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CHAPTER I INTRODUCTION

The general law of contract is almost entirely a creation of the courts. Legislative intervention has been rare. Where legislatures have acted to alter the general law of contract, it has been to implement some overriding policy or, more commonly, to repair some perceived defect in the law developed by the courts.[1]

The British Columbia statutes contain six instances of intervention in relation to the general law of contract. Five of these consist of particular sections of the *Law and Equity Act*[2] and the sixth takes the form of separate statute. These enactments are as follows:

Law and Equity Act Section 31 - Stipulations Not of Essence
Law and Equity Act Section 43 - Rule in *Cumber* v. *Wane* Abrogated
Law and Equity Act Section 54 - Conditions Precedent
Law and Equity Act Section 59 - Enforceability of Contracts
Law and Equity Act Section 62 - Performance Under Protest
Frustrated Contract Act[3]

The last four of these enactments were based on reports made by the Law Reform Commission of British Columbia.[4] Awaiting implementation are three further reports of the Law Reform Commission that touch on the general law of contract. These are the Commission's *Reports on*:

Illegal Transactions[5]
Covenants in Restraint of Trade[6]
Deeds and Seals[7]

The current legislative distribution is unsatisfactory in that it makes access to these provisions much more difficult than necessary. First, parties do not have the security of knowing that enactments which may have modified the general law of contract are confined to a single Act. The fact that at

1. It is important to distinguish between changes to the general law of contract and changes in the law as it relates to contracts having a specific subject matter, or contracts entered into by particular classes of persons. In this report, we are concerned only with the former kind of change. For examples of the latter, *see Consumer Protection Act*, R.S.B.C. 1996, c. 69, Part 1; *Infants Act*, R.S.B.C. 1996, c. 223, Part 3; *Family Relations Act*, R.S.B.C. 1996, s. 127; *Insurance Act*, R.S.B.C. 1996, c. 226, s. 4.

2. R.S.B.C. 1996, c. 53.

3. R.S.B.C. 1996, c. 166.

4. *Report on Waiver of Conditions Precedent in Contracts* (LRC 31, 1977); *Report on the Statute of Frauds* (LRC 33, 1977); *Report on Performance Under Protest* (LRC 81, 1985); *Report on The Need for Frustrated Contracts Legislation in British Columbia* (LRC 3, 1971).

5. LRC 69, 1983.

6. LRC 74, 1984.

7. LRC 96, 1988.

least two statutes are known to contain such provisions raises the spectre that any number of additional Acts may contain relevant provisions. Second, even if the *Law and Equity Act* were the sole repository of revisions to the general law of contract, the researcher still confronts a formidable task. The *Law and Equity Act* is over 60 sections long and deals with topics as diverse as the application of English law,[8] judicial notice,[9] venue in foreclosure proceedings,[10] and damage by collision at sea.[11] Sifting through this mass of complicated and mostly unrelated provisions in a search for those that touch on contract law can be a wasteful and frustrating exercise.

What is called for is a single statute that brings together the provisions identified above and sets them out in an accessible fashion. A useful precedent for legislation of this kind is the *Property Law Act*,[12] which brings together in a single act almost 40 provisions that touch on or modify the substantive law of real property.

In this Report, we propose the adoption of a *Contract Law Reform Act*. This proposed Act would have two functions. The first is that described above - to consolidate and make accessible the existing enactments that affect the general law of contract. The second is to provide a suitable vehicle for the implementation of the three Law Reform Commission reports in this area that have not yet been acted on.

In Chapter 2, which follows immediately, we set out the full text of a draft *Contract Law Reform Act* incorporating the existing statutory provisions and additional sections that would implement the outstanding Law Reform Commission Reports.

Chapter 3 sets out a brief commentary on each section, or related group of sections, in the proposed Act. These descriptions are intended to provide only a brief flavour of their operation and the deficiencies in the law they are designed to correct. For all but two of the provisions, a thorough and exhaustive discussion will be found in the report of the Law Reform Commission on which the provision is based. These reports can be found at most law libraries and are accessible through the Internet at the Institute's website.[13]

8. S. 2.
9. Ss. 7 and 9.
10. S. 21.
11. S. 32.
12. R.S.B.C. 1996, c. 377.
13. http://www.bcli.org.

CHAPTER 2 A DRAFT CONTRACT LAW REFORM ACT

CONTRACT LAW REFORM ACT[1]

PART 1: GENERAL RULES OF LAW APPLICABLE TO CONTRACTS

Deed to take effect as contract

1 Where an obligation created or evidenced by an instrument would, but for this section, take effect as a specialty obligation, it must

(a) take effect as if it were created by a simple contract and, without limiting the generality of the foregoing, any issue respecting

(a) remedies for breach;

(ii) interpretation;

(iii) merger;

(iv) the authority of an agent created by the instrument;

(vi) variation;

(vii) accord and satisfaction; and

(viii) parties to the instrument

must be determined by the law governing simple contracts; and

(b) unless otherwise intended by any party, be enforceable upon execution of the instrument, despite the absence of consideration or physical delivery.

Stipulations not of essence

2 *Stipulations in contracts, as to time or otherwise, which are not deemed to be or to have become of the essence of the contracts according to the rules of equity, must receive the same construction and effect as they would receive in equity.*

Rule in Cumber v. Wane abrogated

3 *Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered in satisfaction of an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.*

Conditions precedent

1. For convenient reference, the portions of the proposed Act that carry forward existing provisions are italicized, and new provisions are not.

4 *If the performance of a contract is suspended until the fulfillment of a condition precedent, a party to the contract may waive the fulfillment of the condition precedent, even if the fulfillment of the condition precedent is dependent on the will or actions of a person who is not a party to the contract if*

(a) the condition precedent benefits only that party to the contract;

(b) the contract is capable of being performed without fulfillment of the condition precedent; and

(c) where a time is stipulated for fulfillment of the condition precedent, the waiver is made before the time stipulated, and where a time is not stipulated for fulfillment of the condition precedent, the waiver is made within a reasonable time.

Enforceability of contracts

5 *(1) In this section "disposition" does not include*

(a) the creation, assignment or renunciation of an interest under a trust, or

(b) a testamentary disposition.

(2) This section does not apply to

(a) a contract to grant a lease of land for a term of 3 years or less,

(b) a grant of a lease of land for a term of 3 years or less, or

(c) a guarantee or indemnity arising by operation of law or imposed by statute.

(3) A contract respecting land or a disposition of land is not enforceable unless

(a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,

(b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

(c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3) (b) , an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.

(5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of

(a) restitution of a benefit received, and
(b) compensation for money spent in reliance on the gift or contract.

(6) A guarantee or indemnity is not enforceable unless
(a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or
(b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

Performance under protest

6 *(1) If a dispute arises between the parties to a contract respecting the obligations of a party under the contract, the party whose obligations are disputed may elect to perform the contract in accordance with the requirements of the other party, and the electing party is then entitled to compensation from the requiring party for any*
(a) service performed,
(b) property supplied or transferred,
(c) liability assumed, and
(d) money paid
by the electing party in the course of that performance beyond that which the contract required the electing party to do.

(2) An electing party is not entitled to compensation under subsection (1) unless, within a reasonable time after the electing party is informed that the performance is required, the electing party gives notice to the requiring party that the performance is under protest.

(3) A contract may specify, with respect to the giving of a notice of protest, any or all of the following:
(a) the form of the notice;
(b) a time within which the notice must be received by the requiring party;
(c) the persons to whom the notice must be given;
(d) the manner in which the notice is to be given.

(4) A notice of protest has no effect unless it is communicated in accordance with every specification referred to in subsection (3) that is included in the contract.

(5) A right to compensation under this section is not affected by a decision or determination by a person connected with the administration of the contract unless the person has no interest in the subject matter of the contract and is independent of every person who has an interest in the subject matter of the contract.

(6) Nothing in this section limits the right of a party to recover compensation on any other basis.

PART 2: FRUSTRATED CONTRACTS

Application

7 *(1) Subject to subsection (2), this Part applies to every contract*

(a) from which the parties to it are discharged by reason of the application of the doctrine of frustration; or

(b) that is avoided under section 11 of the Sale of Goods Act.

(2) This Part does not apply to

(a) a charter party or a contract for the carriage of goods by sea, except a time charter party or a charter party by demise;

(b) a contract of insurance; or

(c) contracts entered into before May 3, 1974.

Idem

8 *This Part applies to a contract referred to in section 7(1) only to the extent that, on the true construction of that contract, it contains no provision for the consequences of frustration or avoidance.*

Act applicable to part of contract

9 *If a part of any contract to which this Part applies is wholly performed*

(a) before the parties are discharged; or

(b) except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract,

and that part may be severed from the remainder of the contract, that part must, for this Part, be treated as a separate contract that has not been frustrated or avoided, and this Part, excepting this section, is applicable only to the remainder of the contract.

Adjustment of rights and liabilities

10 *(1) Subject to section 11, every party to a contract to which this Part applies is entitled to restitution from the other party or parties to the contract for benefits created by the party's performance or part performance of the contract.*

(2) Every party to a contract to which this Part applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustration or avoidance but were not performed, except in so far as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.

(3) If the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (1), that loss must be apportioned equally between the party required to make restitution and the party to whom the restitution is required to be made.

(4) In this section a "benefit" means something done in the fulfillment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.

Exception

11 *(1) A person who has performed or partly performed a contractual obligation is not entitled to restitution under section 10 in respect of a loss in value, caused by the circumstances giving rise to the frustration or avoidance, of a benefit within the meaning of section 10, if there is*

(a) a course of dealing between the parties to the contract;
(b) a custom or a common understanding in the trade, business or profession of the party so performing; or
(c) an implied term of the contract,

to the effect that the party performing should bear the risk of the loss in value.

(2) The fact that the party performing the obligation has in respect of previous similar contracts between the parties effected insurance against the kind of event that caused the loss in value is evidence of a course of dealing under subsection (1).

(3) The fact that persons in the same trade, business, or profession as the party performing the obligations, on entering into similar contracts, generally effect insurance against the kind of event that caused the loss in value is evidence of a custom or common understanding under subsection (1).

Calculation of restitution

12 *If restitution is claimed for the performance or part performance of an obligation under the contract other than an obligation to pay money,*

(a) in so far as the claim is based on expenditures incurred in performing the contract, the amount recoverable must include only reasonable expenditures; and

(b) if performance consisted of or included delivery of property that could be and is returned to the performer within a reasonable time after the frustration or avoidance, the amount of the claim must be reduced by the value of the property returned.

Idem

13 *In determining the amount to which a party is entitled by way of restitution or apportionment under section 10, account must not be taken of*

(a) loss of profits; or

(b) insurance money that becomes payable

because of the circumstances that give rise to the frustration or avoidance, but account must be taken of any benefits which remain in the hands of the party claiming restitution.

Limitations

14 *(1) An action or proceeding under this Part must not be commenced after the period determined under subsection (2) of this section.*

(2) For the purposes of subsection (1), a claim under this Part must be a claim for a breach of the contract arising at the time of frustration or avoidance, and the limitation period applicable to that contract applies.

PART 3: ILLEGAL CONTRACTS

Interpretation

15 In this Part,

"contract" means a contract, trust, transaction, or arrangement or any provision of a contract, trust, transaction, or arrangement and includes a disposition of property and any instrument effecting or evidencing a disposition of property.

"court" means a court, tribunal, or arbitrator exercising its proper jurisdiction;

"enactment" includes an enactment as defined in the *Interpretation Act* (Canada);

"illegal contract" means a contract that in its formation, existence or performance, is null, void, illegal, unlawful, invalid, unenforceable, or otherwise ineffective, or in respect of which no action or proceeding may be brought, by reason of an enactment or of a rule

of equity or common law respecting contracts that are contrary to public policy, but does not include a contract that

(1) is invalid by reason only of a failure to register the contract,
(2) is unenforceable by reason only of effluxion of time,
(3) is unenforceable by reason only of its not being in writing or signed by the party to be charged, or that party's agent,
(4) is invalid by reason only of the creation or vesting of a right after a specified period,
(5) is invalid by reason only that it is in restraint of trade, or
(6) is avoided by frustration;

"performance" means the intended, actual or stipulated performance of an obligation under a contract;

"property" means any type of obligation, power, interest, right or thing that has been or may be transferred under, or which is otherwise affected by an illegal contract;

Application

16 This Part applies in respect of an illegal contract whether or not:

(a) the contract was entered into before or after this Part comes into force, or
(b) the provision of the contract that renders it illegal is severable by the deletion of words or otherwise,

but does not apply where the enactment by reason of which the contract is illegal provides for relief.

Statutory Illegality

17 A contract must not be considered an illegal contract by reason only that its formation, existence or performance contravenes an enactment or defeats its purpose unless the enactment, or the furtherance of that purpose, clearly so requires.

Exclusion of Other Remedies

18 No remedy must be granted by a court to any person involved in an illegal contract in respect of the illegal contract, or in respect of property, except as provided by this Part or by the enactment by reason of which the contract is illegal.

Remedies

19 (1) In a proceeding in respect of an illegal contract, or property, the court may, by order, grant one or more of the following remedies

(a) restitution,
(b) compensation by way of damages or otherwise,
(c) apportionment of any loss arising from the formation or performance of the contract, other than loss of profit;
(d) a declaration;
(e) an order vesting property in any person or directing a person to assign or transfer property to another;
(f) where the court is satisfied that one or more of the obligations or rights under the contract are reasonable,
  (i) a declaration that those obligations constitute an enforceable contract, or
  (ii) an order that those obligations be discharged in a lawful manner specified by the court;
(g) any other remedy the court could have granted under common law or equity had the contract not been an illegal contract.

(2) The court may impose any conditions it thinks fit in an order under this section.

Discretionary Factors

20 (1) In granting or refusing an order under section 19, the court may consider
(a) the public interest,
(b) the circumstances of the formation or performance of the illegal contract, including the intent, knowledge, conduct and relationship of the parties,
(c) if any party to the illegal contract was, at a material time, acting under a mistake of fact or law,
(d) the extent to which the illegal contract has been performed,
(e) if the enactment by reason of which the contract is illegal has been substantially complied with,
(f) the consequences of denying a remedy,
(g) any other factor the court considers relevant.

(2) In granting or refusing an order in respect of an illegal contract that was entered into before this Part came into force, the court, in addition to the factors it may consider under subsection (1), must consider whether or not
(a) a party to the contract has so altered that party's position that granting a remedy would, in the circumstances, be inequitable,
(b) another proceeding has been commenced in respect of the contract, and
(c) a party to the contract has compromised a claim in respect of the contract.

PART 4: CONTRACTS IN RESTRAINT OF TRADE

Court may order relief

21 (1) Where a contract or a portion of a contract constitutes an unreasonable restraint of trade, a court may, unless the contract otherwise provided, by order:

(a) delete a portion of the contract, or

(b) limit the effect of that contract so that, as modified, the contract would have been a reasonable restraint of trade at the time it was entered into, and

(c) subject to the rules of law and equity, enforce the contract as modified.

(2) The court may refuse relief under subsection (1) and decline to enforce the contract where

(a) the deletion or limitation would so alter the bargain between the parties that it would be unreasonable to give effect to the contract as modified, or

(b) the conduct of the party seeking to enforce the contract, with or without modification, disentitles that party to relief.

(3) In the exercise of its discretion under this section, the court must have special regard to the circumstances of the formation of the contract.

Choice of law

22 Where a contract or a portion of a contract in restraint of trade

(a) is governed by a law other than the law of British Columbia, and

(b) imposes an obligation in respect of something to be done or not to be done in British Columbia

the court may, to the extent that

(c) the contract is in restraint of trade, and

(d) the relief is limited to the obligation to do or not to do something in British Columbia,

order or refuse relief as if the contract were governed solely by the law of British Columbia,

CHAPTER 3 COMMENTARY ON THE DRAFT ACT

Section 1: Specialty obligations

Section 1 is aimed at simplifying the law by eliminating the legal distinctions that exist between obligations that arise under a simple contract and those that arise under a kind of document known as "specialty," such as a document created under the seal of the party to be bound by it (a deed). The distinctions between these two kinds of obligations were canvassed by the Law Reform Commission in 1988 in its *Report on Deeds and Seals*.[1] The Report noted that at one time the legal rules applicable to specialty obligations differed significantly from those applicable to simple contracts. For example, specialty contracts enjoyed higher priority in the distribution of an insolvent estate and had the benefit of a longer limitation period.

Over the years, many of the distinctions have been eliminated through the assimilation of specialty obligations to simple contracts. A number of distinctions do remain but, for the most part, they serve no functional purpose. When they are invoked, the result, more often than not, is contrary to the intention of the parties.

One example is the law of agency in relation to deeds. Where a person authorizes an agent to carry out certain functions in relation to a deed, the agent's authority must, itself, be embodied in a deed.[2] So, for example, a principal may create a document under seal (making it a deed) and then place the deed in the hands of an agent with instructions that the deed be delivered to another person on the happening of a certain event (perhaps the payment of money). Unless those instructions are contained in a writing that itself is created under seal, the agent's authority is imperfect and a purported delivery by the agent may be a nullity in certain circumstances. It is anomalies like this that make the retention of a distinction between deeds and simple contracts a trap for the unwary.

Section 1 of the proposed *Contract Law Reform Act* implements the recommendations of the Law Reform Commission. With one exception noted below, it is designed to complete the assimilation by providing that a specialty obligation shall take effect as if it were created by a simple contract. The provision then goes on to identify the remaining areas of divergence between these two types of obligations and expressly state that the rules governing simple contracts apply.

There is one context in which deeds arguably continue to serve a useful purpose. The general law of contract requires that something of value (even if entirely notional) must have passed between the parties before a promise is enforceable. The law refers to this as "consideration." Thus a simple promise to make a gift is not enforceable. Where, however, that promise is embodied in a deed, it may be enforced against the promisor. In other cases, such as complex multi-party agreements there

1. LRC 96, 1988. The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R96.

2. *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555. *See also* the discussion in the Law Reform Commission's Report, *sup*. n. 1 at 26.

may be some uncertainty whether all parties have received consideration. Embodying such an agreement in a deed ensures that it is enforceable against all parties as intended.

It is convenient to have some legal means whereby a promise that is not supported by consideration can be made enforceable if that is the intention of the promisor. The full assimilation of deeds to simple contracts would abrogate this desirable feature of the current law. For this reason, clause (b) of section 1 provides that an obligation that would, because of clause (a), take effect as a simple contract is enforceable despite the absence of consideration.[3]

Section 2: Stipulations not of the essence

Section 2 carries forward section 31 of the *Law and Equity Act*. Its purpose is to resolve a conflict between two bodies of law as to when a time stipulation in a contract is to be regarded as being "of the essence." Where a party to a contract fails to perform in accordance with a time stipulation, the other parties are entitled to treat the contract as at an end if the time stipulation was "of the essence."

The courts of common law and those of equity treated time stipulations in a somewhat different fashion. When a common law court encountered a time stipulation, it would usually construe it as being of the essence without regard to its real importance (or lack of importance) in the context of the particular contract. A court of equity, on the other hand, would examine the contract as a whole to determine whether or not the time stipulation was of the essence, and would only hold a time stipulation to be of the essence when the context demanded it.

When, in England, the courts of law and equity were "fused" in 1873, Parliament thought it was necessary to resolve this conflict and it did so by enacting a provision[4] almost identical to section 31 of our *Law and Equity Act*. The effect of the provision is that the approach taken by the courts of equity was to prevail. In 1879, the legislature of this province adopted the English provision.[5]

Section 3: *Rule in Cumber* v. *Wane abrogated*

Section 3 carries forward section 43 of the *Law and Equity Act*. The purpose of the provision is to reverse the effect of a group of decisions of the English courts which limited the ability of parties to enter into a binding compromise in relation to a debt. Essentially, these decisions held that a promise to accept a smaller payment in satisfaction of an outstanding debt would not be binding at law. A contract could not be made to discharge a debt through accepting payment of a smaller amount.[6]

3. *See* text *infra* at n. 6 for a discussion of another aspect of "consideration."

4. *Supreme Court of Judicature Act, 1873*, c. 66, s. 25(7).

5. *Judicature Act, 1879*, S.B.C. 1879, c. 12, s. 3(7).

6. *Richards* v. *Bartlett* (1584) 1 Leon 19, 74 E.R. 17; *Pinnel's Case*, (1602) 5 Co. Rep. 117a, 77 E.R. 237; *Cumber* v. *Wane*, (1721) 1 Stra 426, 93 E.R. 613; *Folks* v. *Beer*, (1884) 9 App. Cas. 605, [1881-85] All E.R. Rep 106 (H.L.).

The rationale of the rule is based on the notion of consideration. If a debtor is already obligated to pay a sum, a creditor receives nothing new by accepting a promise to pay a smaller portion of it. The common law does not recognize a promise to perform an already existing duty as valid consideration in an agreement. The logic is simply that since the creditor receives nothing of substance from the agreement, it is like a promise to give a gift, and such promises should not be legally binding.

Commercial reality is different from legal theory, however, and many critics of this rule have pointed out that it is frequently in the interests of both parties to modify an existing agreement. In times of market instability or inflation, prices change quickly, and flexibility is an important part of ongoing economic relationships. Even in times of stability, a creditor may have reasons for recognizing the changed circumstances of a debtor. In many cases, it is a question of part payment or no payment at all. Moreover, there is the question of fairness. A debtor may rely upon the promise of a creditor not to enforce a full claim when entering into other agreements, or taking measures to avoid bankruptcy.

Section 3 provides that the receipt of the lesser amount will extinguish the debt where the creditor has so agreed.[7]

Section 4: Conditions precedent

Section 4 carries forward section 54 of the *Law and Equity Act* and concerns the waiver of conditions precedent in contracts.

It is not uncommon to find in contracts, and particularly contracts for the sale of land, a provision that the performance of the obligations of one party, or both of the parties, is made conditional on the happening of some event beyond their control. For example, the condition might be that the land in question be rezoned by a local authority from one form of land use to another. These provisions are known as "conditions precedent." In a series of decisions commencing with that of the Supreme Court of Canada in *Turney and Zhilka*,[8] it was held that such a condition, even if included in the contract solely for the benefit of one party, cannot be waived by that party. The other party to a contract was thus free to treat it as being at an end if the condition was not fulfilled. That result was frequently inequitable and subverted the manifest intentions of the parties.[9]

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7. Remedial legislation first appeared in Ontario, in 1885, a year after the judgment in *Foakes* v. *Beer* was handed down (48 Vict., c. 13, s. 6; *see now*, *Mercantile Law Amendment Act*, R.S.O. 1990, c.M10, s. 16). This was followed by Manitoba *(Queens Bench Act*, S.M. 1895, c. 6, s. 39(10); now *Mercantile Law Amendment Act*, S.M. 1992, c. 32, s. 10) and the then Northwest Territories (R.O.N.W.T. 1888, c. 56, s. 9(7)). Alberta (*Judicature Act*, R.S.A. 1980, c. J-1, s. 22,) and Saskatchewan (*The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(7)) inherited the provision on their formation in 1905. British Columbia's legislation dates from 1903 (*Supreme Court Act*, S.B.C. 1903-4, c. 15 s.2 0 (25)). Except for Manitoba, which, until 1992, required the promise to be in writing, all provinces have adopted substantially the same language. The United Kingdom, despite the 1937 recommendations of the Law Revision Committee, Sixth Interim Report, 1937, Cmd. 5449, 20-21, has never enacted a like provision.

8. [1959] S.C.R. 578. *See also, F. T. Developments Ltd.* v. *Sherman*, [1969] S.C.R. 203; *O'Reilly* v. *Marketers Diversified*, [1969] S.C.R. 741; *Barnett* v. *Harrison*, (1975) 57 D.L.R. (3d) 225 (S.C.C.).

9. *Report on Waiver of Conditions Precedent in Contracts*, (LRC 31, 1977). The Report may be accessed over the

In a report submitted in 1977, the Law Reform Commission considered the development and effect of this rule and recommended that it be reversed by statute. Section 54 of the *Law and Equity Act*, now carried forward as section 4 of the proposed *Contract Law Reform Act*, implements that recommendation.

Section 5: Enforceability of Contracts

This provision carries forward section 59 of the *Law and Equity Act* and sets out the conditions which must be satisfied before a contract can be said to be enforceable.

In 1677, the English Parliament responding to defects in the law of evidence which assisted the perpetration of fraud, enacted a statute that has come to be known as the "*Statute of Frauds*." This statute was "received" into British Columbia law on the founding of the Colony in 1858 and remained on the statute book, virtually unchanged in language and form for many years.[10]

The *Statute of Frauds* provided that certain contracts must be evidenced in writing and signed by the person against whom enforcement is sought. Over the 300 years of its existence, the *Statute of Frauds* had become encrusted with a body of case law which obscured its scope and application and created a body of exceptions to the statute which, while mitigating the rigidity of its operation, also created further uncertainty.

In 1977, the Law Reform Commission reviewed the operation of the *Statute of Frauds* and concluded that it served a number of functions that ought to be preserved but that it should be modernized and restated in accessible language.[11] The Commission's recommendations were implemented by the Legislature through the repeal of the former legislation and the enactment of what is now section 59 of the *Law and Equity Act*. This provision is carried forward in the proposed *Contract Law Reform Act* as section 5.

Section 6: Performance Under Protest

Section 6 of the proposed *Contract Law Reform Act* carries forward section 62 of the *Law and Equity Act*. Like section 4, this provision is also a response to a decision of the Supreme Court of Canada.

Where the parties to a contract differ as to the nature or extent of the obligations it imposes on one of the parties, very often the most beneficial course for all concerned is for that party to perform the contract in accordance with requirements of the other party, but to do so "under protest" purporting

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Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R31.

10. The act appeared in British Columbia in 1897 as the *Statute of Frauds*, R.S.B.C. 1897, c. 85, and with only minor amendments continued in force until 1957. At that time a substantial revision was undertaken, resulting in the enactment of the *Statute of Frauds, 1958*, S.B.C. 1958, c. 18. The 1958 version remained in force until the current version was enacted as the *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, ss. 7, 8.

11. *Report on the Statute of Frauds* (LRC 33, 1977). The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R33.

to reserve the right to assert a claim for additional compensation at a later date. There had been, however, some question how far this course of action was open. The source of the uncertainty was the much-criticized decision of the Supreme Court of Canada in *Peter Kiewit Sons Co. of Canada* v. *Eakins Construction Ltd.* made in 1960.[12]

While this decision cast a shadow over the whole of contract law in Canada, the problems it created were felt most acutely in the construction industry out of which the *Kiewit* case arose.

In a report submitted in 1985, the Law Reform Commission examined the *Kiewit* case and its implications and recommended that legislation be enacted to confirm what is the right of a party to "perform under protest."[13] The Legislature implemented this recommendation through the enactment of section 62 of the *Law and Equity Act*, a provision carried forward as section 6 of the proposed *Contract Law Reform Act*.

Part 2 - Sections 7 to 14: Frustrated Contracts

Part 2 of the proposed *Contract Law Reform Act* carries forward the provisions of what is now the *Frustrated Contract Act*. The purpose of frustrated contract legislation is to provide a fair system of rules to define the positions of the parties to a contract that has been prematurely brought to an end by the application of the common law doctrine of frustration. Contracts may become impossible to perform for a variety of reasons beyond the control of the contracting parties. War, a labour dispute, the destruction of the subject matter of the contact by fire, and the enactment of legislation making performance of the contract illegal, are examples of events that may prevent parties, through no fault of their own, from performing their contractual obligations.

Parties may, in their contract, deal with their position should such events occur but if they do not, the common law doctrine of frustration may come into operation. In some circumstances, the contract will be regarded as coming to an end and the parties excused from further performance under it. But this raises questions as to how the parties should be treated with respect to what has gone on before the frustrating event occurred. What should be the position when one party has fully or substantially performed its obligations before the frustrating event occurred? The answers provided by the common law to this kind of question were not satisfactory.

In one of its earliest reports, the Law Reform Commission examined the need for frustrated contract legislation and recommended a statutory scheme that would define the position of parties to a frustrated contract according to restitutionary principles.[14] The recommendations of the

12. [1960] S.C.R. 361.

13. *Report on Performance Under Protest* (LRC 81, 1985). The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R81.

14. *Report on the Need for Frustrated Contracts Legislation in British Columbia* (LRC 3, 1971). The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R3.

Commission were implemented through the enactment of the *Frustrated Contract Act*.[15] The provisions of which are carried forward as Part 2 of the proposed *Contract Law Reform Act*.

Part 3 - Sections 15 to 20: Illegal Contracts

As a general rule, Canadian courts declined to grant relief to parties who have either deliberately or unwittingly entered into an "illegal" transaction. The laws that define when a transaction may be characterized as illegal, and the exceptions to the general rule are uncertain and inconsistent.

It is important to note that, in this context, the word "illegal" is used in a special sense. A wide variety of arrangements may be termed "illegal" for different reasons. If legislation expressly forbids a formation of a specific contract, that contract is obviously "illegal." However, the term is also used in respect of contracts whose formation is not forbidden. For example, a contract which violates a policy synthesized by a judge from common law cases is also characterized as an "illegal contract." The term "illegal" is thus used as convenient shorthand expression signifying that the transaction so designated is one which a court will decline to enforce on the ground that it infringes some public policy or the terms or object of an enactment. It does not necessarily imply some criminal or dishonourable conduct on the part of any party.

Where a transaction is characterized as "illegal" as a general rule, the transaction is unenforceable and the courts will not intervene to readjust the rights between the parties. The rights of third parties may also be in jeopardy.

In its *Report on Illegal Transactions* submitted in 1983,[16] the Law Reform Commission carried out a detailed examination of the law in relation to illegal contracts and recommended that legislation be enacted which gives the court broad and flexible powers to readjust the rights of parties to an illegal transaction. These recommendations have not, to date, been acted on by the legislature. Part 3 of the proposed *Contract Law Reform Act* would implement the recommendations made by the Law Reform Commission.

Part 4 - Sections 21, 22: Contracts in Restraint of Trade

The law respecting contracts in restraint of trade represents an attempt to balance the public policy favouring the unrestricted ability of a person to engage in productive economic activities with the legitimate concerns of employers, vendors of businesses, franchisers and persons in similar positions. For example, a contract for the purchase and sale of a business, including its goodwill, frequently prohibits the seller from carrying on a competing business. Similarly, the agreement under which an employee is hired may prohibit that employee, on leaving the employer's service, from independently setting up a similar business or entering into employment with a rival firm.

15. R.S.B.C. 1996. c. 166.

16. LRC 69, (1983). The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R69.

Courts have historically enforced a contract in restraint of trade only if it was reasonable in the interests of the parties and of the public. If it is unreasonable in any respect, then it is completely unenforceable and the party intended to be bound by it is free to ignore it totally. The courts have only limited tools at their disposable to "write down" an unreasonable restraint into one that is reasonable and to enforce it.

Modern business practice, the increased complexity of modern society and the changing judicial perception of the relevant factors to consider in determining the essential question of reasonableness have all combined to call into question the rule that an unreasonable restraint is wholly unenforceable.

In its *Report on Covenants in Restraint of Trade*,[17] the Law Reform Commission examined the rule and its operation and made recommendations aimed at striking a fairer balance between the parties. The effect would be that, in many cases, an agreement in restraint of trade would be partially unenforceable where it would otherwise be unenforceable in its entirety. Those recommendations (not yet implemented) are given effect by Part 4 of the proposed *Contract Law Reform Act*.

17. LRC 74, (1984). The Report may be accessed over the Internet at http://www.bcli.org by following the "Publications" link to BCLRC Report R74.

CHAPTER 4 CONCLUSION

The aims of the *Contract Law Reform Act* proposed in this Report are twofold. The first aim is to make the law on this topic more accessible by bringing together in a single statute the various provisions that modify the general law of contract. The current legislative distribution is unsatisfactory in that many important provisions are either buried in a longer omnibus act that addresses a variety of legal concepts or are found in a separate statute. The legislation we propose would mark a significant improvement.

The second aim is to implement three outstanding reports of the Law Reform Commission that fit neatly within the concept of a *Contract Law Reform Act*. Two of these Reports contain recommendations that focus on giving the courts wider and more flexible tools to re-adjust the rights of parties to contracts which, for one reason or another, cannot be enforced according to their terms. These reforms are very much in the spirit of those embodied in the current *Frustrated Contract Act*.

The third area of reform concerns the anachronistic legal position that flows from embodying an obligation in a deed rather than a simple contract. This can have unexpected consequences, contemplated by neither party and can create a trap for unwary business people.

The proposals for consolidation and reform that we make in this Report are, we believe, uncontroversial and we hope they will receive the support of the legislature at an early opportunity.