre-contractual Misrepresentation and the Limits of the Principle in *With v. O’Flanagan*” (2005) 64 Cambridge LJ 94.

152. *Ibid.* at 94.

153. [1936] Ch. 575 (Eng. CA).

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doctor and his agent represented to the purchaser that the practice was “doing at the rate of 2000/ a year.”¹⁵⁴ But in the interval between making this representation and the contract being formed, the doctor fell ill, was unable to work full time, and saw the value of the practice decline precipitously.¹⁵⁵ None of these subsequent occurrences were disclosed to the purchaser. On appeal, the court reversed the trial judge and found in favour of the purchaser, ordering rescission of the contract. In finding for the purchaser, Romer LJ stated the following principle:

If A. with a view to inducing B. to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A. be untrue and B. subsequently enters into the contract in ignorance of that change in circumstances and relying upon that representation, A. cannot hold B. to the bargain.¹⁵⁶

The wording of paragraph (a) is based on a provision in the *Restatement*.¹⁵⁷

Paragraph (b) also tracks the language of a provision in the *Restatement*.¹⁵⁸ This paragraph is intended to capture what have been called cases of “active concealment.”¹⁵⁹ A good example of this category of cases is found in a Manitoba case involving the sale of an apartment building.¹⁶⁰ About a year before the sale, a serious crack had opened up in the wall of the building. The building’s owner had carried out some cosmetic repairs that had the effect of hiding the crack from view, but did not represent a long-term solution to the problem.¹⁶¹ The court found that these actions amounted to a misrepresentation of a material fact and ordered rescission of the contract.

154. *Ibid.* at 576.

155. *Ibid.* at 577 (“there was substantially no practice being carried on”).

156. *Ibid.* at 586.

157. *See Restatement (Second) of Contracts* § 161 (a) (1979).

158. *See Restatement (Second) of Contracts* § 160 (1979).

159. *See McCamus, Law of Contracts, supra* note 14 at 332.

160. *Gronau v. Schlamp Investments Ltd.* (1974), 52 DLR (3d) 631 (Man. QB).

161. *Ibid.* at 636–37, Solomon J. (“[D]efendant knew the crack in the east wall of the apartment block was a serious defect that would require the expenditure of large sums of money to repair it permanently. Instead of repairing the defect, defendant decided to conceal it by a temporary patching of the crack with matching bricks. This concealment was so well done that even Mr. Mason, an experienced builder and real estate broker, did not think there was any serious problem underneath the patching he observed on the east wall; he thought it was just an ordinary maintenance job to repair some small hairline cracks. I am satisfied that defendant was not repairing the crack in the east wall when he ordered a patching job to be done with matching bricks because he was told by his own structural engineer that the defect could only be remedied by the construction of extension joints if and when the soil movement was stabilized. The fact that defendant advertised the apartment block for sale just five days after the patching job was com-

Paragraph (c) is aimed at cases involving half-truths. “Half-truths” consist of “partial disclosure of true facts that creates a misleading impression.”¹⁶² As a general principle, disclosure is not required under contract law, but once a person does disclose a fact, “the disclosure must be exact, complete, explicit and unambiguous.”¹⁶³ A recent British Columbia case¹⁶⁴ involving the sale and purchase of land illustrates this point. The defendants in this case filled in a standard-form property disclosure statement, answering the question “are you aware of any encroachments, unregistered easements or unregistered rights of way?” with a “no.”¹⁶⁵ In fact, the property encroached significantly on a civic right of way. The defendants were aware of this fact.¹⁶⁶ After completing the disclosure statement, the defendants orally advised the plaintiffs that “the fence and shrubs in question lay outside of their property line,” but they also claimed that the city had consented to this encroachment.¹⁶⁷ Only after taking possession of the property and conducting a survey did the plaintiffs “[discover] that a substantial portion of what they thought was their back yard was, in fact, the City right of way.”¹⁶⁸ In finding for the plaintiff, the court noted that “[e]ven when the defendants ultimately communicated information concerning encroachments to the plaintiffs, they did so in such a manner as to shroud the full extent of the problem. They disclosed what can only be described as half-truths so as to understandably lead the plaintiffs to believe that any encroachment on City property was not a particularly significant one.”¹⁶⁹

Paragraph (d) deals with a related category of cases. The concept here is that “in some circumstances silence may amount to an assertion that there is nothing of significance to

pleted strengthens my conviction that it was done for the purpose of concealing the problem from prospective purchasers. It was done in the hope that the patching job would last long enough to enable defendant to sell the block and, if the purchaser complained, to plead the rule of *caveat emptor*. It is also apparent that extensive decoration and landscaping was done for the purpose of distracting the attention of prospective purchasers from the serious problem hidden beneath the innocent patching, to make it appear that the patching was done in the course of normal maintenance. The plan worked so well that neither plaintiff nor third party was aware of what was underneath what they thought was the normal repair of hairline cracks, the kind one could observe in any 11-year-old apartment block.”).

162. McCamus, *Law of Contracts*, *supra* note 14 at 332.

163. Spencer Bower, *supra* note 146 at § 2.03.

164. *Doan v. Killins* (1996), 5 RPR (3d) 282, 66 ACWS (3d) 573 (SC), Melnick J. [cited to RPR].

165. *Ibid.* at para. 4.

166. *Ibid.* at para. 7.

167. *Ibid.* at para. 12.

168. *Ibid.* at para. 19.

169. *Ibid.* at para. 25.

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reveal.”¹⁷⁰ This type of case is very rare. This category appears to be based on a principle stated in the nineteenth-century English case *Brownlie v. Campbell*¹⁷¹ by Lord Blackburn:

where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that was fraud also.¹⁷²

Paragraph (e) is aimed at negotiations for what have traditionally been called “contracts of utmost good faith.” The expression “utmost good faith” has been criticized as being “surprisingly inexact,”¹⁷³ so this paragraph avoids those words for that reason and also to ensure that there is no confusion with the duty of good faith in the performance of contracts that is set out in section 10, above. Instead, this section focusses on the existence of a rule of law obligating disclosure. There is a well-known rule of law that certain types of contracts require advance disclosure. The key to this category is the type of contract being negotiated. The type of contract is important not because it contains an express or implied term requiring disclosure (this would take the contract outside the scope of this section), but rather because its nature necessarily means that, in negotiations, one person will be in possession of facts that another person will not be able to discover without the first person’s disclosure. Further, the first person’s disclosure of these facts is necessary to allow the other person to come to a reasonable decision about whether or not to enter into the contract.¹⁷⁴ The classic example of such a contract is a contract of insurance.¹⁷⁵ Other contracts in this category are guarantees, compromises, releases, and family arrangements.¹⁷⁶

170. Waddams, “Pre-contractual Duties of Disclosure,” *supra* note 148 at 240. *See also* John Cartwright, *Misrepresentation* (London: Sweet and Maxwell, 2002) at §§ 11.9–11.11.

171. (1880), 5 App. Cas. 925 (UKHL).

172. *Ibid.* at 950. Note that *Brownlie v. Campbell* is actually not itself an example of such a case, as the court found that this principle had not been violated (*ibid.*).

173. Waddams, “Pre-contractual Duties of Disclosure,” *supra* note 148 at 242–43.

174. *See* Spencer Bower, *supra* note 146 at § 1.05 (“[I]n negotiating for contracts of certain kinds, the one party must necessarily, from the nature of the contemplated transaction, be cognisant of facts of which the other party must be presumed to be unaware, and for the disclosure of which the latter must rely on the good faith of the former, to enable a judgment to be formed as to the expediency of entering into the contract on the terms proposed.”).

175. *See Insurance Act*, RSC 1996, c. 226, ss. 41–43.

176. *See* Cartwright, *supra* note 170 at §§ 11.24–11.32.

Finally, paragraph (f) deals with cases in which the persons are in a fiduciary relationship. A given relationship is a fiduciary relationship if it falls into one of two categories.¹⁷⁷ The first category is made up of relationships that the law always recognizes as fiduciary relationships. Some examples are lawyers and clients, agents and principals, trustees and beneficiaries, directors and corporations, and partners.¹⁷⁸ The second category embraces “*ad hoc* fiduciary relationships [which] must be established on a case-by-case basis.”¹⁷⁹ The Supreme Court of Canada has articulated a general test for assessing whether any given relationship falls into this category of *ad hoc* fiduciary relationships. “[F]or an *ad hoc* fiduciary duty to arise, the claimant must show,”¹⁸⁰ first that the relationship possesses the following “three general characteristics”¹⁸¹ related to the vulnerability of one of the parties:

- (1) the fiduciary has scope for the exercise of some discretion or power,
- (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests, and
- (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹⁸²

And, in addition to these three general characteristics, a claimant must also show the following to establish that the relationship is an *ad hoc* fiduciary relationship:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- (2) a defined person or class of persons vulnerable to a fiduciary’s control (the beneficiary or beneficiaries); and

177. See generally *Guerin v. Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 [*Frame* cited to SCR]; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574, 61 DLR (4th) 14; *Hodgkinson v. Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161 [*Hodgkinson* cited to SCR]; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 SCR 247 [*Galambos* cited to SCR]; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 6 WWR 191 [*Elder Advocates* cited to WWR].

178. See *Elder Advocates*, *ibid.* at para. 33, McLachlin CJ (for the court) (“Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qu[e] trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child.”).

179. *Ibid.*

180. *Ibid.* at para. 36.

181. *Frame*, *supra* note 177 at para. 60, Wilson J. (dissenting).

182. *Ibid.* See also *Galambos*, *supra* note 177 at para. 70, Cromwell J.; *Hodgkinson*, *supra* note 177 at para. 30, La Forest J.

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- (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.¹⁸³

A fiduciary is required by law to act in the best interests of the beneficiary.¹⁸⁴ This means that, in negotiating with a beneficiary for a contract, a fiduciary cannot be guided by his or her self-interest and must disclose all material facts to the beneficiary.

Removal of certain bars to rescission

- 14** (1) This section applies if
- (a) a person enters into a contract after a misrepresentation is made to the person, and
 - (b) the person would be entitled to rescind the contract without claiming fraud if one or more of the following matters (“**former bars**”) did not apply:
 - (i) the misrepresentation has become a term of the contract;
 - (ii) the contract has been performed;
 - (iii) a conveyance, transfer or other document has been registered under any law of British Columbia, Canada, or a province or territory of Canada.
- (2) The person may rescind the contract even though one or more of the former bars apply.

Comment: The purpose of this section is to expand the reach of the remedy of rescission. Rescission has been described as a remedy that “terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.”¹⁸⁵ Rescission is the major remedy for misrepresentation cases. But there are some inherent limits on when the courts may order rescission of a contract. At common law, “rescission may be barred by inability to re-

183. *Elder Advocates*, *supra* note 177 at para. 33.

184. *See, e.g., ibid.* at para. 22 (“Fiduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or *cestui que trust*, in managing the latter’s affairs.”); Finn, *supra* note 36 at 4 (“The ‘fiduciary’ standard for its part enjoins one party to act in the interests of the other—to act selflessly and with undivided loyalty.”).

185. *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 SCR 423 at para. 39, 178 DLR (4th) 1, Iacobucci & Bastarache JJ. (quoting *Abram Steamship Co. v. Westville Shipping Co.*, [1923] AC 773 at 781 (UKHL), Lord Atkinson).

store benefits under the contract, by intervention of third party rights, or by affirmation.”¹⁸⁶ Common-law rescission applies only to cases of fraudulent misrepresentation. Equitable rescission applies more broadly, embracing cases of negligent or innocent misrepresentation as well as fraudulent misrepresentation. But equitable rescission is also subject to more bars to relief. The three bars noted above apply to equitable rescission as well. In addition, rescission in equity may be barred by execution of the agreement,¹⁸⁷ laches,¹⁸⁸ or merger in a subsequent warranty.¹⁸⁹

A court faced with a fraudulent misrepresentation may order rescission at common law. But an innocent or a negligent misrepresentation may only be remedied, under contract law, by equitable rescission. Section 14 removes two of these bars to relief (it leaves laches in place). This will have the effect of bringing the remedial options for the three types of misrepresentation into closer harmony. The two bars are described in paragraph (1) (b), which refers to them as “former bars.”

The first of these bars (*see* subparagraph (i)) is formally called “merger in a subsequent warranty.” The intent of the legislation is to address an anomaly in the current law. Under the current law, a misrepresentation may form the basis of an order for rescission so long as it is not incorporated into the resulting contract. But if the misrepresentation is incorporated into the contract, then a contracting party’s remedy turns on the existing jurisprudence for determining whether the breach of a contract term may excuse the victim of the breach from performing its obligations under the contract. Simply stated, if the term is classified as a *condition*, then this is a possible outcome of the litigation, but if it is classified as a *warranty*, then it is not possible—the party can only obtain damages. Putting it again in very basic terms, this distinction is used as a device to measure the seriousness of a breach of contract. In this way, the drastic result of non-performance can be reserved for only the most serious breaches. But this theory breaks down when the exact same misstatement can lead to two different results, depending on whether or not it is incorporated into the resulting contract. It definitely seems anomalous for a contracting party who had the foresight to obtain another party’s agreement to include the misstatement as a term of the contract to find its remedial options curtailed by this rule.

186. *Report on Amendment of the Law of Contract, supra* note 35 at 237.

187. *See Redican v. Nesbitt* (1923), [1924] SCR 135, [1924] 1 DLR 536; *Kingu v. Walmar Ventures Ltd.* (1986), 10 BCLR (2d) 15 at 21–22, 38 CCLT 51 (CA), McLachlin JA (for the court).

188. *See* McCamus, *Law of Contract, supra* note 14 at 345–46. *Laches* is “[u]nreasonable delay in bringing a claim” (*ibid.* at 345).

189. *See ibid.* at 346 (“In the drafting of commercial agreements, it is not uncommon for the parties to repeat in the agreement itself representations that have been made during the course of the negotiation of the agreement. . . . When the former representation becomes a term of the agreement, the falsity of the representation becomes a breach of contract, entitling the misrepresentee to the normal remedies for breach of contract.” [footnote omitted]).

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Subparagraphs (ii) and (iii) relate to the second of the bars to rescission removed by this section. The current law bars rescission if a contract has been “executed.” This rule grew out of agreements to transfer land or interests in land. So, in the model case, if a misrepresentation gave rise to a contract for the purchase and sale of a piece of land, then rescission would not be available as a remedy once the conveyance of the interest contemplated by that contract is complete (in other words, after title changes hands). Although the rationale for such a rule is weaker for contracts that do not involve the transfer of land, the rule has been extended to other types of contracts.¹⁹⁰ One important problem with this bar is that the courts have not given it consistent application. They have relied on convoluted exceptions to allow for a remedy in certain cases.¹⁹¹ The *Contract Fairness Act* removes the bar and allows the court to directly address the remedial issue. Subparagraph (ii) addresses the former bar in general terms. Subparagraph (iii) addresses a specific matter that is most relevant for land-transfer cases.

Finally, it is important to bear in mind that this section does not remove all the bars to rescission. Rescission will still be unavailable in cases in which the parties cannot restore the benefits gained under the contract, third-party rights would be affected, or the party seeking rescission affirms the contract. The section just places all misrepresentation cases on the same footing when it comes to the availability of rescission.

Right to damages for misrepresentation

- 15** (1) This section applies if a person (the “**first person**”) enters into a contract after a misrepresentation is made to the first person by
- (a) another party to the contract,
 - (b) a person acting for another party to the contract, or
 - (c) a person who receives any direct or indirect material advantage because of the formation of the contract.
- (2) If the first person suffers loss because of entering into the contract, anyone (whether or not that person made the misrepresentation) who would be liable for damages in tort for the loss, if the misrepresentation had been made fraudulently, is liable for damages for the loss.
- (3) It is a defence to an action under subsection (2) that:

190. See *Seddon v. North Eastern Salt Co. Ltd.* (1904), [1905] 1 Ch. 326, 91 LT 793 (Eng. Ch. Div.) (contract for the sale of shares).

191. See G. H. L. Fridman, “Error in Substantialibus: A Canadian Comedy of Errors” (1978) 56 Can. Bar Rev. 603.

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- (a) if the representation was made by the defendant, the defendant had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true;
- (b) if the representation was made by a person acting for the defendant, both the defendant and that person had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true.

Comment: This is the first of two sections designed to enhance the courts' remedial flexibility by allowing the awarding of damages in cases of innocent or negligent misrepresentation. Section 15 extends to contracting parties a right to seek damages in situations in which rescission is only available. Currently, contract law does not offer damages as a remedy to the victim of an innocent or negligent misrepresentation. Damages in tort have been available since the 1960s in cases of negligent misrepresentation.¹⁹² Tort law does not provide a remedy for innocent misrepresentation, which leaves rescission in equity as its sole remedy. This section gives the courts the power to order damages under contract law in both sets of cases. It will be of particular use in cases in which rescission is not available.¹⁹³ In such cases, the aggrieved parties will still be able to seek damages under this section.

The section's three subsections each play distinct roles. Subsection (1) establishes the scope of the section. Note that the section embraces more than just misrepresentations by a contracting party. It also catches misrepresentations by an agent of a contracting party and by anyone who receives a material advantage from the contract being formed.

Subsection (2) is the operative part of the section. It allows for the awarding of damages in cases of negligent or innocent misrepresentation by creating an analogy to cases of fraudulent misrepresentation. The courts have a longstanding power to award damages for fraudulent misrepresentation under the tort of deceit.¹⁹⁴ This section extends that power to innocent and negligent misrepresentation.

Finally, subsection (3) sets out defences to an action under this section. In brief, if there were reasonable grounds for believing that the misrepresentation was actually true, and the person making it did hold this belief at the time, then these points can be relied on as a defence.

192. See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] UKHL 4, [1964] AC 465; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 SCR 165, 146 DLR (4th) 577.

193. This may occur if ordering rescission would interfere with third-party rights, or if the parties to the contract are unable to restore the benefits they received under the contract.

194. See *Derry v. Peek*, [1889] UKHL 1, 14 App. Cas. 337.

Power to award damages instead of rescission for misrepresentation

- 16** (1) This section applies if, in a proceeding arising out of a contract, a person has rescinded, or may rescind, the contract on the ground of misrepresentation.
- (2) The court may declare the contract to be existing and award damages, or award damages instead of ordering rescission, if the court considers that
- (a) the consequences of the declaration are preferable to the consequences of rescission in the circumstances of the case, and
 - (b) it is just and equitable to do so.
- (3) Damages may be awarded against a person under subsection (2) even if the person is not liable for damages under section 15.
- (4) However, a court must also take into account the following:
- (a) in assessing damages under section 15 or this section, any award of damages under section 15 or this section, or damages or compensation under any other law;
 - (b) in assessing damages or compensation under any other law relating to the contract, any award of damages under this Part.

Comment: The previous section dealt with cases in which a party to a contract seeks damages flowing from an innocent or a negligent misrepresentation. This section vests the court with the discretion to order damages in the place of rescission. The rationale for this section is to temper the harshness of the current remedial options open to the court. Rescission is often a drastic remedy. It has the effect of unwinding a contract and restoring its parties to their original positions. Some cases may call for a less dramatic result. This section empowers the court to award damages, if it is the more appropriate remedy for a given case.

The section is made up of four subsections, which are aimed at a variety of topics. Subsection (1) maps out the scope of the section. The section applies to any case in which a contracting party is seeking, or could seek, rescission as a remedy for misrepresentation.

Subsection (2) is the section's heart. It allows the court to award damages if the following two conditions are met: (a) it is preferable to order damages rather than rescission in the circumstances of the case; and (b) it is just and equitable to make that order.

Subsection (3) clarifies that an award of damages may be made under this section even if the person receiving damages would not have been able to make a successful claim for damages under section 15.

Subsection (4) directs the court (a) to take an award of damages under section 15 into account in assessing damages under this section and *vice versa* and (b) to take an award of damages under this section or section 15 into account in assessing damages under any other law relating to the contract.

PART 5 – TRANSITION AND COMMENCEMENT

Transition

- 17** This Act does not apply to any contract entered into before this Act comes into force.

Comment: This section contains the transitional rule for the *Contract Fairness Act*. It provides that the act will only apply to contracts that are made after the act comes into force. In other words, the act will only have prospective effect: it will not be retrospective or retroactive. This type of transitional rule is commonly found in legislation. It is based on the widely held idea that retroactive legislation should be avoided whenever possible, because it detracts from the stability of the law in general and could have adverse consequences for specific people.¹⁹⁵

Commencement

- 18** This Act comes into force by regulation of the Lieutenant Governor in Council.

Comment: Self-explanatory.

195. See, e.g., Côté, *supra* note 72 at 125 (“Retroactive operation must be the exception rather than the rule. The need for predictability in the legal system is incompatible with the application of provisions to events that precede their enactment.”); Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008) at 667 (“At best retroactive law makes it impossible for people to know whether they are complying with the law; at worst it imposes negative consequences on them for attempting to do so.”).

APPENDIX A

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APPENDIX B

Contract Fairness Act Without Commentary

Part 1 – Interpretation and Application

Definitions

1 In this Act:

“**court**” means, in relation to any matter, the court, tribunal or arbitrator by or before which the matter falls to be determined;

“**good faith**” means the duty to

- (a) exercise discretionary powers conferred by a contract reasonably and for their intended purpose,
- (b) cooperate in securing performance of the main objects of the contract, and
- (c) refrain from strategic behaviour designed to evade contractual obligations.

No variation or waiver

2 Except to the extent that a variation or waiver is expressly permitted by this Act, no person may vary or waive the provisions of this Act and any contract term that purports to do so is void.

Application of this Act

3 If there is a conflict between a provision of this Act and a provision of any other enactment, the provision of the other enactment prevails.

Other legal doctrines preserved

4 Nothing in this Act limits or affects the law relating to torts, unjust enrichment or breach of fiduciary duty.

Part 2 – Unfairness

General test of unfairness

- 5 (1) A contract is unfair if it is both procedurally unfair under section 6 and substantively unfair under section 7.
- (2) The question whether a contract is unfair must be decided in light of the circumstances known by the parties at the time the contract was made.
- (3) For the purposes of this Part, a party knows a fact if the party has actual knowledge of it or is reckless or willfully blind as to its existence.

Procedural unfairness

- 6 A contract is procedurally unfair if a party to that contract is materially disadvantaged in relation to another party to the contract because he or she
- (a) is 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) is 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) has been induced to enter into the contract by compulsion of the will, including threats, harassment or illegitimate pressure,
 - (d) is legally or in fact dependent upon, or subject to the influence of, the other party or persons connected with the other party in deciding whether to enter into the contract, or
 - (e) is for any other reason in the opinion of the court at a material disadvantage

and that other party knows of the facts constituting that material disadvantage, or recklessly or with willful blindness disregards those facts.

Substantive unfairness

- 7 A contract is substantively unfair if in the context of the contract as a whole
- (a) it results in a substantially unequal exchange of values,

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- (b) the benefits received by a materially disadvantaged party are manifestly inappropriate to his or her circumstances, or
- (c) the materially disadvantaged party was in a fiduciary relationship with the other party.

Court to consider circumstances of contract

- 8**
- (1) In determining whether a contract is unfair under section 5, the court may consider all the surrounding circumstances of the contract.
 - (2) In relation to a contract that may be procedurally unfair under section 6 (a), (b), (d), or (e), the court must consider whether the disadvantaged party received appropriate legal or other professional advice.
 - (3) In relation to a contract that may be procedurally unfair under section 6 (c), the court must consider whether
 - (a) at the time the materially disadvantaged party was subject to compulsion of the will, he or she protested,
 - (b) at the time the materially disadvantaged party was subject to compulsion of the will, he or she had a practical alternative course open to pursue, and
 - (c) after the materially disadvantaged party entered into the contract, he or she took steps to avoid it.

Powers of court

- 9**
- (1) Upon determining that a contract is unfair under this Part, a court may grant such relief as it thinks just.
 - (2) Without limiting the power of the court to grant relief, it may do one or more of the following things:
 - (a) declare the contract to be valid and enforceable in whole or in part or for any particular purpose;
 - (b) rescind the contract;
 - (c) declare that a term of the contract is of no effect;
 - (d) vary the contract;
 - (e) award restitution or compensation to any party to the contract;

- (f) vest 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) order that an account be taken, and reopen any account already taken, in respect of any transaction between the parties to the contract.

Part 3 – Good Faith

Duty of good faith

- 10 Every contract imposes upon each party a duty of good faith in its performance.

Standards of performance

- 11 Parties to a contract may not modify or exclude the duty to perform a contract in good faith, but they may, by agreement, determine the standards by which performance of their good faith duty is to be measured, if such standards are not manifestly unreasonable.

Part 4 – Misrepresentation

False representation of law

- 12 For all purposes of contract law, misrepresentation includes a false representation of law.

Non-disclosure as misrepresentation

- 13 In the following cases, non-disclosure by a person (the “**first person**”) of a material fact known to him or her before or at the time the first person makes a contract with another person (the “**second person**”) is deemed to be a misrepresentation that the material fact does not exist:
 - (a) if the first person knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation;
 - (b) if the first person carries out acts intended to prevent the second person from learning a fact;
 - (c) if the first person discloses the fact, or part of the fact, knowing that this disclosure creates a false impression of the fact to the second person;

- (d) if the first person knows that remaining silent creates a false impression of the fact to the second person;
- (e) if the first person is obliged by a rule of law to disclose all known material facts to the second person;
- (f) if the second person is entitled to know the fact because that person is in fiduciary relationship with the first person.

Removal of certain bars to rescission

- 14** (1) This section applies if
- (a) a person enters into a contract after a misrepresentation is made to the person, and
 - (b) the person would be entitled to rescind the contract without claiming fraud if one or more of the following matters (“**former bars**”) did not apply:
 - (i) the misrepresentation has become a term of the contract;
 - (ii) the contract has been performed;
 - (iii) a conveyance, transfer or other document has been registered under any law of British Columbia, Canada, or a province or territory of Canada.
- (2) The person may rescind the contract even though one or more of the former bars apply.

Right to damages for misrepresentation

- 15** (1) This section applies if a person (the “**first person**”) enters into a contract after a misrepresentation is made to the first person by
- (a) another party to the contract,
 - (b) a person acting for another party to the contract, or
 - (c) a person who receives any direct or indirect material advantage because of the formation of the contract.
- (2) If the first person suffers loss because of entering into the contract, anyone (whether or not that person made the misrepresentation) who would be liable for damages in tort for the loss, if the misrepresentation had been made fraudulently, is liable for damages for the loss.
- (3) It is a defence to an action under subsection (2) that:

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- (a) if the representation was made by the defendant, the defendant had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true;
- (b) if the representation was made by a person acting for the defendant, both the defendant and that person had reasonable grounds for believing, and did believe up to the time the contract was made, that the representation was true.

Power to award damages instead of rescission for misrepresentation

- 16** (1) This section applies if, in a proceeding arising out of a contract, a person has rescinded, or may rescind, the contract on the ground of misrepresentation.
- (2) The court may declare the contract to be existing and award damages, or award damages instead of ordering rescission, if the court considers that
- (a) the consequences of the declaration are preferable to the consequences of rescission in the circumstances of the case, and
 - (b) it is just and equitable to do so.
- (3) Damages may be awarded against a person under subsection (2) even if the person is not liable for damages under section 15.
- (4) However, a court must also take into account the following:
- (a) in assessing damages under section 15 or this section, any award of damages under section 15 or this section, or damages or compensation under any other law;
 - (b) in assessing damages or compensation under any other law relating to the contract, any award of damages under this Part.

Part 5 – Transition and Commencement

Transition

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Commencement

- 18** This Act comes into force by regulation of the Lieutenant Governor in Council.

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