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UNCONSCIONABILITY: PANACEA, ANALGESIC OR LOOSE CAN(N)ON?


David Vaver*

This is the substance of an exchange that took place in the third week of a first-year Contracts class:

Student: I think the example you’ve given is a case of an unconscionable contract that wouldn’t be enforced by a court.

Professor: What do you mean by “unconscionable”?

Student: Something not very nice.

Professor: How “un-nice” is not very nice? Something that would make you vomit or just get mad?

Student: “Just get mad” should be enough.¹

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“An unconscionable contract or term should not be enforced.” The sentence runs trippingly off the tongue. But few other propositions have so spurred writers on the law of contracts either to

* Professor, Osgoode Hall Law School, York University. A version of this paper was presented to the 17th Annual Workshop on Commercial and Consumer Law held at the University of Toronto on October 16-17, 1987.

¹ This student should get an A++ in Contracts if he continues on in this vein through the course. See Chesterfield v. Janssen (1750), 2 Ves. Sen. 125 at p. 155, 28 E.R. 82, per Hardwicke L.C. (an “unequitable and unconscientious” bargain is one that “no man in his senses and not under delusion would make on the one hand, and... no honest and fair man would accept on the other”). Or, as the Ontario Law Reform Commission (“OLRC”), in its Report on Sale of Goods (1979), Vol. 1, at p. 162, approvingly quoted from Gimbel Bros. Inc. v. Swift, 307 N.Y.S.2d 952 (1970), at p. 954: “the doctrine of unconscionability is not a charter of economic anarchy... a promisor can be relieved of his obligation... only when the transaction affronts the sense of decency without which business is mere predation and the administration of justice an exercise in bookkeeping.”
rapturous approval or vehement denunciation. Some remain profoundly sceptical.  

The reason why such a statement attracts this range of opinion is that it is not self-defining. Pilate, jesting, might as well have said "What is unconscionability?" and with equal aptness "Who decides?" Theorists since well before Aristotle have argued the toss with little conclusiveness. For unconscionability (or its less pretentious Anglo-Saxonism "unfairness") is a function of time, place, culture and politics. Common law judges in contract cases have entered the fray, but generally have avoided facing directly the question of what constitutes contractual unfairness. Instead they have fashioned rules that to them seem fair when applied to the generality of circumstances. The rules are normally sufficiently pliant for exceptional cases to be decided exceptionally. In addition, judges have fashioned a general escape-hatch under the rubric of unconscionability to deal with situations where the ordinary rules or the facts cannot be bent to accommodate their perception of justice. Beyond that limited judicial role, they have refused to go, recognizing that larger social problems are not theirs to solve but are for the people through their elected representatives in legislatures.

The OLRC in its Report on the Amendment of the Law of Contract plainly wants judges to assume a larger role in policing the contractual market-place. Part of its strategy is to encourage judges to resort to a doctrine of unconscionability more than they have in the past.

I do not agree with this strategy. I am content to see judges exercising powers in a circumscribed way. I have no confidence that they want to or can assume the role of a contractual police

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2 The arguments pro and con are well put in Ziegel, ed., Papers and Comments delivered at the Ninth Annual Workshop on Commercial and Consumer Law (Toronto, Butterworths, 1981): see Hasson, "Unconscionability in Contract Law and in the New Sales Act — Confessions of a Doubting Thomas" (ibid., at p. 59); Leff, "Thomist Unconscionability" (ibid., at p. 96); Reiter, "Unconscionability: Is There a Choice? A Reply to Professor Hasson" (ibid., at p. 77).

3 I use "common law" indiscriminately here and throughout this article to refer to judge-made law, whether its origin is common law or equitable jurisdiction.


5 The OLRC foreshadowed this approach in Chapter 7 of its Report on Sale of Goods, supra, footnote 1, but confined unconscionability to the discrete subject-matter of sale of goods. The scope of the defence there, in the context of an elaborate spelling out of the normal incidents of sale, might be expected to be far more modest than the scope now propounded for the defence across the whole board of contracts.
force. Instead of giving judges this wide-ranging mandate, I prefer to see contractual problems isolated, thought about in their context, and legislative solutions proposed to fix them if fixing they need. The danger of making judges the RCCP (Royal Canadian Contractual Police) is that people will become deluded into believing that all contractual problems will thereby be solved. In reality, they will not and cannot be solved in this way. Indeed, a reform of this character may well create positive mischiefs.

With those preliminary comments, let us examine the OLRC's Report. Plainly, the OLRC has ranged itself alongside, if not thick in the camp of, the ardent believers in unconscionability. It has taken to heart Reiter's battle-cry that academics "must cease wringing their hands over the difficulties involved in unconscionability-unreasonableness cases" and grasp the nettle. In Chapter 6 of the Report, the OLRC recommended that a doctrine of unconscionability be enacted to apply to all contracts. Drawing on Canadian, United Kingdom and Australian statutory precedents, the OLRC set out a list of 12 factors which a court might consider in deciding if a contract or any of its terms should be enforced. When it came to deal with penalty clauses and forfeitures in chapter 7 of the Report, the OLRC said that these too should be governed by the same criteria of unconscionability.

The arguments the OLRC used to support its recommendation are familiar enough.

First comes the argument designed to appease legal conservatives. Nothing really novel or radical is being proposed: a number of Ontario statutes already permit a court to excuse persons from observing their contracts on various broad discretionary grounds, so that the OLRC proposal is merely a generalization of these specifics. Moreover, some courts have already recognized a general doctrine of unconscionability "particularly with respect to cases of a consumer or quasi-consumer character". But some

8 Report, at pp. 121-3. The fact that these statutes have seen little judicial exposure is not mentioned. The OLRC might have had the curiosity to explore the reasons for this phenomenon: see further, text, infra, accompanying footnotes 104-06.
9 Ibid., at p. 120.
courts apparently do not know what unconscionability means and
the Supreme Court of Canada has not “clearly recognized” the
doctrine. Far from this judicial ambivalence giving the OLRC
pause, the OLRC turns it into a reason for giving unconsciona-
bility a statutory base: the doctrine will now be legitimated and
will provide courts with needed guidance.

Second come the arguments for neatness and for doing away
with legal relics. Courts have excused people from performing
their contracts for reasons other than unconscionability, but “it is
possible” to find in such cases “an underlying principle of uncon-
scionability ... that may serve to explain” a number of “seemingly
diverse matters.” This tentative statement quickly firms up with
virtually no bridging reasoning: the “seemingly diverse matters”
become “anachronistic tools” and “fictitious techniques”, and
unconscionability becomes a principle of “pervasive
importance”. Trade in your legal relics now for the new, all-
power, fuel-injected doctrine with the micro-circuits and flashing
lights; no matter that the old Model T principle gets you there,
while the new doctrine may forever be jacked up in the legal
service bay having “diagnostic treatment”.

Third, other jurisdictions such as the United States, the United
Kingdom and New South Wales have enacted sweeping statutes
giving courts a broad discretionary power not to enforce contracts
for unconscionability or its verbal equivalents (“unfairness”,
“unreasonableness”, “harshness”, “oppression”, “not in the
public interest”, or any combination thereof). Anybody who is
anybody is doing it, so why shouldn’t we? This might have been
called the “40 million Frenchmen can’t be wrong” argument, but
for the fact that the French Civil Code does not contain any such
power.

10 Ibid., at pp. 121, 127. Of course, the Report did not say that judges do not know what
they mean by unconscionability: it said, more politely, that the doctrine has not been
“uniformly applied by lower courts”: ibid.
11 Ibid., at p. 120.
12 Ibid., at p. 127.
13 Angelo & Ellinger, “Unconscionable Contracts — A Comparative Study” (1979), 4
Otago L. Rev. 300, at p. 317: “The French, then, like the English, have some specific
rules relating to unconscionability, but do not have a general lesionary doctrine”.

The position is apparently similar in Quebec, where, according to Laskin C.J., courts
do not have a dispensing power “to refuse to enforce a promise in strict conformity with
Fourth comes the moral imperative: courts should be able to “redress the imbalance where parties are not bargaining from equal positions and where the stronger party has taken advantage of its superior power to impose harsh and oppressive conditions on the weaker party”. Three cheers for that, but can’t one identify these situations more precisely? Yes and no, says the Report:

While it is true that some unconscionable clauses are readily identifiable, it would be impossible to list all clauses to which a presumption [of unconscionability] or prohibition should apply.

The Report does not name names and tell us what these “readily identifiable” clauses are. All it is prepared to identify is the “enforceable” end of the unenforceability/enforceability spectrum: unconscionability is not “a life jacket for persons who have entered into a bad bargain; nor should it interfere with the right of parties to bargain freely with respect to the terms of their contract.”

* * * * *

The Report is attractively and succinctly written. It has lots of footnotes and should therefore be presumed prima facie correct. Yet even a well-disposed reader will find the Report flawed in a number of key aspects and will thus find it difficult to agree with its reasoning and conclusion. The flaws include: (1) methodology; (2) logic; (3) interpretation of the current law; (4) strategy; (5) implementation of strategy; and, ultimately (6) a failure to grapple with the underlying values that unconscionability masks.

1. Methodology

The Report proposes legislation. Is it too much to expect the Report to have been written in a way that might appeal to a legislator of good will who is asked to support its enactment? That person might ask some obvious questions which the Report answers obscurely at best:

— At what mischiefs is this proposal aimed?
— Is the present law not avoiding these mischiefs?
— Who will benefit from the proposed change?
— Who will be harmed by it?

14 Report, at p. 127.
15 Ibid., at p. 135.
16 Ibid., at p. 127.
— Is the proposal the best, or at least the most politic, way of addressing the mischiefs?

The legislator might go on to ask what evidence the authors of the Report have to suggest that any claimed mischiefs do indeed exist. On this the Report is conspicuously silent.

In part this can be traced to the Report’s methodology. None of the authors seems to have poked a nose out of his or her office or law library to find out what contractual mischiefs were actually occurring in the market-place. The Report hews to the path of traditional law reform: contract law problems are to be found in law reports under the index heading “Contracts”, not in the streets, stores or offices of the nation. No business person or consumer seems to have been asked what problems he or she is encountering; or even if the sorts of problems encountered in the law reports are real, anecdotal or endemic; and if real or endemic, how such problems might be solved.17 Perhaps the OLRC suspected that the same “discouraging apathy” encountered when it tried to survey business persons’ attitudes about reform of the sale of goods law would again surface: business people and consumers alike found the law practically irrelevant to their ordinary affairs.18 Still, there is no a priori reason why careful field research might not have yielded useful results. Admittedly, the OLRC works under budgetary constraints; but, at the least, the complaints files of the many departments of the Ontario Government and of the trade and consumer organizations that abound in Ontario and Canada generally could have been tapped as a valuable and suggestive resource. One is left wondering whether the problems the Report isolates are real-life problems at all or are mere fantasies whirling around inside the authors’ heads. In this light, the charge the Report levels against judges who use “anachronistic tools” for decision making is paradoxical: a dose of material taken from law reports, contracts textbooks and contract statutes seems in itself an anachronistic tool with which to fashion modern law reform.

17 OLRC members apparently did discuss some matters covered by the Report with practising lawyers. Whatever the scope of these discussions, they do not appear to have had much or any impact on the drafting of the chapters dealing with unconscionability.

18 OLRC, supra, footnote 1, Vol. 1, at pp. 25-6.
2. Logic

The method by which the Report proceeds lacks logical rigour. Its language is that of faith more than of reason.

Such logic as there is proceeds along the following lines: unconscionability exists at common law, yet not all courts seem to understand it and the Supreme Court has failed to recognize it "clearly". Not only is it a stand-alone doctrine, it is (or may be) a "principle" underlying other doctrines. Not only is it a good doctrine and principle, it is a better principle than that which currently exists. Therefore, it should be more prominent. This requires legislation. Other doctrines should be downgraded or replaced by unconscionability. The law of Ontario will then be better because cases will be decided on clearer grounds. This will make future decisions more predictable.

Some of this reasoning seems internally inconsistent and much of it is undocumented. On the one hand, the Report ahistorically traces unconscionability back to the 19th century; on the other hand, it implies that unconscionability may be a figment of lower courts' imagination since the Supreme Court might not recognize it. Moreover, lower courts have not applied unconscionability "uniformly"; significantly for a Report replete with footnotes, not one example is given of this default.

The Report should have got its story straight. If unconscionability is really such a pervasive doctrine and principle, deeply rooted in legal history, why on earth would the Supreme Court not recognize it? If it has not been applied uniformly, in what respects has it been going wrong? Do we need legislation simply to affirm an existing doctrine or is a new one being created?

Most of the Report's reasoning is purportedly empirical, rather than a priori, and so should depend for its validity on evidence. But evidence is remarkably lacking. We are told that unconscionability "may" serve to explain rules against forfeiture of leases and clogs on the equity of redemption, relief against penalty clauses and against "certain" contracts in restraint of trade, and the

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19 Report, at p. 120, note 7. In fact, equitable jurisdiction springing from the Chancellor's conscience is much older. In Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.), at p. 46, Megarry J. said: "a couplet attributed to Sir Thomas More, Lord Chancellor, avers that 'Three things are to be helpt in Conscience; Fraud, Accident and things of Confidence.' (See 1 Rolle's Abridgement 374)."

20 Ibid., at p. 121.
devices used by the courts to circumvent exemption clauses of various kinds;\(^\text{21}\) to which one might reply with equal cogency, unconscionability "may" equally serve not to explain such matters. Tentative assertions of this kind prove nothing, even when the Report later restates them more emphatically without saying why what was a mere possibility seven pages earlier is now a fact.\(^\text{22}\) The force of such assertions can logically be dissipated by equally tentative, generalized and plausible assertions. Here is one of my own (though I claim no credit for its originality): quite different policies "may" serve to explain this veritable rag-bag of cases historically, and quite different individual policies "may" be needed to justify each of them today.

Moreover, we are not told what shortcomings the various excuses for non-performance exhibit, informed as they (all, most, many, or some?) "possibly" are by unconscionability,\(^\text{23}\) and why these deficiencies are so serious that the excuses should be jettisoned in favour of some overarching principle of unconscionability. It is surely not enough simply to assert that all these excuses are "anachronistic tools" and "fictitious techniques" without subjecting at least some, if not all, to analytical scrutiny. It is at best sloppy, and at worst devious, reasoning to pick "fundamental breach and adverse construction" as the devils with which to scare off all, most, many or some other excuses for non-performance in favour of the salvation angel of unconscionability. In this light, the Report's assertion that unconscionability is the better way is unpersuasive.

3. Interpretation of Current Law

The OLRC apparently wants to help persons who have less bargaining power than others in cases where "the stronger party has taken advantage of its superior power to impose harsh and oppressive conditions on the weaker party".\(^\text{24}\) The conclusion the


\[^{22}\] See quotation accompanying footnote 12, supra.

\[^{23}\] Report, at p. 120: "It is possible to range even more widely, and find in other existing categories of excuse for non-performance of a contract an underlying principle of unconscionability. In particular ...". The reader is asked to infer that all, most, or many such excuses are explicable in these terms. All, most or many minds may well marvel at the daring sweep of the generalization — and ultimately at its essential meaningless.

\[^{24}\] Ibid., at p. 127. One should however note that nowhere in the actual criteria the Report proposes to be enacted is this emotive language actually used: *ibid.*, at pp. 129-30.
OLRC wants us to draw from this noble ideal is that legislating a doctrine of unconscionability will enable courts to assist weaker parties where they presently cannot do so.

Two questions immediately spring to mind: are not courts doing, or at least saying that they are doing, this already? Have they indicated any case where common law doctrine hamstrings them from assisting a weaker party? The answer to both questions is, obviously, no.

The Report itself appears to agree with this, at least in part, when it says that unconscionability is already of "pervasive importance". Apparently, however, the persons administering the judicial system cannot recognize this, for the Report criticizes them for using "anachronistic tools" and "fictitious techniques" instead of unconscionability. Counsel and judges are apparently speaking prose without quite knowing it. So, if judges tossed away their fictitious ploughshares and picked up the hi-tech unconscionability implement instead, they would no longer "conceal the reasons for judicial decision": they would start developing "clear principles" and applying their minds to "truly relevant criteria for decision".

A number of claims seem to be made here, of varying degrees of dubiousness. If the claim is that judges are hampered in doing justice because of the tools which they have hand-crafted for themselves and which they are unable to refashion, the judges themselves might well be surprised. It is flatly contrary to their own rhetoric, of which the following two passages may be replicated ad nauseam from the law reports:

\[
\text{It has always been assumed that one of the virtues of the common law system is its flexibility, that it is capable of changing with the times and adapting its principles to new conditions.}^27 \\
\text{\ldots \ The Courts have not been slow either to adapt or extend the ancient principles of law so as to apply them to new conditions prevailing in the community.}^28
\]

Plainly, the Report must think that these statements are false if applied to unconscionability, but little proof is forthcoming.

\[^{25}\text{Ibid., at p. 127.}\]
\[^{26}\text{Ibid.}\]
It is not as if an unconscionability doctrine does not already exist in Canadian common law. However, for some reason that is not clear, the Report downplays this phenomenon to an extraordinary extent. It first says that “some recent judicial decisions reflect an acceptance of a generalized doctrine of unconscionability, particularly with respect to cases of a consumer or quasi-consumer character”, citing three decisions of the Ontario Court of Appeal and two from the British Columbia Court of Appeal. This is some understatement. The Report omits to say that many other decisions mention and even purport to apply the doctrine, both in those courts and in other provincial courts, including courts of appeal. Indeed, when Lord Denning, in his famous judgment in Lloyds Bank Ltd. v. Bundy, said that English law recognizes a category of “unconscionable transaction” extending to “all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker”, he specifically drew on two Canadian cases for support. Moreover, the Report’s statement, that unconscionability applies “particularly with respect to cases of a consumer or quasi-consumer character”, appears to suggest that its application outside such cases is rare or sporadic. This is not so. Of the four recent cases cited in the footnote to this statement, one might broadly (but not particularly aptly) categorize two as cases of a “consumer or quasi-consumer character”: a case where an injured person settled with an insurance adjuster and one where a person mortgaged property.

29 Report, at p. 120, and notes 7 and 8.
31 The test generally approved is that suggested by Crawford, “Comment” (1966), 44 Can. Bar Rev. 142, at p. 143: a “combination of inequality and improvidence” invokes the jurisdiction: see Wallace v. Toronto-Dominion Bank, supra, at p. 440 D.L.R., p. 169 O.R., per Houlden J.A. (dissenting), who cites Crawford for the proposition that “the power of a court to declare the provisions of a contract unenforceable on the grounds of unfairness or unconscionability is well established in Canadian law”.
32 Report, at p. 120.
with a bank as collateral for a friend's indebtedness. But the purchase of a commercial fishing boat with its licence and a minority stockholder's claim that he was shortchanged in a corporate takeover assuredly do not qualify even as "quasi-consumer" cases, any more than do later cases which the Report claims could have been more aptly decided on unconscionability grounds.

All this is buttressed by the curious half-truth that the Supreme Court of Canada has not "clearly recognized" the doctrine. But, within the last couple of decades, the court has dealt with unconscionability submissions at least four times, twice striking down a term or a contract, and twice refusing to do so. One may criticize the court's reasoning or application of the doctrine, but that is another matter. To suggest, as the Report does by innuendo, that the court would sometime in the future deny the doctrine's existence is implausible, especially when the court has traditionally relied so heavily for its contract doctrine on English common law. The Report does not in any event hint why the

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36 Report, at p. 121, note 9. The cases cited are discussed infra accompanying footnotes 49 et seq.
38 Bauer v. Bank of Montreal (1980), 110 D.L.R. (3d) 424 at pp. 429-30, [1980] 2 S.C.R. 102 at p. 110, where a unanimous court rejected the submission that a particular clause in a bank guarantee was "onerous and unreasonable", without suggesting that the submission was legally irrelevant (note that McIntyre J., who wrote the judgment, had, as a court of appeal judge, accepted the doctrine of unconscionability without any qualms: Harry v. Kreutziger, supra, footnote 35); Dyck v. Manitoba Snowmobile Ass'n Inc. (1985), 18 D.L.R. (4th) 635 at p. 637, [1985] 1 S.C.R. 589 at p. 593, per curiam, (7-person court), holding that an agreement waiving claims for personal injuries arising from a sports accident was enforceable, since it did not fall within the class of cases "where the differences between the bargaining strength of the parties is [sic] such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other".
39 The Privy Council recently affirmed the existence of an equitable doctrine of unconscionability, while confining it to cases where a party has been induced to contract "as a result of victimisation" and not merely through "contractual imbalance not amounting to unconscionable dealing": Hart v. O'Connor, [1985] A.C. 1000 (P.C.), at p. 1018. The
court might want to deny the faith and overrule a large body of Canadian case law, including decisions delivered or subscribed to by most of the present justices of the court.

Even the Report's claim that courts have not "comprehensively" addressed the types of relief available for unconscionability is a little misleading. Courts tend to categorize unconscionability as a species of equitable fraud and thus import the remedies for that type of action into unconscionability, including rescission on terms, adjusting the price to a "fair" level, and more latterly compensation when rescission is impracticable. It is perhaps more accurate to say that, apart from the substantive recommendation that the Attorney-General be given standing to apply for an injunction to enjoin the actual or incipient making of unconscionable contracts, the OLRC's recommendations on remedies will put beyond argument what remedies should be available, while preserving the court's discretion to decide which remedy is appropriate in a particular case.

4. Strategy

The foregoing discussion indicates in part what the OLRC's strategy was. It was to assert that unconscionability was secreted in the interstices of the common law, but was not very well worked or thought out: so legislation was needed to prod the judges along. Once legislation was proposed, one could include a beefed-up unconscionability provision with consequential beefed-up remedies.

I have tried to demonstrate that the premise for this strategy is non-existent or at least flawed. But the Report does apparently have a fall-back position, which runs something like this: although unconscionability exists at common law, courts do not apply it often enough; if they did, cases would be more clearly decided; presumably also, cases would be more justly decided, for clarity without justice seems a rather modest goal for which to strive.

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40 Report, at p. 127.
42 Dusik v. Newton, supra, footnote 35.
43 Report, at pp. 133-4.
44 The laws of apartheid are clear enough; presumably, if they were not, the Report would
This fall-back position is also unpersuasive. The Report does not expressly identify any case where a court has failed to protect a weaker party from harsh and oppressive conditions imposed on it. On the contrary, what it principally objects to is that “[m]any cases in which a general doctrine of unconscionability might have been applied continue to be decided on other grounds”. The problem the Report therefore claims to see is one of means, rather than ends. Let us examine this claim.

First, if the OLRC believes that giving courts overt tools with which to work will mean the disappearance of covert tools, it is deluding itself. A quarter of a century after the promulgation of the Uniform Commercial Code, with its famous section 2-302 allowing courts to strike down unconscionable contracts, American courts are still liberally using well-worn techniques of interpretation and construction to avoid “unconscionable” contracts and clauses. True, more cases may now be decided on unconscionability grounds than previously, but it is unrealistic to imagine that unconscionability can ever attain more than partial hegemony.

This phenomenon is perhaps more significant than has been realized. The Realists assumed, and their Canadian neo-equivalents continue to assume, that judges would actually welcome having overt tools with which to work. Some judges may, but certainly not all. Though obviously aware of the immediate consequences of their decisions, judges may prefer to decide a case on a legalistic ground rather than taking the forthright course of calling one of the parties a rogue. This may reflect humans’ tendency to ask them to be made clear. For what purpose, though, is not entirely plain: so that people could know unequivocally for or against what they were fighting?

Report, at p. 121. The one case with which the Report does take issue (at pp. 141-2) is itself highly debatable: H. F. Clarke Ltd. v. Thermidaire Corp. Ltd., supra, footnote 37. There, a majority of the Supreme Court of Canada struck down a clause providing for “agreed damages” in the event of breach of a business contract. The majority thought that the clause did not purport to quantify the plaintiff’s losses on breach. Instead, the clause purported to strip the defendant of the gross trading profit made from the breach. The clause was plainly “punitive”, in the sense that no common law court would have made such an order in the absence of the clause even if the contract-breaker were a fiduciary of the contract victim—which it was not.

“Courts have often used interpretation or construction to avoid giving effect to an inherently unfair provision of an agreement when a decision based on unconscionability would have been more candid”: Farnsworth, Contracts (Boston, Little, Brown & Co., 1982), pp. 498-9, quoted in Goldberg, “Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors” (1983), 58 Wash. L. Rev. 343, at pp. 345-6, note 14.

I had this forcibly drawn to my attention some years ago when I was lecturing (or
avoid confrontations; it may flow from limitations in the judicial process on finding out the "real" truth of any case; it may be part of a larger strategy of maintaining judicial power free from the public scrutiny that plain talk frequently attracts.

Second, the examples the Report notes as cases where "unconscionability might have been applied" instead of other grounds are a curious brace indeed. They seem to undermine rather than advance the Report's case. In the first one, *Heffron v. Imperial Parking Co.*, a person whose car was stolen from a parking garage and damaged recovered the cost of repairs and the value of lost contents from the garage, even though prominent signs at the garage and wording on the driver's parking stub informed him that "we are not responsible for theft or damage of car or contents, however caused". Roaming the byways of bailment, fundamental breach and construction, Estey J.A., for the court, reached the result that the driver was not bound by this transparently clear and simple language. The same result might have been reached through unconscionability, but whether the reasoning would have been any more comprehensible or would have provided any firmer guidance for later cases may be doubted. The checklist of 12 non-inclusive factors the OLRC provides will not help much: some factors lean in favour of the plaintiff succeeding, some in favour of the defendant, and no one (least of all, I suspect, the OLRC) has any idea which factors should prevail or how they can or should be weighted. But all this merely diverts attention from the silliness of the result in *Heffron*, however reached.

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50 The case presumably involved the following scenario. The motorist's insurer had paid out the owner and was now pursuing a subrogated action against the garage and, indirectly, the garage insurer. By having its policy-holder put up signs and insert exemptions in the parking stubs, the garage insurer wanted to insulate itself against this sort of suit, as well as against those rarer cases where the motorist was uninsured. The garage might have avoided the car's theft by taking better and relatively costless precautions. This suggests that it should carry the risk as the most efficient loss-avoider. On the other hand, as Estey J.A.'s decision indicates, a court can, with the benefit of hindsight, always find some additional cheap precaution that a garage could have taken to avoid virtually any mishap. Decisions such as *Heffron* force garages either to self-insure or carry insurance. Parking costs to all are thus raised for the benefit of a few uninsured motorists. *Heffron* ought therefore to have respected the allocation of risk the garage sought to impose by
In the second case, *Murray v. Sperry Rand Ltd.*, a farmer obtained restitution and consequential losses flowing from a failure of agricultural machinery to live up to promises of performance the sellers made orally and in their promotional brochures. The court danced its way around a disclaimer clause to hold the seller, the distributor and the manufacturer jointly and severally liable. No doubt the farmer could also have won on unconscionability grounds, as similar plaintiffs have done in the United States, by demonstrating how closely the farmer's intellectual qualities matched those of the plants he was growing and how sophisticated and tricky the sellers really were. But this is to shave with a sword, instead of Occam's razor. Statements of performance designed or expected to come to a buyer's attention should always bind the seller and any person making or party to them; any contrary disclaimer should be ineffective. There is already a judicial and legislative trend to this effect. Far from being a useful tool, unconscionability is a positive hindrance to the extent that it diverts attention away from such more compact solutions.

The third example, *Beaufort Realities (1964) Inc. v. Chomedey Aluminum Co. Ltd.*, is even odder. A subcontractor was allowed to file and enforce a mechanic's lien for work done on a property, even though its contract with the head contractor contained a contract; its result is to create inefficient and costly overlaps in insurance coverage. Some decisions now explicitly recognize this point: see, e.g., *ITO-International Terminal Operators Ltd. v. Mida Electronics Inc.* (1986), 28 D.L.R. (4th) 641 at p. 675, [1986] 1 S.C.R. 752 at p. 799. But they are too few and far between to represent a counter-trend to the enormous number of cases where courts have delighted in avoiding an exemption clause without regard to the insurance consequences.

There may, of course, be a case for the motorist's recovering from the garage the amount of his uninsured deductible, but this is no reason for allowing him to recover as well the insured loss for his insurer's ultimate benefit.

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52 Leff included farmers in his list of "presumptive sillies" apparently recognized by courts, a list which includes sailors, heirs and women: "Unconscionability and the Code — The Emperor's New Clause" (1967), 115 U. Pa. L. Rev. 485, at pp. 532-3. Recent American case law confirms this for farmers: Mallor, "Unconscionability in Contracts Between Merchants" (1986), 40 Sw. L. J. 1065, at pp. 1083-4, even when the farmer looks more like an agribusiness or when, in cases such as *Langemeier v. National Oats Co.*, 775 F.2d 975 (C.A. 8, 1985), he is an experienced agricultural financier and only a thesis away from a doctorate in agronomy.

53 For judicial predisposition to this effect, see *Hallmark Pool Corp. v. Storey* (1983), 144 D.L.R. (3d) 56 at pp. 65-6, 45 N.B.R. (2d) 181 at pp. 197-8 (C.A.), per La Forest J.A. for the court.

comprehensive clause renouncing lien rights. Both the Ontario Court of Appeal and the Supreme Court of Canada claimed that the clause, properly construed, was not supposed to cover the situation where the contractor had repudiated its contract with the subcontractor. The way that Wilson J.A. in the Court of Appeal phrased the question to be answered (“is it fair and reasonable in the context of this fundamental breach that the waiver of lien continue to bind the [subcontractor]?”) is so close to the language of unconscionability that she plainly would have reached the same result under the latter doctrine. Two points should be noted. First, the result under either route is strange. The only purpose of a waiver of lien clause is to protect an owner from having its property encumbered, and thus from encountering delays in getting loans to finance the property, precisely when the head contractor fails to pay its subcontractors. The Beaufort Realities clause was worded in typically broad language that did not limit its operation by reference to the reason for or nature of the head contractor’s default. Why the courts should decide to protect subcontractors from the plain consequences of the contracts they sign is unclear. Second, unconscionability will remain only an alternative means of deciding a case such as this. The OLRC has not purported to abolish the doctrine of fundamental breach or rules of construction. Beaufort Realities and the reasoning upon which it is based will continue as a binding precedent. Faced with another similar case, why would court or counsel prefer the less predictable path of multi-factor unconscionability to Beaufort?

Third, take the rare case where a Canadian court has purported to apply a broad concept of unconscionability, albeit as an alternative ground, to avoid an exclusion clause. In Davidson v. Three Spruces Realty Ltd. the plaintiffs sued to recover the value of property of theirs that had disappeared from the defendant’s vault. The defendant, which had rented the vault space to the plaintiffs, pleaded that the plaintiffs had signed a contract containing a wide exclusion clause which, among other things, exempted it from liability for loss of property or “for any act,

neglect or omission whatsoever”. When the contract was signed, the defendant told the plaintiffs that almost absolute safety was assured and that the plaintiffs need not insure their property. In fact, the defendant ran its operation with few security precautions and failed to advise the plaintiffs that other goods had been stolen from the vault. Anderson J. allowed the plaintiffs’ claim, holding the exclusion clause inapplicable on four alternative grounds. One was that the clause was unconscionable and thus unenforceable as an “abuse of freedom of contract”. The judge listed seven factors that he thought supported this conclusion. The OLRC might well have used this case as an example of the mess into which contract doctrine has fallen. But is unconscionability the way out? Davidson’s case suggests not. The result is plainly right on a short well-established ground: a defendant who dissuades a plaintiff from insuring property that is later lost through the defendant’s negligence should be liable for the value of the property, since its action caused the plaintiff’s loss. The

57 Ibid., at pp. 492-3 D.L.R., pp. 476-7 W.W.R. The other three grounds for holding the clause unenforceable or inapplicable were: (a) it did not apply to vault storage but to safety box rental (another branch of the defendant’s business); (b) the defendant’s “gross negligence” constituted a “fundamental breach” of contract, to which the clause did not apply; and (c) the defendant’s misrepresentation about safety and insurance induced the plaintiffs to believe that no exclusion clause existed or would be enforced. These grounds, and the reasoning supporting them, overlapped considerably.

58 “(1) Was the contract a standard form contract drawn up by the bailee? (2) Were there any negotiations as to the terms of the contract or was it a commercial form which may be described as a ‘sign here’ contract? (3) Was the attention of the plaintiffs drawn to the limitation clause? (4) Was the exemption clause unusual in character? (5) Were representations made which would lead an ordinary person to believe that the limitation clause did not apply? (6) Was the language of the contract when read in conjunction with the limitation clause such as to render the implied covenant made by the bailee to use reasonable care to protect the plaintiffs’ property meaningless? (7) Having regard to all the facts including the representations made by the bailee and the circumstances leading up to the execution of the contract, would not the enforcement of the limitation clause be a tacit approval by the Courts of unacceptable commercial practices?” Ibid., at p. 493 D.L.R., pp. 476-7 W.W.R.


60 Cf. cases where a party’s promise to insure is interpreted as making the insurance moneys the pool from which compensation is to be sought, thereby modifying the ordinary legal allocation of risk: Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd. (1976), 69 D.L.R. (3d) 558 at p. 567, [1978] 1 S.C.R. 317 at pp. 329-30.

Davidson raises a further general point: is a party to a contract bound to tell the other of events arising before or during the contract that might impair the other’s expectation that the contract will be duly performed? The much criticized case of J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co. (1972), 26 D.L.R. (3d) 699, [1972] S.C.R. 769, suggests not, but surely the OLRC should have considered whether or not this holding
additional unconscionability verbiage — these were "unacceptable commercial practices", regard had to be had to "all the facts", the clause was so "unreasonable" as to be a "clear abuse of freedom of contract"\(^{61}\) — just confuses the analysis. The club of unconscionability is not needed to batter the gnat of misrepresentation. As in *Murray v. Sperry Rand Ltd.*,\(^{62}\) unconscionability again diverts attention away from this compact solution to an amorphous and unpredictable line of reasoning. The court's implicit invitation to other courts and to counsel to resort more often in the future to unconscionability has not been accepted. *Davidson* has not become a leading case; instead, it stands unwanted and virtually alone. Is this not itself a suggestive phenomenon?

5. Implementation

Let us assume that, given legislation of the sort the Report proposes, courts would indeed eschew other devices and would use unconscionability more. This would realize the Report's strategy to give unconscionability the lead role, instead of merely a bit part, in the new play "Contractual Excuses Redefined". What would be achieved by this?

Fear not, says the Report: there will be no "flood of uncertainty"; in fact, "the volume of litigation has been extremely modest" in jurisdictions with an unconscionability provision; the problem of inconsistent decisions can be cleared up by setting out statutory criteria, so that judges will not be enabled "to impose their view of public policy on the market place".\(^{63}\)

All these claims are implausible. First, compare the Report's statement that "the volume of litigation has been extremely modest" in unconscionability jurisdictions with the statement made in a recent American article: "The courts took several years should generally prevail. In its prior *Report on Sale of Goods, supra*, footnoe 1, the OLRC recommended that a plaintiff who learned of such events could insist that the defendant give an "adequate assurance of due performance", failing which the plaintiff could withdraw from the contract (*ibid.*, vol. 2, at pp. 528 et seq., adopting the principle of U. C. C. Art. 2-609). At that time, the OLRC avoided imposing any duty on the defendant to advise the plaintiff of such events. Should it not now have faced this issue squarely when dealing with general contract reform?

\(^{61}\) *Davidson, supra*, footnote 56, at p. 493 D.L.R., p. 477 W.W.R.

\(^{62}\) *Supra*, footnote 51.

\(^{63}\) Report, at pp. 127-9.
to begin using the doctrine of unconscionability aggressively, but the doctrine now has been litigated in literally hundreds of cases". If this is the OLRC's view of "extreme modesty", one can feel only relief that the OLRC has no jurisdiction over the law of pornography. But perhaps the OLRC would confess and avoid: there may be lots of litigation in the U.S. but Canadians (or Ontarians) are not as litigious. For the sake of argument, let it be accepted that there may not be an enormous amount of litigation; in any event, if unconscionability will do good things, fiat justitia, ruant curiae.

Second, take the point that the doctrine will not lead to uncertainty. In Dyck v. Manitoba Snowmobile Ass’n the Supreme Court of Canada in a terse per curiam opinion recently said that a 19-year-old plaintiff, injured through the defendants’ negligent conduct of a snowmobile race in which the plaintiff was participating, could not sue for damages: as a condition of entering the race, the lad had signed a waiver absolving the defendants from liability for such negligence. The court rejected an argument that the waiver was unconscionable.

The association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. ... [T]he races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an

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64 Mallor, supra, footnote 52, at p. 1070 (emphasis added).
65 That this is so is not self-evident: witness the new litigation business which the Canadian Charter of Rights and Freedoms has spawned and which threatens to overwhelm the courts.
66 Note that the Report does not entirely have the courage of its convictions because, after saying that the form of the doctrine adopted elsewhere has not led to a “flood of uncertainty”, it goes on to propose criteria to flesh out the bare bones of unconscionability, so that the concerns of some critics “can be satisfactorily answered”: Report, at p. 127. If it in fact is true that there has been no “flood of uncertainty”, the critics are already satisfactorily answered. Interestingly enough, the OLRC itself previously recognized that unconscionability involved serious questions of uncertainty when it said in its Report on Sale of Goods (supra, footnote 1, Vol. 1, at p. 163) that “[w]e appreciate that businessmen may not welcome this additional layer of uncertainty”, but countered this by saying that Ontario courts would exercise their power “responsibly”. Perhaps we are only talking about “acceptable” levels of uncertainty, and the current Report’s authors intend merely to emphasize the word “flood”. The implication is then that only a “trickle” instead of a “flood” of uncertainty requires to be stemmed.
68 Ibid., at pp. 637-8 D.L.R., p. 593 S.C.R.
organization like the association to seek to protect itself against liability from
suit for damages arising out of such dangers.

Would the case be decided any differently under the Report's
new criteria? I have run the case by the criteria point by point with
all the good will that I can muster and have reached a firm
conclusion: I haven't the slightest idea!

Let us see why. The task is to decide if the waiver "is unconscio-
nable in the circumstances relating to the contract at the time it
was made". No definition is given of "unconscionable" but all
lawyers know that it is an obscurantist term simply meaning
"unfair". Let us go through the criteria one by one, leaving
criterion (a) (a really difficult one) for last.

Under criterion (b), is the waiver "reasonably necessary for the
protection of the interests" of the association? Yes (maybe), if its
interest is not to be sued for negligence. No (maybe), if its interest
is not to take or to relax reasonable (costly or costless?) precau-
tions that it might otherwise have taken; and/or if the interest
being protected is merely that of the association's insurer; and/or if
the association's interest in having its premium remain low is
"unreasonable".

Under criterion (c), the degree to which Dyck was required to
waive his rights, which he otherwise had, to sue the association, its
officials and agents for negligence is total. Is this good or bad?

Under criterion (d), is there "gross disparity" between the
considerations given by the association and Dyck when compared
with other similar contracts in similar circumstances? Quite apart
from the question of what disparities are "gross", what is this
criterion getting at? Presumably, some understanding of the
market in waivers, so that one can work out if the price paid ($25

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69 Report, at p. 136, Recommendation #4. The check-list of factors is conveniently summa-
rized here, at pp. 136-7, as well as at pp. 129-30.

"entirely agreed" with the trial judge's statement that "if it is a question of what is
unconscionable, or, to use a word with a less legal flavour, unfair, I can see nothing
whatever unfair in the defendant retaining the money". More recently, in Elton John v.
James (November 29, 1985, Ch. D.), Nicholls J., having found a "dominating influence"
exercised by the manager in a management contract with a composer-musician, went on
to hold that the agreement at its inception "was an unfair transaction (I prefer to use this
expression rather than 'unconscionable transaction', but without intending any different
meaning.)" (Judgment, at p. 100).

71 Just as occurs in antitrust and anti-competition cases, there may be a problem of defining
the relevant market.
and the giving up of a personal injury suit) is too high for what Dyck was getting (the chance of snowmobiling, winning a prize, and the risk that the association might omit safety precautions). Does anyone else in Manitoba, some other province or some other country give up their tort rights for a $25 entry fee and the chance of winning a prize? Yes, Dyck did it before. And Mr. Crocker recently paid $15 in return for a similar waiver and chance for prize money when he entered a tube-racing spectacle in Ontario.72 But is this “similar”? Is there a “gross disparity” between the considerations? Crocker’s case was in Ontario; it was tube-racing; the spectacle was a gimmick to attract the masses; the Molson people were there plying the contestants with drink; the entry fee was 40% lower, but we are not talking about large dollar amounts. What if we find that some sports offer two sorts of entry fee: a higher one if you take out insurance, a lower one if you sign a waiver?73 How far afield do we range? Shall we look at sports in pari materia to snowmobile racing? In what respects — in the degree of danger, such as professional (or amateur) car racing, equestrian events, track and field, or chess (where the participants sometimes come to blows)? And what if we find that every other sport takes a waiver? What conclusion do we draw from this: that there is a (desirable or undesirable?) conspiracy or conscious parallelism between sports organizers, sports sponsors, sports insurers, against sports people? And what if people have protested about waivers — is this evidence that waivers are known, good, hateful to people, to some people? Should we then blame concerned sports people for not banding together and rising against this iniquity?

Perhaps we are entitled to look even more widely on the question of what “considerations” were exchanged. Dyck gave up his right to sue the association and its officials for negligence, but the latter did not give up their rights against him. So, Dyck can recover nothing against them if they are negligent, but the association and its officials can recover their full damages from Dyck if he is negligent towards them. In the actual case, Dyck swerved to avoid the negligent official; he caused himself harm rather than choosing to run over the official. Had Dyck been fully aware of the


implications of the one-way waiver, he might rationally have thought: "Since I will get nothing if I injure myself because of the negligence of the association and its officials, I might as well look after myself first. If any officials get in my way, I may as well run them down. I have few assets and no third-party liability insurance, so if they sue me, they will get nothing." Thus, the effect of the association's not providing Dyck with a reciprocal waiver is to discourage altruistic behaviour and to encourage antisocial negligent behaviour. Is this a "disparity" between the "considerations" that can be labelled "gross"?

Under criterion (e), did the association know, when entering into the contract, that Dyck would be substantially deprived of the benefit or benefits he reasonably anticipated under the contract? This is a little tricky. The benefit he expected under the contract was a chance to win prize money. The waiver at the time must have appeared ancillary to that. What benefit did Dyck "reasonably anticipate" from the waiver? Note that there are two possible routes that might be taken:

(i) Dyck had read the waiver previously, he had scanned it on this occasion, he thought it was "mumbo-jumbo", he didn't really care what it meant, he thought it was like a lease or loan agreement: "all these things were something which he ignored ... something used to avoid hassles and to frighten people off from suing."74 From this, an inference could be drawn that he subjectively "anticipated" not being able to sue anyone if he got hurt in the race. Moreover, even if he did anticipate being able to sue, this was "unreasonable": as a normative matter, he (and other like people) should read their contracts; if they don't, that's their fault. The court should discipline them for not doing so or not seeking information about the meaning of the contract. Where would the world be if people didn't read their contracts or could get out of them by not reading?

OR

(ii) Dyck might have read the contract but he didn't really understand what it meant or its full implications. After all, he was only a young man waiting to enter the race. It is a bit hard

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74 This appears in the trial judge's judgment, [1981] 5 W.W.R. 97 at p. 102, 11 Man. R. (2d) 308 at p. 315 (Q.B.), per Kroft J.
to expect him to have a full appreciation of the insurance company legalese in which the waiver was couched. It might also be a bit hard to expect him to appreciate fully the risks he was running: that the association was more intent on putting on a good show than caring too hard about the safety of the participants. He might have thought that he would have some trouble suing someone if an accident occurred, but did he reasonably anticipate that he was giving up all hope of recovery even if the association and its officials were negligent? To the point of causing him $60,000 in personal injuries loss? Even if they were insured and the loss would be borne by an insurer and not the association or its officials personally? Even if he did not have personal disability insurance, as indeed most people of his age (and indeed most people of any age in Canada) would not?

Under criterion (f), was the natural effect of the transaction, or either party's conduct prior to the contract, such as to cause Dyck to some relevant degree "to misunderstand the true nature of the transaction and his ... rights and duties thereunder"? Again, one of two possible routes is open:

(i) Dyck knew that the document was a legal one intended to affect his rights adversely, to frighten him off from suing. He was going to race, come what may. He didn't care what he signed. Inference: he must have understood the true nature of the transaction.

OR

(ii) Dyck didn't really appreciate the full impact of what he was signing. How could a 19-year-old lad be expected to understand the risks of snowmobiling, including the risk that the association was going to run the race negligently? How far does anyone understand the legalese in which waivers are written and the reality of what one is giving up by signing them?

Under criterion (g), Dyck did not have independent advice, but should he have reasonably secured it? Again, two possibilities:

(i) There was no independent lawyer advising people at the track, but Dyck could have asked the officials. They might not have been "independent" but they could have given him
advice. If they misrepresented the nature of the document, he might have been able to avoid the waiver.\textsuperscript{75} If he was worried about waivers, he could have sought independent advice elsewhere before the race, since he knew a waiver would need to be signed. He chose not to, and didn't care what he was signing. We shouldn't care about people who don't care for themselves.

OR

(ii) We can't expect people to ask for an independent lawyer's advice every time they sign a legal document. Everybody was signing waivers at the track. Isn't there something unmanly about a jock, willing to take risks on the track, asking a lawyer about risks? The association should have educated people more about the nature of what they were signing and told them to take out insurance themselves to cover the possibility of injury.

\textit{Under criterion (h),} what is the relative bargaining strength of the parties, taking into account reasonable alternative sources of supply or demand? Two possibilities:

(i) The defendant was just a voluntary association, not General Motors. Dyck was a member of it. If he didn't like the terms, he could have tried to get the association to change them. If they didn't change them, then he didn't have to race. He could watch instead. Or he could do other things on the prairies. Snowmobiling isn't a staple of life like food. The association didn't put a gun to his head to make him sign. He signed "voluntarily".

OR

(ii) The association wasn't going to let Dyck race if he didn't sign. The terms were: "sign the waiver or stand on the sidelines". We will have to reconsider the evidence under criterion (b): Could Dyck have raced on different terms elsewhere? Taken up a substitute such as sky-diving, cross-country skiing, chess? Could we possibly make an argument that the association was a spot mini-monopolist in

\textsuperscript{75} Or not: see \textit{Bauer v. Bank of Montreal}, supra, footnote 59.
snowmobile-racing services and thus under a duty to provide "fair" terms of entry?76

Under criterion (i), did Dyck know or should he reasonably have known of the existence and extent of the waiver terms? Yes and no: see previous discussion.

Under criterion (j), was Dyck or the association better able to guard against the loss or the damages? The association comes off worse here. The accident was caused because the official signalling the finish walked into the middle of the track and Dyck crashed while swerving to avoid him. The idea behind this extraordinary behaviour was that it was both a point of honour for officials to get as close to the finishing vehicles as possible and to put on a "show" for the spectators. This behaviour could have been changed costlessly by a simple instruction from the association. Instead, it encouraged it by acquiescence. Equally effective and costless means of putting on a good show must have been available.

On the other hand, this criterion obscures another relevant point. It is quite possible that the best risk-avoider may not be the person upon whom it is "just" to place the risk. For example, suppose (contrary to the facts in Canada and many other countries) a society where most persons carry first party disability insurance which compensates them adequately for personal injury; and suppose further that third party liability insurance is not commonly carried by sports organizers. Even though the association might be the best risk-avoider, it might be "fair" to enforce the waiver if the result prevents Dyck's insurer recovering its losses through a subrogated action against an uninsured association.77 After all, Dyck might have been injured without anyone's fault, in which case the insurer would have had no action; why should the happenstance that Dyck could sue for negligence put the insurer in a better position?78

Under criterion (k):

76 See, e.g., Vaver, supra, footnote 67, at pp. 159-60.
77 Thus, if best risk-avoider A tells the other party B to take out insurance against the risk that occurs and B agrees, it would seem "fair" to place the risk of loss on B, whom the parties intend to be compensated through the purchase of insurance: T. Eaton Co. Ltd. v. Smith (1977), 92 D.L.R. (3d) 425, [1978] 2 S.C.R. 749.
78 This logic leads to a more general argument that subrogated actions generally should be abolished: see Hasson, "Subrogation in Insurance Law — A Critical Evaluation" (1985), 5 Oxford J. Legal Studies 416.
How was the contract formed? Simply by telling Dyck to sign on the dotted line, which he did. There was no explanation, and the form was in legalese.

(ii) Was it on "written standard terms of business"? It was on written standard terms, but it is difficult to call the activities of a voluntary association running snowmobile races a "business".

(iii) The "setting, purpose and effect of the contract" is evident from what has been said already.

Under criterion (1), Dyck and the association had entered into similar contracts previously, and the association required waivers of all contestants. What is the significance of this? That an evil repeated many times becomes good? That repetitive conduct causes no surprise and therefore should be reinforced by a court?

Now back to criterion (a): to what degree did the association take advantage of Dyck's inability to protect his interests because of his "[physical or mental infirmity, illiteracy], inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, [financial distress], or because of the existence of a relationship of trust or dependence or similar factors"? We know the Supreme Court of Canada's answer on this factor, which the Report calls "the traditional area of equity unconscionability": Dyck was educated, he was well able to look after his interests if he wanted to, he should have understood the form, the relationship between him and the voluntary association was not one of trust or dependence. On the other hand, Dyck's apparent nonchalance and his relationship with the association can be viewed differently, and with some plausibility. It could also be argued that he lacked "business knowledge and experience" or that there were "similar factors" to a "relationship of trust or dependence".

This exercise reveals the flaws in the Report's strategy. By trying to make unconscionability do everything, one ends up by making it do virtually nothing. The claim that unconscionability

79 The words in parentheses appear in the criterion but do not seem to apply to this particular case.
80 Report, at p. 130.
81 Vaver, supra, footnote 67, at pp. 159-60.
82 It is not clear whether "similar factors" applies merely to the last phrase or whether it applies to all the factors mentioned in criterion (a).
can be made certain, or more certain, by listing 12 non-exclusive factors is false. For one thing, the 12 factors may be deduced from the plethora of unconscionability cases in the U.S., where the doctrine is no clearer. The matter cannot be improved by eliminating all factors or listing 100.

Nor are the factors given any particular priority or weighting. Does a plaintiff with three factors in its favour trump a two-factor defendant, assuming (as will often be the case) that other factors are irrelevant or virtually so? Does it depend upon which three factors a plaintiff has, or on which two the defendant has, or on which factors are irrelevant?

Further, the factors themselves are not merely descriptive but heavily prescriptive. The word "reasonably" is writ large in many of them. As our discussion above has shown, it is quite possible to reach different conclusions on whether one factor favours a plaintiff or a defendant. What conclusion will be reached will depend very largely on one's starting point. In a case such as Dyck, a judge might reach exactly the same result under the OLRC criteria if he or she starts from the premise that people willing to take physical risks should also be prepared to take contractual risks. Thus, Finlayson J.A. recently said for the majority of the Ontario Court of Appeal:

Our permissive society encourages risk-taking activities from scuba-diving to sky-diving and those who participate cannot have their cake and eat it. If they insist upon taking abnormal and completely unnecessary risks, they cannot complain of the consequences inherent in the very risk that makes the activity challenging and attractive.

How does this square with the Report's claim, already referred to, that judges will not, through unconscionability, be "enabled to impose their view of public policy on the market place"? Judges are already imposing these views without unconscionability; why would they not do so with the doctrine? Moreover, one avowed purpose of the OLRC Report was to encourage judges to declare openly their views instead of using covert tools. It is not clear that the Report invites them to change their views; if so, the invitation is discreetly veiled. In the end, it is likely to be some expressed or

83 Crocker v. Sundance Northwest Resorts Ltd., supra, footnote 72, at p. 564 D.L.R., p. 620 O.R.
84 From personal observation, I think it is quite difficult either to have or eat cake while sky-diving, and the exercise is certainly messy while scuba-diving.
85 Supra, text accompanying footnote 63.
unexpressed judicial ode to individual liberty or to collective responsibility as a value to be promoted, rather than a turgid cogitation over unconscionability's 12 or more factors, that will dictate the result of an individual case.

Against this background, the Report's sanguine observation that a "wrong" decision can always be appealed must have been made in jest. Commenting on statutes allowing courts not to enforce "unfair and unreasonable" contracts, the House of Lords has said that it does not want appellate courts (including itself) clogged up with appeals from a trial judge's "quasi-discretionary" decision on unconscionability. Does not the following sentiment cause the believers in the "bounded uncertainty" of unconscionability a little pang of doubt?:

... [T]he court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.

In short, only an unconscionable decision on unconscionability has any chance of being reversed.

6. Underlying Values

Many years ago, Professor Macaulay pointed out that the rules of contract law (be they common law or statutory) can be classified as furthering one of two opposing policies: on the one hand are policies supporting the institution of a free market (or economic efficiency); on the other are policies designed to promote general economic welfare by social control (or distributional equity). Free market policies emphasize self-reliance, minimizing disruption of plans and losses incurred on the faith of there being a bargain, and

86 Report, at p. 127.
87 George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1983] 2 A.C. 803 at p. 816 (H.L.), per Lord Bridge, the other judges concurring. The court's comments were directed both to the provisions of the Unfair Contract Terms Act 1977 (U.K.), and also to its predecessor provision which was directly in issue in the case. Cf. the discussion of this language in relation to the Contracts Review Act 1980 (N.S.W.) in Antonovic v. Volker (1986), 7 N.S.W.L.R. 151 (C.A.), at pp. 154 et seq. and pp. 166-7.
the presence of clear rules to aid quick and rational bargaining. On
the other hand, policies designed to promote general economic
welfare by social control include relieving hardship where
enforcement would be unduly harsh, allocating losses to the party
best able to spread or absorb them, and providing generalized
rules that would prevent certain bargains being made or would
encourage market changes in various industries. All judges
consciously or subconsciously effect these policies in their
decision-making; but individual judges differ in individual cases
on which set of policies to apply in a particular case. Court-
watchers can hazard guesses as to the way a particular judge will
likely jump in a particular case but, when the composition of a
particular appellate panel is unknown, forecasting an actual
decision is akin to gazing into a crystal ball with vaseline-smeared
spectacles. What is conscionable or fair obviously depends upon
one's starting point.

Unconscionability now, and as envisaged by the Report, plainly
falls within the second class of policies suggested by Macaulay. It is
not, as the Report claims, a sort of golden thread running through
the law of contracts. Rather it is a form of rhetoric that masks
unresolved conflicting values. The Report does not suggest how to
resolve this conflict. It nowhere suggests what values unconsciona-
bility should espouse, nor can one glean any consistent theory
from its language. Simply to say that some "standard form terms
and manifestly unfair bargains" should not be enforced tells no
one, least of all judges, counsel or contractors, anything about
which terms or which bargains the Report is talking.

The examples given in the Report do not reveal its thinking: the
OLRC seems prepared to see waiver of lien clauses struck down, car
insurers shifting their losses to parking garage insurers,

88 Macaulay, "Justice Traynor and the Law of Contracts" (1961), 13 Stanford L. Rev. 812,
at pp. 814-15.
89 See, e.g., Stockloser v. Johnson, supra, footnote 70, where two common law judges
(Somervell and Denning L.JJ.) indicated a preference for social control over contracts by
asserting an equitable jurisdiction to order repayment of moneys paid under an aborted
commercial instalment contract. The third judge, Romer L.J. (an equity judge),
disclaimed the existence of any such jurisdiction, thereby indicating a preference towards
free market policies.
90 Thus Laskin C.J. tended to social control of contracts rather than pure free market
type; see Vaver, "Developments in Contract Law: Chief Justice Laskin and the Law of
Contracts" (1985), 7 Supreme Court L. R. 131, at pp. 210-11.
manufacturers being able to recover an exclusive distributor’s gross profits for the latter’s breach,\textsuperscript{93} and farmers recovering lost profits arising from the failure of defective machinery.\textsuperscript{94} Why any of this should be so is not answered. Nor is it answered by observing the way courts play the unconscionability game in the United Kingdom and the United States, as well as in Canada.

In these countries, the occasional consumer contract is set aside for unconscionability, but standard form contracts between business parties are increasingly being struck down: not surprisingly, since a business party has more incentive and resources to resist enforcement and litigation costs can generally be written off as a business expense against income tax. Thus, in the United States, farmers have succeeded in recovering consequential damages for crop losses arising from defective herbicides\textsuperscript{95} and defective machinery,\textsuperscript{96} despite standard form contractual disclaimers seeking to insulate the seller from such losses. In one case, the court said:\textsuperscript{97}

With increasing frequency, courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms ... and that even large business entities may have relatively little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement.

Commenting on such cases, a writer sympathetic to the concept of unconscionability in business contracts has admitted:\textsuperscript{98}

Unconscionability is not a highly predictable doctrine even with the fullest exposition of the facts of a case. A review of the merchant cases indicates that courts are less likely to explain themselves in merchant unconscionability than in consumer cases.

In the United Kingdom, in the space of two years, the highest court has decided at least three cases dealing with unconscionability. It has said that a farmer could recover lost profits from a seed supplier for supplying defective seed, even though the contract on standard and commonly used terms clearly limited the supplier’s liability to the price of the seeds.\textsuperscript{99} The reasoning given

\textsuperscript{95} Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.C., South Dakota, 1981).
\textsuperscript{97} Ibid., at p. 124.
\textsuperscript{98} Mallor, supra, footnote 52, at p. 1087.
\textsuperscript{99} George Mitchell, supra, footnote 87. For critical comment on the case in the Court of
was totally unconvincing. Not only was the clause standard in the seed supply industry but the National Farmers’ Union had never protested it. To find the clause unenforceable, the court said that the agreement was not negotiated (does this mean that every clause in an insurance contract is up for grabs?); that the supplier was negligent (but then why else have the clause?); that suppliers had previously negotiated settlements with farmers who had been supplied defective seeds (but since when have settlements to “buy peace” been relevant or even admissible as admissions of anything?); and that suppliers could cheaply insure against the risk (but why couldn’t the farmers equally purchase cheap crop insurance?). In another case, the court said that a contract made between two farmers for the sale and purchase of land at an undervalue should be enforced without requiring the buyer to pay the difference to make up the market price, even though the seller was insane:100 the seller was legally advised and the buyer did not know of the seller’s latent insanity.101 In yet another case, the court said that a woman induced by her husband to give a bank security over the family home so as to keep the husband’s business afloat was bound by the charge, even though she had no independent legal advice and the atmosphere attending the transaction was “tense” with the husband “in and out of the room, ‘hovering around’”.102 The bank had misrepresented the effect of the charge: none the less (or perhaps therefore) this was “an ordinary banking transaction”.103

In Canada, Professor Hasson concluded that courts are likely to give relief on unconscionability grounds in “truly egregious cases”.104 But what strikes a judge as “egregious” is itself an amorphous concept, as Hasson recognizes. For example, an

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100 What now of Chesterfield v. Janssen (1750), 2 Ves. Sen. 125, 28 E.R. 82?
103 Ibid., at p. 709. This is not an isolated phenomenon. In Bauer v. Bank of Montreal (1980), 110 D.L.R. (3d) 424 at p. 430, [1980] 2 S.C.R. 102 at p. 110, the Supreme Court of Canada similarly labelled the giving of a bank guarantee as an “ordinary commercial transaction”, even though the bank had, as a condition of obtaining the guarantee, made a promise that it failed to fulfil. The court ruled the promise to be inadmissible because of the parol evidence rule (ibid., at pp. 431-2 D.L.R., p. 112 S.C.R.).
104 Hasson, supra, footnote 2, at p. 61.
An ingenious observer might have thought that a three-month small loan at 200-300% per annum effective interest would prima facie qualify for the epithet “egregious” or “unconscionable”, if not something worse. One’s view might have been reinforced by the fact that the person seeking this declaration was not a borrower wanting to welsh on a deal but a provincial Director of Trade Practices acting in the public interest under specific legislative authority. But this was not enough for a judge of the British Columbia Supreme Court. He refused to grant an interim injunction against a tax discounter whose business was advancing cash on such terms, against an assignment of the proceeds of the taxpayer’s income tax refund as calculated by the discounter, without having further evidence:105

There is no material before me to assist in establishing the circumstances of the people who avail themselves of this “service”. Who are they? To what extent are they a credit risk? Would they be able to borrow money elsewhere? Are they unemployed, and if so what are their prospects of employment? Are they transients? Were they in any way taken advantage of? What was their capacity to reasonably protect their own interest? Were they literate? Were they ignorant? Were they sober? Did they fully appreciate what they were doing? Did they understand the various documents that were signed? What are the risk factors in the business under consideration?

Perhaps unsurprisingly, the British Columbia government did not take up the court’s invitation to investigate the mental capacity and job history of each of the no doubt hundreds of persons who dealt with the lender. Instead it passed legislation fixing the maximum percentage chargeable under this form of loan.106

I do not have the slightest idea if (a) the OLRC approves decisions such as these; (b) these cases would be decided the same way in Ontario under current unconscionability theory or any other theory; (c) they would be decided differently under the new OLRC criteria for unconscionability; or (d) a tiny change in the facts would cause a different decision even in the originating jurisdiction. The OLRC has done nothing to reduce the legal expense that accompanies an unconscionability action; indeed, by increasing the number of factors and loading them with a value

105 Hanson, Director of Trade Practices v. John’s Tax Services Ltd. (March 5, 1975), per McKay J. The case was brought under the unconscionability provisions of what is now the Trade Practices Act, R.S.B.C. 1979, c. 406.

decision, the OLRC has probably increased the expense of preparing or combating such a case. The person with the deepest pocket is once again likely to triumph.

There is a more efficient and less costly way of proceeding. It is to stop pursuing the dream that doctrinal tinkering will have much impact on contract law, except by making it easier to state in legal primers. I would leave unconscionability pretty much the way it is now: a marginal doctrine designed to protect people who can't help themselves against people who can and do help themselves at the former's expense. I would then concentrate on specific legal reform. Even from the limited data base provided by the law reports, the OLRC could readily identify particular problematic areas and make concrete suggestions for dealing with them, such as:

(a) Plaintiffs generally (including businesses and farmers) should always (or never) be able to sue for consequential losses flowing from defective products supplied to them; or, if one wishes to espouse a different policy, standards of quality and fitness implied by sale of goods legislation or common law can never be contracted out of, even by commercial parties, unless the plaintiff has had independent legal advice;

(b) Banks should never recover on charges or guarantees entered into for sums over $x unless the defendant has had independent legal advice;

(c) Waivers of personal injuries should never be binding, or should be binding only if the plaintiff has been given the choice of another waiver-free alternative;

(d) Brokers should never recover commission from their principals if the brokered contract fails to complete for no fault of the principal;\footnote{107}{In \textit{H.W. Liebig & Co. Ltd. v. Leading Investments Ltd.} (1986), 25 D.L.R. (4th) 161, [1986] 1 S.C.R. 70, the court reached this result on the facts of the case by a 4-3 majority, with 1 of the 4 in the majority writing an opinion concurring in the result. Another useful precedent for the future!}

(e) Employees should be entitled to at least one month's notice for every year worked with an employer or associated corporation;\footnote{108}{Sometimes a court holds a short-notice provision in an employment contract enforceable in the case of a long-term employee (\textit{Wallace v. Toronto-Dominion Bank} (1983), 145 D.L.R. (3d) 431, 41 O.R. (2d) 161 (C.A.)), and sometimes not (\textit{Allison v.}}}
(f) Unconscionability can never be pleaded by a corporation or person having a net worth of $x.

And so on.

I do not mean to suggest that these proposed rules are the best solution to the social and economic situations in which they arise. They are hypotheses reflecting particular values that can be argued over, defended or rejected — and not just by lawyers but by those actually affected by their operation. More or less radical solutions could equally be suggested and tested. Knowledge of current market conditions and the likely impact of the rules on future markets would, where appropriate, be obtained before they might be implemented. This information might cause the hypotheses to be modified or rejected. Moreover, whether or not the proposed rule was politically acceptable and the means suggested for its enforcement and administration (court, tribunal, or something else) was the most appropriate could be considered in the normal way. At least, the task would be carried out once and for all, legislation enacted, and people guided thereby.

The fact that we cannot identify all the situations that might offend the right-thinking OLR Commissioner is no reason for not trying to find some. And, having found some, to say (as has been suggested) that the legislature is unlikely to act to rectify the situation, is either dubious or devious. It is dubious because, as the example of tax discounting has shown, legislatures are willing (however imperfectly) to regulate particular unfair contracts. It is devious insofar as it suggests that legislative unwillingness to regulate particular unfair contracts entitles unelected judges to perform this task. I should first have to be convinced that legislatures were indeed unwilling to deal with a perceived evil; but if this were in fact true in a specific case, it is a perversion of constitutional law to suggest that this gives judges a mandate to provide their own solution.\textsuperscript{110}

\textsuperscript{109} See, supra, text accompanying footnotes 104 to 106. See further, Milczynski, “Tax Rebate Discounting in Canada: The Case for Abolition” (1987), 2 Jo. Law & Social Policy 73, at p. 74, who concludes that “[t]he only solution to the problem of tax discounting’s intrinsic unconscionability and ineffective regulation is its complete and total ban”.

\textsuperscript{110} Compare the following view: “[T]here is a growing resistance to overregulation of the
In any event, bad decisions in contract cases will not disappear by giving judges broader powers to tamper with unfair contracts. The results will not likely be vastly different from those currently reached, nor will the reasoning be any clearer in the sense that future cases will be more predictable. Professor Trebilcock has recently exposed the disarray into which the common law doctrine of restraint of trade, one of those areas which the Report claims is infused with a concept of unconscionability, has fallen. He convincingly argues that, if economic efficiency is the goal of this doctrine, it is far from clear that courts are the appropriate instruments to achieve the results desired. While recognizing that the alternatives to judicial regulation are not ideal, Trebilcock equally cautions against "comparing highly flawed legislative, bureaucratic and regulatory processes with an idealized or romanticized vision of the common law". As far as the OLRC is concerned, this message has fallen on deaf ears.

Trebilcock's words remind us of what the late Professor Leff observed two decades ago in respect of unconscionability:

One may suggest that first (and less important) it tends to permit to make the true bases of decisions more hidden to those trying to use them as the basis of future planning. But more important, it tends to permit a court to be nondisclosive about the basis of its decision even to itself ... [W]hen you forbid a contractual practice, you ought to have the political nerve to do so with some understanding (and some disclosure) of what you are doing. ... Subsuming problems is not as good as solving them, and may in fact retard solutions instead.

Leff, where are you when we need you?

economy. Rather the pressure is to reduce the number and powers of existing regulatory agencies. This suggests an enlarged, not a reduced role, for the courts in policing the fairness of disclaimer clauses": Ziegel, Comment (1979), 57 Can. Bar Rev. 105, at p. 117.

Thus, in George Mitchell, supra, footnote 87, all 10 judges involved in the case from trial through the appeals agreed that the plaintiff was able to avoid the exemption clause in that case. The Court of Appeal offered a bewildering number of reasons why this should be so, quite apart from the point that the term was not "fair and reasonable". And why was the clause not "fair and reasonable"? Because it took away the plaintiff's statutory rights. Will a clause that takes away those rights always be "unfair and unreasonable"? No. When will it be? Probably if it would have been avoided at common law before the statute that gave courts the express power to strike down the clause. Is the reasoning on "fairness and reasonableness" going to help one advise the result of later cases? Re-read Lord Bridge's statement accompanying footnote 87, supra, for the illuminating answer.

Report, at p. 120.


Leff, supra, footnote 52, at pp. 557-9.