UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

COMMERCIAL LAW STRATEGY

A PROPOSED UNIFORM

ILLEGAL CONTRACTS ACT

By

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Part A - Background

[1] The purpose of this Report is to carry forward work that was initiated two years ago, as part of the Commercial Law Strategy, in relation to illegal contracts. In particular, Professor Mary Ann Waldron of the Faculty of Law, University of Victoria was asked to review certain aspects of the law in relation to illegal contracts and to report back to the Civil Law Section. She did this at the Section's meeting in Fredericton in August of 2003. The minutes of the meeting record:[1]

> Professor Waldron reviewed her paper on illegal contracts and noted that this issue grew out of the work which had been conducted on section 347 of the *Criminal Code*[2]. The principal questions to be addressed are what makes a contract illegal and what would happen if a contract is determined to be illegal. Twenty years ago, the Law Reform Commission of British Columbia was of the opinion that the courts and the common law would not serve to adequately update the law on illegal contracts.[3] Common law developments since that time indicate that such opinion was largely correct, as the courts have held closely to traditional law and the majority of cases have lacked policy discussions. Professor Waldron reviewed certain cases, particularly the decisions of *Still v. B.C.* and *Top Line Industries* v. *International Paper*, and indicated that differing approaches have led courts to produce inconsistent results in this area of law. Professor Waldron suggested that statutory reform, as had been advocated by the Law Reform Commission, would be appropriate.
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> The Conference was requested to consider whether a working group should be struck and legislation be prepared to take back to the next Conference. The creation of a working group was supported. However, it was suggested that the working group should give consideration to the Civil Code of Quebec and do a comparative study between the common law and the Civil Code. It may be premature to prepare draft legislation until the common law and Civil Code comparison is completed.
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> **RESOLVED:**
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> 1. **THAT** the Report by Professor Mary Ann Waldron on illegal contracts be received.
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> 2. **THAT** the Report appear in the 2003 proceedings.
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> 3. **THAT** the chairperson of the Civil Section, with necessary consultation among interested participants, establish a consultative committee to prepare a draft Act and commentaries based on the Waldron Report and the applicable provisions of the Quebec Civil Code, the comments received from discussions at the 2003 Conference for presentation to the Conference in 2004.

[2] Two steps were taken pursuant to the resolution. First, Professor Michelle Cumyn of the Faculty of Law, Laval University was asked to prepare a paper that addresses the treatment of illegal

1. Uniform Law Conference of Canada, Proceedings of Annual Meeting, August 10-14, 2003, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=2003&sub=2003f>.

2. *Criminal Code*, R.S. 1985, c. C-46.

3. Law Reform Commission of British Columbia, Report No. 69: *Report on Illegal Transactions* (1983). *See also* British Columbia Law Institute, Report No. 4: *Proposals for a Contract Law Reform Act* (1998).

contracts under the Civil Law of Quebec. Second, in lieu of a fully constituted national working group Arthur Close was requested by the Chair of the Civil Law Section to proceed with the preparation of a Report and a draft act with commentaries for presentation to the Civil Law Section in Regina.

[3] While the major paper being prepared out by Professor Cumyn will be the subject of a separate presentation, she has also played an important role in developing this Report, and the draft legislation which embodies a number of valuable suggestions she made. She has also contributed an additional set of commentaries to the draft Act which set out a Quebec perspective on it. [These commentaries are set out in a distinct sans serif typeface.]

[4] The preparation of draft legislation was made easier by the existence of two drafts that provided a point of departure. First was draft legislation that had been prepared to implement the 1983 recommendations of the Law Reform Commission. The second was a preliminary draft bill prepared by Lorna Proudfoot of the Legislative Counsel's office in Newfoundland. Ken Downing of the Legislative Counsel's office in British Columbia assisted in the preparation of the final draft of the English language version of the legislation. The French language version was prepared by Michel Aucoin, Legislative Counsel, Department of Justice (Canada).

[5] Part C of this Report sets out a draft *Uniform Illegal Contracts Act* (hereafter UICA) for consideration by the Section. Part B identifies certain issues that arose in the course of its preparation and the way they were dealt with.

Part B - Drafting Issues

Writing Requirements and *Ultra Vires* Issues

[6] At the conclusion of Prof. Waldron's paper she makes the following observations:[4]

> Recent developments do suggest that several of the Commission's recommendations be revisited and reviewed. Particularly, the issue of whether the language should be clarified to clearly include ultra vires contracts should be considered. As well, cases in which a contract is unenforceable because of formal deficiencies might usefully be brought within the provisions, particularly in jurisdictions in which the Statute of Frauds has not been substantially reformed.

[7] Both of these suggestions are incorporated into the draft Act. The *ultra vires* issue is addressed in paragraph (c) of the definition of "defect" which identifies as a vitiating factor a lack of "status, capacity or power to enter into the contract" by a party to it. The formality issue is addressed in section 2.

4. Paragraph 102.

Developments in Relation to Severance

[8] A case discussed in Prof. Waldron's paper[5] was *Transport North American Express Inc.* v. *New Solutions Financial Corp.*[6] This case was one that involved section 347 of the *Criminal Code* and concerned a contract providing for rate of interest that, in effect, exceeded the 60% upper limit stipulated in the section. The tension in the case involved two conflicting approaches to the modification of the contract through "severance." The trial judge was prepared to adopt a concept of "notional severance" that would have limited the effective interest rate to 60% and allowed it to be enforced on that basis. A majority of the Ontario Court of Appeal adopted the more formalistic "blue pencil" approach to severance adopting the view that a term must be either severed or not severed and that it was impermissible to "read down" an offending term. The Court of Appeal held that the provision for interest at the offending rate must be struck out totally if the lender was to enforce any rights under the contract.

[9] The case was further appealed to the Supreme Court of Canada which handed down its decision in February 2004. The majority of a closely divided Supreme Court endorsed the "notional severance" concept employed by the trial judge.[7]

[10] In discussing the notional severance approach Prof. Waldron noted the British Columbia Law Reform Commission had rejected the blue pencil test but queried whether the Commission's recommendations in its *Report on Illegal Transactions*[8] would permit notional severance of the kind employed by the trial judge in the *New Solutions* case.[9]

[11] The Law Reform Commission did, in fact, embrace a notional severance concept that was very close to that articulated in the *New Solutions* case but in a separate report that focused on contracts that were illegal by reason that they were in restraint of trade.[10] In particular, a provision that embodied the Commission's view was drafted in this way:[11]

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

5. Paragraph 87.

6. (2001) 200 D.L.R. (4th) 560 (Ont. Sup. Crt. Jus.); (2002) 214 D.L.R. (4th) 44 (Ont. C.A.).

7. 2004 SCC 7.

8. *Supra* note 3.

9. *Supra* note 7 at para. 90, 91.

10. British Columbia Law Institute, Report No. 74: *Report on Covenants in Restraint of Trade* (1984).

11. This drafting is drawn from BCLI *Proposals for a Contract Law Reform Act, supra* note 3.

(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.

[12] As the *New Solutions* case demonstrates, the notional severance approach is not confined to restraint of trade cases but is amenable to a wider application. This remedy has, therefore, been adopted as part of the proposed UICA. Section 5(1)(g) provides for the remedy of severance generally with notional severance expressly dealt with in subparagraph (i)(B).

Exclusions from the Act

[13] At least so far as illegality arises under an enactment, a UICA is most usefully viewed as defining a "default" position that provides relief to parties where no relief from the consequences of the illegality is provided by the enactment that makes it illegal. This basic principle is expressed in section 3(3)(a). A further question arises, however, whether further exclusions from the Act are called for. A list of potential exclusions are set out in paragraphs (3)(3)(b) to (3)(3)(g) which have been square bracketed in the draft.

[14] As the commentary to the section indicates, the draft reflects a view that the things that should or should not be excluded from an UICA is not something that is amenable to a uniform approach. The Act must operate against the background of the existing laws of the enacting jurisdiction which may vary significantly across the country.

[15] Take one example cited in the commentary. Whether or not one would wish the UICA to operate in relation to a contract that has become unenforceable through frustration may depend on whether the enacting province has adopted modern frustrated contracts legislation such as the Uniform *Frustrated Contracts Act*.[12] If it has, it makes sense to exclude frustrated contracts from the ambit of its operation. If not, while the draft UICA was not developed expressly to deal with frustrated contracts, it probably provides a better set of tools to the courts in adjusting relationships where frustration has occurred than would be available at common law. The same might be said in relation to other types of contract that are unenforceable through the operation of a statute or the common law.

12. Uniform Law Conference of Canada, *Frustrated Contracts Act* (1974 Proceedings, 28), online <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1f4>.

[16] The strategy of the draft Act is to flag most of these for attention but leave the final decision as to their inclusion or exclusion to the enacting jurisdiction.

[17] Some jurisdictions may also wish to exclude certain kinds of contracts where their unenforceability flows from a rule of public policy that is so fundamental to their legal system that no relief should be available.

Choice of Law

[18] Earlier drafts of the Act contained a provision that would have allowed the law of a jurisdiction that had adopted the UICA to displace what would otherwise be the proper law of the contract. It was framed in the following fashion:

> **X** Where an illegal contract
>
> i. is governed by a law other than the law of [the enacting province], and
>
> ii. imposes an obligation in respect of something to be done or not to be done in [the enacting province]
>
> the court may, to the extent that the relief is limited to the obligation to do or not to do something in [the enacting province], grant or refuse relief as if the contract were governed solely by the law of [the enacting province].

[19] The need for such a provision arises most critically in the case of contracts that are in restraint of trade. An example might be a contract between an employer who carries on business nationally and a former employee in which it is agreed that the employee would not become associated with a competing business in any of the western Canadian provinces (the employee's former "territory") for a period of ten years. A court in a western province might well take the view that the protection given to the employer was much wider, both in duration and geographical scope, than necessary to protect the legitimate interests of the employer. This could lead to a conclusion that the contract is contrary to the public interest as an unreasonable restraint of trade and therefore is unenforceable by the employer. If that province had adopted the UICA it might be invoked by the court to permit the contract to be enforced but over a smaller area and for a shorter time. But if the proper law of the contract is that of a jurisdiction that has not adopted the UICA the ability of the court to do so becomes problematic.

[20] Adopting a choice of law rule such as the one set out above involves a departure from the usual rules of private international law and as such injects a degree of uncertainty into contract law that many would regard as undesirable. It is also inconsistent with Québec law. According to the Civil Code, the law governing the consequences of the nullity of a contract, or one of its terms, is the governing law of the contract, irrespective of where the contract was to be performed. If, however, the contract does not present any foreign elements, it remains subject to the mandatory rules of its country of origin (art. 3111). Where the law designated by the contract treats it as invalid, the court is given the power to apply the law of the country with which the contract is most closely connected, in order to validate the contract (art. 3112).

[21] The decision in the *New Solutions* case, however, changes the complexion of the debate. In the example given, even if the "proper law" jurisdiction has not adopted the UICA, so long as it is in Canada notional severance will be part of that proper law and available to that western court. Simply applying notional severance as a common law remedy should provide an acceptable outcome in the majority of the restraint of trade cases but it is not a complete answer. Notional severance may not be available where the proper law is that of a non-Canadian jurisdiction. Moreover it may be appropriate for the court to award compensation or restitution as a remedy in addition to the "reading down" that would flow from notional severance. This would be possible if the UICA were applicable but the common developments do not go that far.

[22]A tentative decision has been taken to exclude a choice of law rule of this kind from the draft UICA but this issue is expressly drawn to the attention of the Section should it wish to give the matter further consideration.

Part C - Draft Legislation and Commentary

UNIFORM ILLEGAL CONTRACTS ACT

Interpretation

1 In this Act:

"contract" includes
(a) an agreement, a trust, a transaction and an arrangement,
(b) any provision of an agreement, a trust, a transaction or an arrangement, including a provision transferring or otherwise disposing of property, and
(c) if the context requires, the instrument recording the contract; ("contrat")

"court" includes a tribunal, and an arbitrator, acting within its proper jurisdiction; ("tribunal")

"defect", in relation to a contract, means whichever of the following results in the contract becoming an illegal contract:
(a) the formation, existence or performance of the contract does not comply with or is contrary to an enactment;
(b) by virtue of a rule of equity or common law, the contract is contrary to public policy;
(c) a party to the contract lacked status, capacity or power to enter into the contract;
(d) the operation of an enactment, or of a rule of equity or common law, that affects the enforceability of the contract other than in the manner contemplated by paragraph (a) or (b); ("vice")

"enactment" means any primary or subordinate legislation passed by the legislative or executive branch of any level of government in Canada, including any legislation passed by any minister or other official of such a government that is passed in accordance with that persons' authority; ("texte")

"illegal contract" means a contract that is null, void, voidable, illegal, unlawful, invalid, unenforceable or otherwise ineffective as a result of a defect; ("illégal")

"performance" includes intended performance; ("exécution")

Comment: The key definitions in section 1 are "contract," "defect"and "illegal contract". These cast a wide net to bring within the Act as many kinds of transactions as possible that may be vitiated for one reason or another. The repetition of the various synonyms for the concept of the vitiation of a contract is deliberate in the definition of "illegal contract." The purpose is designed to track as many statutory formulations as possible and put beyond doubt the applicability of this Act where these words are used in another enactment. Section 2 adds a gloss to the definitions. Later in the Act, in section 3(3), certain kinds of illegal contracts are excluded from its operation.

The Québec Perspective: The approach that consists in defining a contract as including various legal instruments which are not contracts would not be consistent with civil law methodology. For the Act to be implemented in Québec, its substantive provisions, once redrafted in civilian form, should find their way into the *Civil Code* of Québec, within the existing provisions relating to the nullity of contracts (art. 1416 ff.). The result pursued by the definition of "contract" would then be achieved automatically, since the rules governing nullity of contracts may always be extended by analogy to other juridical acts, without its being necessary to provide an explicit definition to that effect.

The definitions of "defect" and "illegal contract" cover the full range of absolute or relative nullities in Québec law. There are two categories of rules which may bring about the absolute or relative nullity of a contract. The first are those which relate to the procedure of contract formation. The second are those which concern public order, either statutory or based on general moral or social imperatives recognized by the courts.

"property" means an obligation, power, interest, right or thing, of any type, that is the subject matter of an illegal contract. ("bien")

Comment: The term "property" is used in section 3(4). The concern it addresses is where property is purported to be transferred under an illegal contract and the property is then the subject of a further transfer to a person who is not a party to the contract. If this transferee's title is called into question the court can grant relief to the transferee.

Exception

2 Despite the definitions of "defect" and "illegal contract", the fact that the formation, existence or performance of a contract does not comply with or is contrary to an enactment, or that a contract does not comply with a formality required by an enactment, does not render the contract null, void, voidable, illegal, unlawful, invalid, unenforceable or otherwise ineffective unless that result is clearly required

(a) by the enactment, or

(b) in order to further the enactment's purpose.

Comment: Section 2 creates a benevolent rule of interpretation designed to ensure that contracts are not characterized as illegal owing to the violation of a feature of a statute that is not central to its operation.

The Québec Perspective: The benevolent rule of interpretation is recognised by Québec courts and legal scholars. A codification of the rule in the *Civil Code* of Québec would be desirable.

Application

3 (1) This Act applies to an illegal contract whether or not

(a) subject to subsection (2), the contract was entered into before or after the coming into force of this Act, or

(b) the defect is a provision of the contract and that provision is severable.

Comment: Subject to subsection (2), the Act applies retrospectively to existing contracts. The remedy of severance is provided in section 4(1)(g).

(2) This Act does not apply to an illegal contract that was entered into before the coming into force of this Act if, within a proceeding commenced before the coming into force of this Act, the contract is challenged as being null, void, voidable, illegal, unlawful, invalid, unenforceable or otherwise ineffective as a result of the defect.

Comment: The Act does not apply retrospectively to existing contracts except where the illegality is the subject of litigation at the time the Act comes into force.

(3) Despite subsections (1) and (2) but subject to section 4(2), this Act does not apply to an illegal contract if

(a) the defect is that the formation, existence or performance of the contract does not comply with or is contrary to an enactment and the enactment expressly sets out the relief that may be granted in relation to such a contract,

[**the following are optional]**

[(b) the defect arises through the operation of [limitation statute of enacting province] or legal or equitable doctrines relating to delay,

(c) the defect is that the contract is not in writing or signed or witnessed as provided by an enactment,

(d) the defect is that the contract calls for the creation or vesting of a right and, under the contract, that creation or vesting will occur later than the time at or before which the creation or vesting must occur under an enactment or at common law,

(e) one or more parties to the contract are minors,

(f) the contract is avoided by frustration, or

(g) the defect is that the contract has not been filed or registered as required by an enactment.]

Comment: Enacting jurisdictions will wish to consider very carefully the interface between an *Illegal Contract Act* and their existing statute-base. There may be certain contracts that should be excluded from the operation of the Act. A particular kind of contract may be excluded for one of two reasons.

First, an enactment may render a contract unenforceable for reasons that are central to the system of justice. Many jurisdictions might regard their statute of limitations as falling into this category.

A second reason for excluding certain kinds of contracts is that specialized enactments may provide relief from the consequences of illegality that are more finely-tuned to the body of law involved than a law of general application. For example, some provinces have replaced their old *Statute of Frauds* legislation with a more modern statement of the principle that incorporates a benevolent version of the equitable doctrine of part performance and allowing a party to rely on a change of position. Supervening illegality may cause a contract to be frustrated in which case the position of the parties are best dealt with under local frustrated contracts legislation (if it exists). Some provinces will have moved to modernize their laws in relation to minors' contracts while others will not.

Individual jurisdictions must decide the precise types of contracts to be listed in section 2(3). This decision will be informed by local policy and statutes. The only element in the list that should be retained in all cases is paragraph (a).

Claims for relief

4 (1) Any party to an illegal contract may claim relief under section 5.

(2) Without limiting subsection (1) but subject to subsection (3), if an illegal contract purported to transfer an interest in property to a person, a person who acquires or who purports to have acquired some or all of that interest in property from

(a) the first mentioned person, or

(b) any other person whose right to transfer that interest depends on the first mentioned person having acquired the interest under the illegal contract,

may claim relief under section 5.

(3) Subsection (2) does not apply if

(a) the relief sought by the person claiming relief under subsection (2) is expressly, or by necessary implication, prohibited by an enactment other than this Act, or

(b) an enactment, other than this Act, expressly provides for the relief that may be granted in those circumstances to the person claiming relief.

Comment: Even where specific legislation exists to define the legal position of, and provide relief in appropriate circumstances to, the parties to an illegal contract, that legislation may not address the question of relief for a non-party who has a claim to property passing under the contract. Section 4 permits enacting jurisdictions to fine-tune the applicability of the Act by filling that gap without doing violence to the legislative scheme for relief inter-partes.

The Québec Perspective: In the *Civil Code* of Québec, there already exist a number of provisions protecting both the true owner and a third party purchaser of property sold under an illegal contract (see art. 1454, 1455, 1701, 1707, 1713-1715).

Relief

5 (1) A court may grant relief in relation to an illegal contract in one or more of the following ways:

(a) restitution;

(b) compensation;

(c) apportionment of a loss arising from the formation, existence or performance of the contract;

(d) damages from a party at fault;

(e) a declaration;

(f) an order vesting property in any person or directing a person to assign or transfer property to another person;

(g) if the court is satisfied that

(i) the contract would be reasonable and lawful if

(A) one or more provisions of the contract were deleted, or

(B) the contract as a whole, or one or more of its provisions, were given limited effect only, and

(ii) the deletion or limitation would not so alter the bargain between the parties that it would be unreasonable to give effect to the contract as modified,

an order that the contract be modified to effect the severance or limitation and that the contract, as modified, be performed in a lawful manner specified by the court;

(h) any other relief the court could have granted under common law or equity had the contract not been an illegal contract.

Comment: Section 5(1) sets out a list of remedies that may be granted by the court when relief is sought from the consequences of an illegal contract. It gives the court a flexible set of tools necessary to fashion an outcome that will do justice between the parties.

Paragraphs (a), (b) and (c) parallel the remedies available under the *Uniform Frustrated Contracts Act*. A claim for damages under paragraph (d) will not arise often, but the kind of circumstances where damages might be properly claimed is where the validity of a contract hinges on getting the approval of a particular authority, and one of the parties is obliged by the terms of the contract to obtain it. If that party willfully or negligently fails to do so and damages would seem to be appropriate.

Paragraph (g) empowers the court to to sever portions of an illegal contract and notional severance of the kind endorsed in the *New Solutions* case is expressly covered.

Paragraph (h) is intended to act as a backstop to the other remedies and does not constitute an invitation to the courts simply to enforce an illegal contract. Given the breadth of the other remedies, it is not likely to be invoked often. The kind of situation where it might be invoked is where restitution is made of a parcel of land and the conduct of the adverse party suggests that an injunction enjoining trespass on the parcel is necessary for the protection of the successful party. Paragraph (h) would allow the injunction to be joined with the other relief.

The Québec Perspective: In the *Civil Code* of Québec as in paragraphs (a) and (b), taking into account section 5(2), the general rule is that the court must order restitution as between the parties to an illegal contract (art. 1422). Where restitution in kind has become impossible or is liable to affect third parties, the court must order restitution by monetary equivalence (art. 1700). For instance, if a service is performed under an illegal contract, the court will order restitution by equivalence, to the extent necessary to prevent unjust enrichment. Property purchased under an illegal contract may also be restituted by equivalence, where a third party has acquired rights in such property. The apportionment of losses incurred in relation to property or otherwise is governed by articles 1701 to 1706 of the *Civil Code*.

In the civil law as in paragraph (d), a party may obtain compensation by way of damages where wrongful conduct by the other party has caused him or her to suffer a loss, including a loss of profits (art. 1457, 1611).

As in paragraph (g)(i)(A), the *Civil Code* of Québec provides that an illegal clause may be deleted and the

remainder of the contract upheld in appropriate cases (art. 1438). Notional severance, as set out in paragraph (g)(i)(B), is presently available in certain cases only, such as adhesion and consumer contracts (art. 1437). An even broader power to vary the terms of the contract is conferred upon the courts in the case of money loans (art. 2332). The adoption of notional severance as a general remedy would be desirable.

(2) The amount to which a person is entitled by way of restitution, compensation or apportionment under subsection (1) (a), (b) or (c) must be determined in accordance with the following:

(a) the amount must not include loss of profits, and

(b) the amount must be reduced by the fair market value of

(i) any benefits that remain in the hands of the claimant, and

(ii) any property that has been returned to the claimant within a reasonable time after the contract is challenged as being null, void, voidable, illegal, unlawful, invalid, unenforceable or otherwise ineffective, and

(c) if and to the extent that the claim is for expenditures incurred in performing the contract, other than in performing an obligation to pay money, the amount must be limited to reasonable expenditures.

Comment: Section 5(2) provides guidance as to the way that restitutionary relief is to be assessed. It embodies the same policy as sections 7 and 8 of the *Uniform Frustrated Contracts Act*.

(3) A court making an order under this section may include, in that order, any terms and conditions it considers appropriate.

Discretionary Factors

6 (1) In granting or refusing to grant relief under section 5, a court must consider the following:

(a) the public interest;

(b) the circumstances of the formation, existence or performance of the illegal contract, including the intent, knowledge, conduct and relationship of the parties;

(c) whether a 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) whether the contract was illegal from the time of its formation or whether the circumstances of its operation led to an illegal result;

(f) if the defect arose out of an enactment, whether the enactment has been substantially complied with;

(g) the consequences of refusing to grant relief;

(h) any other factor the court considers relevant.

(2) In granting or refusing to grant relief in respect of an illegal contract that was entered into

before the coming into force of this Act, a court, in addition to the factors set out in subsection (1), must consider whether or not:

(a) a party to the contract has so altered that party's position that granting relief 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 settled a claim in respect of the contract.

Comment: Section 6 sets out the factors to be considered by the court in granting or withholding relief. Additional factors may come into play if the contract predates the Act. These are set out in subsection (2).

The Québec Perspective: In civil law jurisdictions, while restitution is the general rule, a court may refuse to order restitution in favour of a party who has acted fraudulently, immorally or by deliberately breaching the law. The factors underlying this exception to the general rule are identified at paragraphs (b) and (c). A codification of the exception in the *Civil Code* of Québec would be desirable.

In the *Civil Code* of Québec, a distinction is made between rules of public order which exist to protect a contracting party and rules of public order which exist in the interests of society as a whole (art. 1417, 1419). In the first instance, violation of the rule entails a relative nullity: only the party protected by the rule may have the contract annulled; he or she may also opt to affirm the contract (art. 1420). In the second instance, violation of the rule entails an absolute nullity: any person with sufficient legal interest may have the contract annulled (art. 1418).