



# BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia

Vancouver, British Columbia V6T 1Z1

Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)

Website: [www.bcli.org](http://www.bcli.org)

BRITISH COLUMBIA  
LAW INSTITUTE

UNFAIR CONTRACTS RELIEF PROJECT

## Backgrounder

### Report on Proposals for Unfair Contracts Relief

Date: 28 September 2011

#### INTRODUCTION

The *Report on Proposals for Unfair Contracts Relief* 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 the 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*)

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

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

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.

## THE FORMAT OF THE REPORT

The 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 the 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 provi-

sion 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.