On the "Agreement Most Foul": A Reconsideration of the Doctrine of Unconscionability

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> It is important ... in any intellectual enterprise to remember that there must always be a certain difference between theory and practice or experience.
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> —Morris Cohen[1]

I. INTRODUCTION

"WE WORRY AND ARE WORRIED," wrote Professor Arthur Leff in a short but insightful article,[2]

> [B]y the question of unconscionability as much as we are because it is a spectacular example of an attempt to give a legal-technological answer to a question really posed by a fundamental ambivalence over values, that is, by a problem which has no technical solution.[3]

Professor Leff has surely seized upon the correct answer. Unconscionability is a vexing doctrine not because of its intrinsic or inherent difficulty, but because of *our* inability to render uniform judgment on whether some given transaction offends our conscience to such an extent that we would wish to set it aside. The purpose of the present paper, however, is not to bemoan our inabilities and incapacities, nor is it to put in place the legal-theoretical props necessary to render such judgment.[4] Rather, it is my intention to fortify what I shall refer to as

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* LL.B. (Manitoba). I would like to thank the anonymous referees for their helpful comments on an earlier draft of this paper, as well as John Eaton for his more general assistance.

1 M.R. Cohen, *Reason and Law: Studies in Juristic Philosophy* (Glencoe, Illinois: The Free Press, 1950) at 63.

2 A.A. Leff, "Thomist Unconscionability" (1979–80) 4 Can. Bus. L.J. 424.

3 *Ibid.* at 424.

4 This has been accomplished—at least in the minds of some—elsewhere: see the Ontario Law Reform Commission's *Report on the Amendment of the Law of Contract* (Ottawa: Ministry of the Attorney General, 1987). Any reading of the *Report* would not be complete without reference to Professor David Vaver's criticisms of it: see D. Vaver, "Unconscionability: Panacea, Analgesic, or Loose Can(n)on? A Critique of the Ontario Law Reform Commission's Report on the Amendment of the Law of Contract" (1988) 14 Can. Bus. L.J. 40.

Professor Leff's "ambivalency thesis" and provide answer to the question of whether, given this and other uncertainties of which I shall make mention, the doctrine of unconscionability ought to have a place in the common law at all.

In Part II, I explicate and—hopefully—elucidate the conceptual and jurisprudential bases of unconscionability in Canada. In Part III, I survey the myriad challenges and problems confronting the doctrine, the arguments which have traditionally been proffered in its favour. Conclusions as to the viability of the doctrine are drawn in Part IV.

II. THE CONCEPT OF UNCONSCIONABILITY

A. First Considerations

There is a world of difference between furnishing a definition of unconscionability as a concept (the "semantic" definition) and defining unconscionability in practice (the "heuristic" definition).[5] The semantic definition may be arrived at with relative ease, requiring only a brief foray into the jurisprudence and literature. The heuristic definition, however, is a rather more difficult proposition—indeed, it is this difficulty which drives Leff's ambivalency thesis. For while it is one thing to sketch out the parameters of a *general* doctrine of unconscionability using such normative and value-laden terms as "improvident," "unreasonable," and "inequality of bargaining power," it is quite another to attach to those terms any real meaning by pointing to a *specific* transaction or event and saying, "*that* would constitute an unconscionable bargain, I duly note it, and I shall order my affairs accordingly." There is, in other words, a big difference between theory and practice, and the step from a theory of unconscionability to a predictable, workable, and intelligible doctrine of unconscionability might well be impossibly large. While I shall not make this distinction between semantic and heuristic unconscionability again—mainly because it becomes im-

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[5] The less pretentious analogues of semantic and heuristic unconscionability: "conceptual" and "real," respectively. It is well worth noting that this schism has not gone unnoticed: see, for example, J.A. Manwaring's difficult but rewarding article, "Unconscionability: Contested Values, Competing Theories and Choice of Rules in Contract Law" (1993) 25 Ottawa L. Rev. 235 at 252, where he writes that:

> No secularized dictionary meaning of the word 'unconscionable' establishes a core of meaning which can guide subsequent application or analysis. The abstracted and decontextualised definition of 'unconscionable' does not tell us what criteria are used to distinguish the 'conscionable' from the unconscionable, reasonable or fair contracts from those that are reasonable and unfair.

Compare the words of Lord Scarman in *National Westminster Bank* v. *Morgan*, [1985] 1 All E.R. 821 at 831: "[d]efinition is a poor instrument when used to determine whether a transaction is or is not unconscionable."

possible to divorce the concepts from their application—one would do well to keep in mind this difficulty until it is sketched out more fully in Part III.[6]

B. "The Agreement Most Foul": An Explanation of Unconscionability

That the oft-cited maxim "the Chancery mends no man's bargain"[7] was coined centuries ago should surprise neither the lawyer nor the layperson, for it illustrates what is arguably the most basic principle of the law of contract and agreements in general: that a bargain freely entered into will not be set aside merely because one party finds it unpalatable after it has been struck. Bargains ought to be adhered to, and the court should strive not to interfere with the arrangements of those who have freely agreed to be bound by the terms which they themselves have negotiated. This concept has been termed "sanctity of contract."

Yet, sanctity of contract and arcane maxims notwithstanding, the courts have shown a surprising penchant for dismantling agreements which, despite their technical "soundness,"[8] cannot be allowed to stand on the ground that they are unconscionable. The rationale is this: that while we all make bad bargains, some bargains are *so* egregiously unfair and one-sided, either in the manner in which they were formed, in their terms and conditions, or even in the consideration secured from each party, that a court of conscience and equity could not possibly let them stand. Thus, contracts in which the bargaining process greatly favours one party, have grossly inadequate consideration between the parties, or contain manifestly unfair terms, are all liable to be upset on the ground that they are "unconscionable."

While this is clearly at odds with freedom of contract and, assuming a limited readership, the free-market system we currently endorse and in which we function, it has been argued that "... no civilized system of law can accept the implications of absolute sanctity of contract."[9] We must, therefore, perform a balancing act; we must gauge the importance of protecting society's more vulnerable members against the need for certainty and predictability in the marketplace, and, ideally, arrive at a position where no disadvantage is worked on

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6 See the discussion under the heading of "Uncertainty," Part III(B)(1).

7 *Maynard* v. *Moseley* (1676), 3 Swans. 651 at 655, as quoted in S.M. Waddams, *The Law of Contracts*, 3d. (Toronto: Canada Law Book, 1993) at 295.

8 I.e., that all other contractual requirements—such as consideration, absence of duress, etc.—have been complied with.

9 Waddams, *supra* note 7 at 296.

either the market or those whom we are endeavouring to protect.[10] Problems arise, as one would expect, when attempting to discern exactly whom we take to be in need of our protection and what constitutes a disadvantage.

Understandably, one might think unconscionability to be some sweeping synonym for the more familiar concepts of undue influence, duress, and perhaps even coercion or fraud.[11] However, one would be mistaken. While unconscionability is certainly similar to these doctrines, it is in effect quite distinct, both conceptually and, to a lesser extent, doctrinally. For unconscionability is concerned not with the ability of the aggrieved party to give full and proper consent,[12] but with the overall odious nature of the transaction and the circumstances under which the bargain was struck.[13] This is not to assert, however, that all agreements in which, say, undue influence is present can never be unconscionable: this is plainly not the case. Such agreements might well be unconscionable, but—and this is the distinction—the converse is not true: an un-

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10 Compare Professor Alan Schwartz's insight that "unconscionability is not a private law specialty but rather a branch of the law whose task is to ensure that markets function competitively": see A. Schwartz, "Unconscionability and Imperfect Formation: A Research Agenda" (1991) 19 Can. Bus. L.J. 437 at 438.

11 Even a commentator as distinguished as Professor Klippert appears to have conflated the admittedly slippery concepts of coercion and unconscionability: see G. Klippert, *Unjust Enrichment* (1982) at 156 and 170.

12 *Cf.* Sopinka J.'s *obiter* comments in *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 318, 4 W.W.R. 577 [hereinafter cited to W.W.R.] at 633:

> [T]he weight of academic and judicial opinion is that the doctrine of unconscionability operates to set aside transactions even though there may have been consent or agreement to the terms of the bargain. It is not that this doctrine vitiates consent but rather that fairness requires that the transaction be set aside notwithstanding consent.

13 Professor Leff draws the useful distinction between unconscionability in the bargaining process and unconscionability of the final contract owing to too-onerous terms and conditions, which he refers to as "procedural" and "substantive" unconscionability, respectively: see A.A. Leff, "Unconscionability and the Code—The Emperor's New Clause" (1967) 115 U. Pa. L. Rev. 485, as well as "Unconscionability and the Crowd—Consumers and the Common Law Tradition" (1970) 31 U. Pitt. L. Rev. 349. Compare also the words of Lord Brightman in *Hart* v. *O'Connor*, [1985] A.C. 1000 at 1017–18, where his Lordship writes that:

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

conscionable agreement may exist without so much as a trace of undue influence.[14] Thus, an agreement made while X is under duress may be set aside for reasons of undue influence as well as unconscionability, whereas an agreement which takes advantage of X while she is in a hard place but nevertheless in full possession of her faculties could only be avoided on the ground that it constitutes an unconscionable transaction. Unconscionability is, then, related to but unmistakably distinct from undue influence and its ilk.[15]

Typically, when a plaintiff asserts that a particular bargain is unconscionable, she seeks its avoidance.[16] Avoidance, however, is not the aggrieved party's only recourse. The court's equitable jurisdiction is vast, and, as Professor Fridman has suggested, the only bars to relief are those which are themselves imposed by equity, including the protection of the *bona fide* purchaser for value, laches, and any inequitable conduct of the plaintiff.[17] As well, there is the intriguing possibility that the judiciary might redraft and edit impugned contracts in order to rectify any inequities arising therefrom,[18] though a number of cases—including one from our own Manitoba courts—have rejected this line of reasoning.[19]

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[14] *Cf.* Davey J.A. in *Morrison* v. *Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) at 713 where he writes that "[t]he finding ... against undue influence does not conclude the question of whether the appellant is entitled to relief against an unconscionable transaction."

[15] For a superior explanation, see B.E. Crawford, "Restitution—Unconscionable Transaction—Undue Advantage Taken of Inequality Between Parties" (1966) 44 Can. Bar Rev. 142 at 143. It is worthwhile noting, too, that the differences in the two doctrines are not altogether acute in practice: see R.W. Clark, *Inequality of Bargaining Power* (Toronto: Carswell, 1987) at 110, where he writes that "[d]espite the theoretical distinction drawn in *Morrison* v. *Coast Finance* between undue influence and the unconscionability doctrine, there is little evidence in the decided cases to support it." See also the recent article by Professor Bigwood in which he locates a common theme of anti-exploitation in the English incarnations of both doctrines: R. Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503.

[16] As an aside, note that if a party wishes to *breach* a bargain which she thinks unconscionable, the courts will not award specific performance against her should the court find the agreement to be unconscionable or obtained by "sharp practice": see Crawford, *supra* note 15 at 143 n.6, where he writes that "it seems to be a fairly safe assumption that [in *Hnatuk* v. *Chretian* (1960), 31 W.W.R. 130 (B.C.)] the denial of specific performance finally disposed of the issue between the parties, and that the result would probably have been the same if the action had been initially brought for rescission."

[17] G.H.L Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 236.

[18] See Clark, *supra* note 15 at 57 where he makes note of this more "controversial question."

[19] As Clark, *ibid.*, notes, the cases of *Samuel* v. *Newbold*, [1906] A.C. 461 (H.L.) and *Gronbach* v. *Petty* (1952), 5 W.W.R. (N.S.) 68 (Man. C.A.) put forward the proposition that the

Lest one rush out to avoid a now-regrettable contract, however, there are certain conditions which must appear before the jurisdiction of the court is invoked. Unsurprisingly, there is some disagreement in this area; indeed, as Mr. Justice Sopinka observed in the 1992 case of *Norberg* v. *Wynrib*, "the doctrine of unconscionability and the related principle of inequality of bargaining power are evolving and, as yet, not completely settled areas of the law of contract."[20] For their part, Professors Maddaugh and McCamus have posited that there are just two elements to unconscionability: an inequality of bargaining power and an improvident agreement.[21] Professor Klippert,[22] on the other hand, would seek to supplement this bipartite conception by inserting poverty on the part of the plaintiff into the mix, relying on the "classic" case of *Fry* v. *Lane*.[23] Others still have sought to define unconscionability in terms of the transaction's divergence from "community standards of commercial morality."[24] And, never to be outdone, the provincial legislatures have turned their collective minds to unconscionability and wrought a number of statutes intended to remedy certain, rather more specific contractual problems. I examine each competing "theory" of unconscionability in turn.

C. The Bipartite Approach

Support for the proposition that unconscionability entails the twin requirements of an "inequality of bargaining power" and an "improvident transaction" is readily found in the early Ontario case of *Waters* v. *Donnelly*.[25] The plaintiff, whom Mr. Justice Osler decribed as "decidedly weak-minded and very easily led,"[26] had agreed to exchange, *inter alia*, his peach orchard to the defendant, "a remarkable shrewd intelligent man,"[27] in return for the defendant's livery stable. It was found as a fact that the plaintiff's property was worth at least $2 000 more than the defendant's. In the course of his decision to set aside the agreement, Chancellor Boyd stated the governing principle:

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court's jurisdiction under the unconscionability doctrine does not extend to the reworking of agreements.

20 *Supra* note 12 at 634.

21 P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Toronto: Carswell, 1992) at 625.

22 Klippert, *supra* note 11 at 172.

23 (1888), 40 Ch. D. 312, [1886–90] All E.R. Rep. 1084.

24 *Harry* v. *Kreutziger* (1978), 9 B.C.L.R. 166, (1979), 95 D.L.R. (3d) 231 (C.A.) at 241, Lambert J.A. writing [hereinafter *Harry* v. *Kreutziger*].

25 (1884), 9 O.R. 391.

26 *Ibid.* at 393.

27 *Ibid.*

> [I]f two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand.[28]

Three important points emerge from the above passage. First, it is clear from the words "no matter if a confidential relationship exists between them" that no fiduciary or quasi-fiduciary relationship need be in place in order to found a claim of unconscionability.[29] Second, the notion of an inequality or disparity of bargaining power is contemplated, albeit somewhat obliquely, by the Chancellor's reference to the ability of one party to take an "undue advantage" of the other by virtue of the relation in which they stand. Third, in order to set aside the agreement, the stronger party must have capitalised on her position and have *factually* taken "undue advantage" of the weaker party, presumably by securing an agreement more provident than she could have secured had she been dealing with a party possessed of equal bargaining power.

Other judges have said as much. In *Black* v. *Wilcox*,[30] Mr. Justice Evans wrote the following:

> When these common features appear, inequality of position, an overreaching by the stronger and a highly beneficial bargain to him, a presumption arises that the stronger party has, in the words of Lord Selborne L.C. ... made "... an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable."[31]

Similarly, in *Harry* v. *Kreutziger*,[32] Mr. Justice McIntyre of the British Columbia Court of Appeal held that in order to successfully found an action in unconscionability,

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28 *Supra* note 25 at 401, quoting the Lord Chancellor of Ireland in *Slator* v. *Nolan* (1876), Ir. R. 11 Eq. 386.

29 Compare the judgment of Mr. Justice La Forest in *Norberg* v. *Wynrib*, *supra* note 12 at 592: "[a] fiduciary or confidential agreement is not a necessary ingredient for a claim involving inequality of bargaining power, even though such a relationship may be present." See also Fridman, *supra* note 17 at 148, and Crawford, *supra* note 15 at 146. It should be noted too that if one *could* find a fiduciary relationship, the contract might not only be dismantled, but the weaker party might well make out a case against the stronger for failing to act in her absolute best interests, thereby availing herself of a greater selection of more robust remedies. In such a case, a plaintiff could conceivably *profit* from an improvident transaction!

30 (1976), 70 D.L.R. (3d) 192 (Ont. C.A.).

31 *Ibid.* at 196–97.

32 *Supra* note 24.

> [I]t must be shown ... that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain.[33]

The Supreme Court of Canada has also had occasion to expound upon the unconscionability doctrine. Lamentably, the issue was neither squarely raised nor critically examined by any of the cases, and the statements of the Court are more *obiter dicta* than *ratio decidendi*. In *Norberg* v. *Wynrib*,[34] in the context of a civil action for sexual assault, Mr. Justice La Forest located common ground between unconscionability in contract and sexual battery in tort:

> It must be noted that in the law of contracts proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the position of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special "power dependency" relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation.[35]

Less explicit is the case of *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*,[36] in which Dickson C.J.C. was "much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability,"[37] since directly considering the issues of unconscionability "will often lead to the same result as would have been reached using the doctrine of fundamental breach, but with the advantage of clearly addressing the real issues at stake."[38] Curiously, Dickson C.J.C. refrained from articulating any guidelines for the application of the doctrine or even what "unconscionability" means.[39]

Hunter Engineering notwithstanding, it should be clear from the passages cited[40] above that only the *conjunction* of the two elements will give rise to a

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33 *Supra* note 24 at 237.

34 *Supra* note 12.

35 *Supra* note 12 at 597. Justices McLachlin and Sopinka were of the opinion that the doctrine of unconscionability was inapplicable to the case at bar, and decided the case upon other bases.

36 [1989] 1 S.C.R. 426, (1989), 57 D.L.R. (4th) 321 [hereinafter *Hunter Engineering*].

37 *Ibid.* at 341.

38 *Supra* note 36 at 342.

39 As Professor Flannigan notes, the shortcomings in Dickson C.J.C.'s judgment are "regrettable, for these are deep waters": see R.W. Flannigan, "*Hunter Engineering*: The Judicial Regulation of Exculpatory Clauses" (1990) 69 Can. Bar Rev. 515 at 529.

40 These quotations can easily be multiplied. See the judgment of Davey J.A. in *Morrison* v. *Coast Finance Ltd.*, *supra* note 14 at 713 where he writes that "the material ingredients are

claim in unconscionability: the presence of just one will not suffice. As Professor Crawford observes in his oft-cited comment, "[i]t is the combination of inequality and improvidence which alone may invoke [the] jurisdiction [of the court]."[41] Regardless of how improvident an agreement might be, without more, it remains inactionable so far as unconscionability is concerned.[42] Similarly, a fair bargain struck between parties possessed of unequal bargaining power is not liable to be set aside on the ground of unconscionability. Such are the broad outlines of the bipartite approach. I turn now to a fuller exposition of each branch.

1. The First Branch: Inequality of Bargaining Power

a. Generally

In the "extraordinary"[43] case of *Lloyds Bank Ltd.* v. *Bundy*,[44] B, in an effort to save his son's company, borrowed a sum of money from the plaintiff bank, securing the loan with a mortgage on his farm. The son's business failed, and the plaintiff sought to exercise its rights of sale as mortgagee and attempted to evict B from the property. To make a long and well-known judgment short, since B was advised by and relied upon the bank manager, and since the bank manager was cognisant of this fact yet failed to explain the bank's position properly, the mortgage was set aside. Lord Denning considered the separate categories of fraud, duress, and undue influence, and determined that:

> [T]hrough all these instances there runs a common thread. They rest on "inequality of bargaining power." By virtue of it, the common law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other.[45]

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proof of inequality in the position of the parties ... and proof of substantial unfairness of the bargain obtained by the stronger."

41 Crawford, *supra* note 15 at 143, cited with approval in *Wallace* v. *Toronto Dominion Bank* (1983), 145 D.L.R. (3d) 431 (Ont. C.A.) at 440, Houlden J.A. writing.

42 Though this certainly might indicate that something else is amiss, such as undue influence or duress, at which the courts should obviously look askance.

43 P. Slayton, "The Unequal Bargaining Doctrine: Lord Denning in *Lloyds Bank* v. *Bundy*" (1976) 22 McGill L.J. 94 at 95.

44 [1974] 3 All E.R. 757 (C.A.).

45 *Ibid.* at 765. It should be noted that "undue" in this context does not entail any sort of *mala fides* or wrongful intention; rather, it simply means that the stronger party was motivated by her *own* wants. As his Lordship went on to note, "[w]hen I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who

While *Bundy* marked a point of departure for the development of the English law of restitution and contract,[46] its effect on Canadian jurisprudence has been more muted[47] and, if nothing else, simply made explicit that which was previously implicit: that the touchstone of intervention is inequality of bargaining power.

Inequality of bargaining power was also the central theme of the Canadian case of *Morrison* v. *Coast Finance Ltd.*[48] The plaintiff, "an old woman 79 years of age, and a widow of meagre means,"[49] had been asked by her boarder to lend him a sum of money for "investment" purposes. Morrison assented, and the boarder escorted her to the defendant finance company. While there, a loan for approximately $5 000 was taken out on the security of a first mortgage on Morrison's home. Unbeknownst to Morrison, the company in which the boarder wished to invest actually owed money to a related business of the defendant; the investment, then, was more accurately a settlement of indebtedness. Unsurprisingly, the boarder failed to make good on the mortgage payments, at which point Morrison consulted legal counsel, and brought an action to set aside the loan agreement.

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stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other" (*ibid.*).

46 The Master of the Rolls was advancing a unitary doctrine, one which sought to sum up and indeed supplant the discrete doctrines of fraud, duress, and undue influence. Lord Denning's unitary approach was unequivocally rejected by the House of Lords in *National Westminster Bank* v. *Morgan*, *supra* note 5. There, Lord Scarman, writing for the House, found that since Lord Denning M.R. had "deliberately avoided reference to the will of one party being dominated or overcome by another," his opinion "was not the ground of the court's decision, which has to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment" (at 830).

47 As Flannigan, *supra* note 39 at 531–32 suggests, Lord Denning's dictum in *Bundy* forms one of the pillars on which Lambert J.A. erected his "sufficient divergence" approach, discussed *infra* in part 3 of this section. It should be noted too that the Supreme Court seems also to have endorsed Lord Denning's approach, albeit without explicit reference to *Bundy*: see the judgment of the court in *Dyck* v. *Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589 at 593, where it was held that the relationship between the appellant—a contest entrant seeking relief from a limitation of liability clause—and the respondent—the association seeking to uphold the limitation clause—did not "fall within the class of cases, notable among which are contracts made on the dissolution of marriage, where the differences between bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other." *Bundy* received explicit reference in the recent maritime case of *Tignish Credit Union Ltd.* v. *Murphy* (1996), 138 Nfld. & P.E.I.R. 263 (P.E.I. C.A.), discussed *infra*.

48 *Supra* note 14.

49 *Supra* note 14 at 712, *per* Davey J.A.

In the course of its judgment to set aside the loan, the British Columbia Court of Appeal noted that while no undue influence could be found, such a finding was not determinative of the question of unconscionability and inequality of bargaining power.[50] Moreover, since there could be "no doubt about the inequality of the position of the plaintiff on one side and the respondent companies and [the boarder] on the other,"[51] and since Morrison's "extreme folly ... [was] self-evident," the question of whether the transaction was unconscionable was quickly answered in the affirmative.

By way of illustration, inequality of bargaining power was found *not* to have existed in the case of *Grieshammer* v. *Ungerer & Miami Studios*.[52] In this case, the plaintiff signed up for dancing lessons with the defendant, with the final exceeding one-half of her annual income. Notwithstanding that the plaintiff's emotions were shrewdly played upon, the parties were found to have met on equal terms, and the contract was accordingly upheld. Mr. Justice Tritschler's comments are instructive: "[i]t is not the function of this Court to protect adults from improvident bargains. That this was a ridiculous bargain is beyond doubt, but if the case did not go beyond that, [the] plaintiff could not succeed."[53]

A more recent case in which parties were found to have met on equal terms is the Prince Edward Island Court of Appeal decision of *Tignish Credit Union Ltd.* v. *Murphy*.[54] M, along with his wife K, incorporated a business, securing a revolving line of credit from the appellant credit union. After exceeding their credit limit, M and K mortgaged their matrimonial home to the appellant and negotiated a further line of credit. Later, M and K separated, with M completely withdrawing from the business. K soldiered on, renewing business dealings with the appellant in her own name. Doom then descended in the form of a third party demand served upon the appellant by Revenue Canada, claiming $22 387.59 as due from K's business. After failing to pay in full her line of credit, K's home was seized, and the appellant credit union became, pursuant to the terms of the agreement, a mortgagee in possession of the property. K refused to surrender her home, and the appellant commenced an action seeking a writ of possession.

At trial, K defended the claim on the ground that she had not received independent advice in her dealings with the appellant, and that she had suffered physical abuse at the hands of her former husband. The trial judge agreed, and,

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50 *Supra* note 14 at 713; see note 14, *supra*, for the text.

51 *Ibid.*

52 (1958), 14 D.L.R. (2d) 599 (Man. C.A.).

53 *Ibid.* at 604.

54 *Supra* note 47.

citing an inequality of bargaining power and a lack of independent advice, set aside the agreements and mortgages which K had entered into, as well as the mortgage sale which the appellant had succeeded in obtaining, notwithstanding that no evidence had been adduced which revealed her dealings to be in any way improvident. Predictably, the credit union sought and received leave to appeal.

After reviewing the relevant case-law—including, *inter alia*, *Lloyds Bank* v. *Bundy*— Mr. Chief Justice Carruthers concluded that the evidence did not bear out the findings of the trial judge, and reiterated the important message that the judicial avoidance of contracts ought to be reserved for exceptional circumstances. His words are worth quoting at length:

> The trial judge in the case at bar found that [K] was not liable on the basis there was an inequality of bargaining power and she did not receive independent legal advice. The mere lack of independent legal advice, however, does not invalidate her actions in the absence of special circumstances. I am unable to find that circumstances existed in this case comparable to those which existed in the *Bundy* case where Lord Denning held the bank to such an obligation. There was no evidence given here to establish that the terms of any document signed by [K] were very unfair, or that property was transferred for a consideration which was grossly inadequate. Nor was there any evidence to suggest that [K's] reasoning powers were grievously impaired by reason of her own needs or desires or by her own ignorance or infirmity. Nor was there evidence of undue influences or measures brought to bear on her by the credit union for the benefit of the credit union.[55]

The court accordingly reversed the judgment of the trial judge, and granted the appellant possession of K's home.

b. A Broader View

It has been argued that the courts have been moving towards a "broader view" of what constitutes an inequality of bargaining power,[56] citing as support the English case of *A. Schroeder Music Publishing Co. Ltd.* v. *Macauley*.[57] Macauley, a budding young song writer anxious to publish his work, entered into a five-year term agreement with the plaintiff company, which was terminable at any time at the company's election. Under the terms of the contract, the plaintiff was not obliged in any way to actually publish Macauley's works, yet retained copyright in any and all songs produced by Macauley during the term of the agreement. At the House of Lords, Lord Diplock described the inequalities as follows:

> To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining

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55 *Supra* note 47 at 269.

56 Maddaugh & McCamus, *supra* note 21 at 631.

57 [1974] 1 W.L.R. 1308 (H.L.). See also *Clifford Davis Management Ltd.* v. *W.E.A. Records Ltd.* [1975] 1 W.L.R. 61 (C.A.).

> power. It is not without significance that on the evidence in the present case, music publishers in negotiating with song writers whose success has been already established do not insist upon adhering to a contract in the standard form they offered to the respondent.[58]

That the case turned more on restraint of trade than unconscionability is unimportant. What is important is that the courts are now recognising market realities, and have begun to appreciate that, in certain circumstances, "take it or leave it" does not square with contractual freedom or fairness.

c. The Prima Facie Categories

In an altogether separate vein, jurists and judges have over the years evolved the idea that there exist several categories in which an inequality of bargaining power is ordinarily found, and have recognised membership in such categories as *prima facie* evidence of an inequality of bargaining power.[59] The categories of what Professors Vaver and Leff refer to as "presumptive sillies"[60] include, *inter alia*, the illiterate, the aged, the sick, the inebriated (at the time of the transaction, of course), the unintelligent, and the ignorant.[61] However, a new and novel category appears to be gaining momentum—emotional distress.

In *McKenzie* v. *Bank of Montreal*,[62] the plaintiff, M, developed a strong emotional attachment to L, a rogue who was substantially indebted to the defendant bank. Without M's knowledge, L fraudulently mortgaged her car to secure his indebtedness. Predictably, L failed to make good on the mortgage, and M's car was seized, whereupon L and M went to the defendant's credit manager to ar-

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58 *Supra* note 57 at 1316.

59 Maddaugh & McCamus, *supra* note 21 at 625. While it is settled law that a fair and reasonable bargain will preclude claims of unconscionability—see the discussion under Part II(B)—questions remain as to what other evidence might rebut this presumption. One possible extinguisher of unconscionability suits is independent legal advice; compare Lord Denning's judgment in *Lloyds Bank* v. *Bundy*, *supra* note 44 at 765, where he writes that "the ... law gives relief to one who, without independent advice, enters into a contract on terms terms which are very unfair ... ." As the Master of the Rolls continued, however, he stressed that he did "not mean to suggest that every transaction is saved by independent advice," but cautioned that "the absence of it may be fatal."

60 Vaver, *supra* note 4 at 54 note 52; Leff, "Unconscionability and the Code," *supra* note 13 at 532.

61 Maddaugh & McCamus, *supra* note 21 at 625–27. While it may be charged that these categories go more to capacity than inequality, I think they should properly be regarded as going both to capacity *and* inequality, especially since unconscionability is not concerned with capacity (though, this being said, incapacity would give rise to inequality between the parties).

62 (1975), 55 D.L.R. (3d) 641 (Ont. S.C.) [hereinafter *McKenzie (S.C.)*], aff'd 70 D.L.R. (3d) 113 (Ont. C.A.) [hereinafter *McKenzie (C.A.)*].

range for its return. While there, the credit manager—who knew of the fraudulent mortgage—requested that M sign a number of documents which she had not read, one of which was a mortgage of her interest in certain land to re-secure L's indebtedness. Both the trial judge and the Court of Appeal found that the bank had failed in all the circumstances to meet its obligation to see that the plaintiff was aware of the significance of her actions. As such the agreement was pronounced unconscionable. Mr. Justice Stark of the Supreme Court of Ontario found,

> [The plaintiff's] emotional attraction to [L] overruled her appreciation of his deficiencies, and she seems to have been so under his influence that she was quite prepared to sign whatever documents he produced.[63]

Mr. Justice Houlden of the Ontario Court of Appeal agreed with this assessment, finding:

> [T]here was an inequality of bargaining power in this case, and the bank failed to meet the obligation that rested on it to see that the plaintiff knew what she was doing when she executed the mortgage."[64]

McKenzie was applied in the later case of *Royal Bank* v. *Hinds*,[65] where the very recently widowed H assumed, with no discernable benefit to her and at the insistence of the overly-anxious bank, the burden of her deceased husband's personal debts. Through the course of the transaction, H received neither independent legal advice, nor any caution by the bank about the "hazardous course"[66] upon which she was embarking. Unsurprisingly, this was a case in which the court felt judicial intervention appropriate—the bargain was patently improvident and, owing to her husband's recent death, H occupied a vulnerable bargaining position. As Stark J. wrote,

> At the least, this was a case where it was incumbent upon the bank to satisfy itself that the customer was independently advised. Any lawyer or indeed any unprejudiced banker would not have advised her assumption of her husband's loan."[67]

d. Community Standards

Apart from any consideration of the meaning of inequality or of what the *prima facie* categories are, a body of jurisprudence suggests that the standard of inequality of bargaining power varies with the parties and activities. For instance,

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63 McKenzie (S.C.), *ibid.*, at 648.

64 McKenzie (C.A.), *supra* note 62 at 114.

65 (1978), 20 O.R. (2d) 613 (H.C.). See also *Tignish Credit Union Ltd.* v. *Murphy*, *supra* note 47, discussed above.

66 *Supra* note 65 at 615.

67 *Ibid.*

in *A & K Lick-a-Chick Franchises Ltd.* v. *Cordiv Enterprises Ltd.*,[68] Mr. Justice Richards noted that "[a] finding of inequality of bargaining power cannot be made in isolation but must be relative to those standards which constitute the norm." Compare this with Lambert J.A.'s dictum from the *Harry* v. *Kreutziger* case—"sufficiently divergent from standards of commercial morality."[69] Thus, what might constitute an unconscionable transaction in rural Manitoba may simply be hard luck on Bay Street.

I would suggest, however, that nothing new or novel is being espoused here. Determining the customs and conventions of the community in which the transaction took place is just another way of determining the equality of bargaining power as between the parties. Whether we scrutinise complex transactions between sophisticated corporations[70] or assess the dealings of two rural parties,[71] we still perform substantially the same analysis, and the results ought to be the same irrespective of whether the court has had regard to the customs, conventions, or standards of the community in which the parties transacted. Having dealt with inequality, let us now turn attention to the second branch of the bipartite approach.

2. *The Second Branch: Improvidency of the Transaction*

The second requirement set out by Chancellor Boyd in *Waters* v. *Donnelly* is that the agreement arrived at must be *improvident*. The agreement must benefit the stronger party, though how and to what extent is an issue which has not yet been squarely put before the courts. In any event, we *can* be assured that improvidency encompasses the inadequate consideration cases, as well as the too-onerous terms cases,[72] and that the presence of an improvident agreement appears to follow an inequality of bargaining power as a matter of course.

Understandably, one might call into question the apparent superfluity of this branch, and might charge that it makes little sense to formally require that a transaction be improvident since precious few parties, will contest a fair and reasonable agreement. I would suggest, however, that while this might be true in the majority of unconscionability cases, we must consider the possibility of post-contractual exigencies which render even the most advantageous bargain

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68 (1981), 119 D.L.R. (3d) 440 (N.S.S.C.) at 449.

69 See the discussion of Lambert J.A.'s statement in Part II(E), *infra*.

70 As in Hunter Engineering, *supra* note 36.

71 As in *Harry* v. *Kreutziger*, *supra* note 24.

72 See generally Waddams, *supra* note 7 at c. 14, where he canvasses exhaustively all the various categories and scenarios where unconscionability has been found to have arisen.

an impossible burden to shoulder.[73] Parties will attempt to escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them, as was the case in *Tignish Credit Union* v. *Murphy*.[74] Remember, it was only when Revenue Canada's third party demand was served upon the credit union that K found herself in dire straits. The agreements she entered into were reasonable and, it would appear, quite manageable until that point. Yet, if we were to abolish the requirement that the transaction be improvident, had K been able to prove that an inequality of bargaining power had existed, she would have been able to slip her contractual bonds in spite of the reasonableness of her bargain. The requirement that the transaction be improvident plays a useful role, even if only in this small class of cases.

D. The Tripartite Approach

A number of jurists and judges alike have asserted that the criteria of the bipartite approach to unconscionability constitute a necessary but unmistakably insufficient account, and would have us add to the mix the criterion of *poverty*.[75] While this would certainly square with the etiology of the doctrine,[76] it is suggested that this requirement is anachronistic and may safely be dispensed with; to hold otherwise is to assert the plainly absurd proposition that an affluent person can never strike an unconscionable bargain.

In spite of this apparent absurdity, however, some commentators have contended there is more to poverty than a moment's glance would reveal, and have posited that disparities in wealth might *ipso facto* give rise to an inequality of bargaining power.[77] While this certainly might apply to transactions which take

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73 Compare the Manitoba Law Reform Commission's working paper, "Extension of the Unconscionable Transactions Relief Concept to all Contracts (Winnipeg: Queen's Printers, 1972), discussed *infra* in Part III(B)(3).

74 *Tignish Credit Union* v. *Murphy*, *supra* note 47.

75 Klippert, *supra* note 11 at 172 and *Fry* v. *Lane*, *supra* note 23.

76 *Cf.* Fridman, *supra* note 17 at 146, where he writes that unconscionability "may have begun with the assertion of the right to upset transactions made by and with expectant heirs who were anxious to dispose of their inheritance before obtaining it ... ." For a rather more in-depth discussion of the doctrine's historical roots, see Clark, *supra* note 15 at c. 1.

77 Professor Janet Baldwin (Seminar given in Restitution, University of Manitoba, Faculty of Law, 4 March 1997), suggesting that this disparity is particularly acute in family law cases, where the inequalities between spouses are, at least in the jurisprudence, legion. In this connection, see the recent case of *Rosen* v. *Rosen* (1994), 3 R.F.L (4th) 267 (Ont. C.A.), where, owing to the wife's business knowledge and her consultation with a number of lawyers, no such inequality of bargaining power was found to have obtained. For a general discussion of the unconscionability doctrine *viz.* domestic transactions, see B.C. Bedont, "Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994–95) 12 Can. Fam. L.Q. 21.

place in typical free market circumstances, what occurs in the atypical circumstances—of what advantage is wealth when the agent is hopelessly lost, or when the agent is hopelessly outsmarted by an impecunious genius? Emphasis should not lean toward monetary disparities, but rather instead to the bargaining positions of the involved parties as disclosed by an investigation of all germane facts.

E. Unconscionability as Sufficient Divergence from Community Standards

In his separate and concurring judgment in *Harry* v. *Kreutziger*[78]—a case where a fisherman secured relief against the improvident sale of his boat—Mr. Justice Lambert offered the following reductionist account of unconscionability:

> In my opinion, questions as to whether use of power was unconscionable, an advantage was fair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case and the *Bundy* case, are really aspects of one single question. *That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded* [emphasis added].[79]

I respectfully submit that the adoption of Mr. Justice Lambert's approach, notwithstanding that it might well be an accurate assessment of what the unconscionability analysis truly drives at, would lead to greater confusion and obfuscation of an already less-than-clear doctrine.[80] The question of what constitutes sufficient divergence is at least as baffling as the question of inequality of bargaining power, especially when one has regard to the criteria Mr. Justice Lambert has provided for our use:

> The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more germane than those from earlier times when standards were, in some respects, rougher, and, in other respects, more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law.[81]

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78 *Supra* note 24.

79 *Ibid.* at 241.

80 Nonetheless, judges across Canada have accepted, albeit uncritically, Lambert J.A.'s approach: see, for example, *A & K Lick-A-Chick Franchises Ltd.* v. *Cordiv Enterprises Ltd.*, *supra* note 68; *Langenfurth* v. *Bunter* (1986), 42 Alta. L.R. (2d) 173 (Q.B.); and *Haymour Holdings Ltd.* v. *R.* (1986), 5 B.C.L.R. (2d) 145 (S.C.). See also the judgment of La Forest J. in *Norberg* v. *Wynrib*, *supra* note 12 at 597: "[c]ommunity standards of conduct may also be of some assistance. In *Harry* v. *Kreutziger* ... Lambert J.A. approached the issue of unconscionability from a different angle: [quotation omitted]."

81 *Harry* v. *Kreutziger*, *supra* note 24 at 241.

How can we ever make a principled decision should we employ the approach and apply the criteria propounded by Mr. Justice Lambert. For while it might read well in the headnotes, saying that a transaction was "sufficiently divergent from community standards" is merely another way of saying that the transaction was "unconscionable"; the two are quite synonymous, and neither is meaningful without having reference to other factors and principles.[82] And while proponents of the bipartite approach can point to two such features—inequality of bargaining power and the improvidency of the agreement—the criteria with which Lambert J.A. has furnished us appears only to require some measure of judicial genuflection on the latest case-law and germane legislation, and accordingly cannot be said to offer up any guiding principles or—perhaps more importantly—any *restrictive* principles with which to plan or evaluate prospective litigation. I would suggest, then, on pain of palm-tree justice,[83] and on the ground that a principled decision is *a priori* superior to an unprincipled decision, that we would do well to refrain from employing Mr. Justice Lambert's sufficient divergence, opting instead for the more traditional bipartite approach. The two hurdles present in the latter afford us an educated guess at what constitutes an unconscionable transaction, and ensure that we—the judiciary, the lawyers, and the litigants—are at least playing by the same ground rules.

D. Legislative Unconscionability

Relatively short shrift has been paid to the attempts of the provincial legislatures to codify the doctrine of unconscionability, at least so far as the Canadian experience is concerned.[84] This may, I suspect, be attributed to the relatively scant contribution the legislation has made. While the court's equitable jurisdiction has indeed been broadened, the broadening *Act* is of such narrow application that courts seldom invoke this wider jurisdiction. Nevertheless, my dis-

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82 *Cf.* Flannigan, *supra* note 39 at 531, where he writes that "[i]n declaring that transactions are to be evaluated against 'community standards of commercial morality' Lambert J.A. has arguably merely expressed the original motivation for both the traditional Canadian doctrine of unconscionability and Lord Denning's [inequality of bargaining power] principle." The reader will also be reminded of the definitional problems facing unconscionability: see the discussion under the heading of "First Considerations," *supra*.

83 As Professor Flannigan has said of Lambert J.A.'s approach: "[i]t is, potentially, a very wide doctrine," because "[t]he traditional doctrine was arguably only narrower because it was used sparingly and in very compelling circumstances. Nevertheless, Lambert J.A.'s reformulation of the test directly raises the question whether the law of contract should adopt a general standard of 'fairness' with which all contracts must comply": *ibid.* at 531 and 531, n.67.

84 The American experience has been markedly different—§2-302 of the *Uniform Commercial Code* ("Unconscionable Contract of Clause") has engendered an astonishing amount of commentary. For a small sampling, see Manwaring, *supra* note 5 at 239 n.4.

cussion of the doctrine would not be complete without at least some mention of Manitoba's two pertinent *Acts*.

1. *The* Unconscionable Transactions Relief Act

The Manitoba *Unconscionable Transactions Relief Act*,[85] a mercifully short piece of legislation, comprises six short sections. Of these, section 2 (Power of Court) forms our principal concern. The section reads as follows:

> Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances at the time the loan was made, the cost of the loan was excessive or that the transaction is harsh and unconscionable the court may
>
> (a) re-open the transaction and take an account between the creditor and the debtor;
>
> (b) ... relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due ... ;
>
> (c) order the creditor to repay any such excess if it has been paid or allowed on account by the debtor;
>
> (d) set aside, either in whole or in part, or revise or alter, any security given or agreement made in respect of money lent ... .

The first obvious point to note is that the *Act* protects only against unreasonable *loans*; all other transactions are not covered. Second, a wide range of remedies are available; the court has a wide jurisdiction to do and seems capable of ordering almost anything it thinks just, including, the revision and alteration of the impugned agreement.[86]

Notice, however, that the typical proviso—"to do what is just in the circumstances"—is *not* used here. While there may exist a number of possible explanations, it is plausible that the legislature did not wish to *explicitly* empower the courts to make such judgment, given that the Chancellor's foot seems to have left a large enough imprint on this area of law in any case.[87]

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[85] R.S.M. 1987, c. U-20. Compare the similar acts in other jurisdictions: *Unconscionable Transactions Act*, R.S.A. 1980, c. U-2; *Unconscionable Transactions Act*, R.S.N. 1990, c. U-1; *Consumer Protection Act*, R.S.B.C. 1979, c. 65; *Unconscionable Transactions Relief Act*, R.S.N.S. 1989, c. 481; *Unconscionable Transactions Relief Act*, R.S.N.B. 1973, c. U-1; *Unconscionable Transactions Relief Act*, R.S.P.E.I. 1988, c. U-2; *Unconscionable Transactions Relief Act*, R.S.S. 1978, c. U-1; and *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U.2. The *Acts*, as well as the case-law arising therefrom, are discussed in G.H.L. Fridman, *The Law of Contract*, 3d ed. (Toronto: Carswell, 1994) at 337–40.

[86] This is at odds with the court's jurisdiction under common law: see note 19, *supra*.

[87] On the *Unconscionable Transactions Relief Act*, see, for example, *Granville Savings and Mortgages Corp.* v. *Slevin et al.* (1991), 68 Man. R. (2d) 241 (Q.B.), where Mr. Justice Dureault set aside, pursuant to the *Act*, the defendant's guarantee of a mortgage loan.

2. *The* Business Practices Act

The Manitoba *Business Practices Act*[88] is more robust than its specialised cousin, protecting generally against the commission of an "unfair business practice."[89] The pertinent section of the *Act* reads as follows:

> 3. It is an unfair business practice for a supplier to take advantage of a consumer if the supplier knows or can reasonably be expected to know that the consumer is not in a position to protect the consumer's own interests.

I have two brief observations. First, the *Act* protects only against "suppliers"—i.e., people in the business of selling, manufacturing, or distributing goods, where goods are defined as being "goods or services that are or may become the subject of a consumer transaction." Presumably, one could not make use of the protections contained in the *Act* in cases of unconscionable transactions struck between non-supplier individuals; "personal" transactions are out. Second, the wording of the provision is sufficiently broad to catch the banks, financial institutions, and insurance companies which have vexed consumers for some time.[90]

III. VIRTUES AND VICES

THROUGHOUT ITS LONG AND STORIED HISTORY, critics of unconscionability have adduced evidence of the vices, theoretical and otherwise, of the doctrine. They have generally charged that it will lead to unparalleled uncertainties, both

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88 R.S.M. 1987, c. B-120. Again, compare the similar legislation of the other provinces: *Trade Practice Act*, R.S.B.C. 1979, c.406; *Business Practices Act*, R.S.O. 1990, c. B-18; *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3; *Business Practices Act*, R.S.P.E.I. 1988, c. B-7; *Trade Practices Act*, R.S.N. 1990, c. T-7. The pages of Fridman, *supra* note 85 at 340–42, prove once again to be a fruitful source of information about the *Acts*.

89 Section 5 of the *Act* provides that "[n]o supplier shall commit an unfair business practice." On the *Act*, see, for example, the recent case of *Arnold et al. v. Gen-West Enterprises Ltd. et al.* (1996), 112 Man. R. (2d) 306 (Q.B.), where Mr. Justice Hanssen set aside a deposit agreement for the purchase of a vehicle when it was revealed that the vehicle had been "written off," and that Gen-West made a deliberate decision not to inform the plaintiffs of this fact. As Hanssen J. wrote at 309, "I am convinced [Gen-West] knew if [it] disclosed this fact, it would have affected the amount [the plaintiffs] were willing to pay for the vehicle and, perhaps, even their decision to purchase it. In other words, [Gen-West] knew that as a result of [its] failure to disclose this information the [plaintiffs] 'might reasonably be deceived or mislead'."

90 See the discussions of *Morrison* v. *Coast Finance Ltd.*, *McKenzie* v. *Bank of Montreal*, and *Lloyds Bank Ltd.* v. *Bundy*, *supra*, as well as *Smyth* v. *Szep*, [1992] 2 W.W.R. 673 (B.C.C.A.) at 684, where an insurance settlement struck between an experienced adjuster and a 19-year-old university student was found to be unconscionable on the basis of an "obvious disparity of bargaining position [and an] obvious unfairness in the bargain." On *Smyth*, see D. Vaver, "Unsettling Settlements: Of Unconscionability and Other Things" (1992) 50 The Advocate 749.

in the conduct of our affairs and in the body of jurisprudence surrounding the doctrine. The critics' arguments are here reproduced in the sections entitled "Uncertainty," "Unfairness," "Slippery Slopes," and "Obfuscation."

Proponents of unconscionability have not been mutely standing by, and have proffered arguments illuminating the virtues of the doctrine. Specifically, they posit that unconscionability fills a definite need in our common law and, more sentimentally, in ourselves. Their reasoning is set out in the sections entitled "Flexibility" and "Just Deserts." I begin with the virtues.

A. The Virtues

1. Flexibility

The greatest advantage of a general doctrine of unconscionability is the tremendous flexibility which it arrogates to the judiciary.[91] No legislation, working either solely or in concert, could countenance and provide remedy for *all* the various mischiefs and schemes dreamt up by the wicked and unscrupulous. Moreover, unconscionability makes possible the avoidance of contracts which would be left intact by other, more stringent contractual doctrines.

This point should be driven home by the following "bad samaritan" hypothetical.[92] Suppose A, an avid fan of cold and flatness, embarks on a winter walking tour of rural Manitoba. Unfortunately, A strays from the trail, and, after trying for hours to retrace her steps, contracts hypothermia and collapses in the middle of a farmer's field. Suppose further that B, the unscrupulous owner of the field, stumbles across A in a chance inspection of his property, and offers to take her to the nearest town for $5 000. A, who is not yet delusional at this point, accepts B's offer. B then delivers A to safety.

Two points must be made. First, B is under no obligation to rescue A; had B refused to rescue A, he would not be subject to criminal sanction or civil liability.[93] Second, since B neither compelled A to accept his offer nor interfered in

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91 Though this "cardinal virtue" of unconscionability is not without its costs: see the discussion entitled "Uncertainty" in Part III(B)(1).

92 While I am unsure of its provenance, I suspect it was one of the many brainchildren of the late Professor Leff. It bears a resemblance to the scenario in *Post* v. *Jones*, 19 How. (60 U.S.) 150 (1856) where two vessels came upon a disabled third in remote waters, and purchased from the third vessel a cargo of oil for a fraction of its market value.

93 In the event A did not accept B's offer. B would not liable in tort to A's estate; as we know, the courts have yet to recognise a duty to rescue in our law, and B in no way contributed to A's predicament. Secondly, since A was a stranger to B and not under his charge, the crime of failing to provide necessaries of life under section 215 would not have been committed. Section 215 (1)(c)(ii) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, reads as follows: "Every one is under a legal duty (c) to provide necessaries of life to a person *under his charge* if that person (ii) is unable to provide himself with the necessaries of life."

any way with A's capacity to make full and proper consent, the doctrines of duress and undue influence have no application.[94] In this situation, launching an action to rescind the contract on the basis of unconscionability constitute A's *sole* recourse, short of breaching her obligation.[95] A general doctrine of unconscionability seems, then, a distinct necessity, if only in this connection.

2. Just Deserts

Another virtue of a general doctrine of unconscionability is that it accords with our sentimental side and reinforces, in certain circumstances, the concept of the just desert. The unscrupulous— like the farmer in the above hypothetical—and the generally objectionable seem to get what we feel they deserve when a contract that greatly benefits such people is set aside on the basis of unconscionability. Seeing that the wicked not profit from their improprieties lifts one's spirits immensely.

As an illustrative example, consider the *Morrison*.[96] An elderly and impoverished woman was effectively bilked out of monies she did not even have by taking out a first mortgage on her home. While we might have set aside the contract on different grounds—such as undue influence or duress—it is more accurate and sentimentally more pleasing that the wrongdoer in this case was "punished" not for any discernable wrongdoing but for taking advantage of a person whom we would all agree deserves as much protection as the market will allow.

B. The Vices

1. Uncertainty

The most obvious and cutting objection to a general doctrine of unconscionability is the market *uncertainties* which might prevail should the courts begin to

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94 Arguably, the emerging doctrine of "practical compulsion" might apply here. However, it is submitted that it would not, given that B did nothing to secure the bargaining advantages with which he was presented. It would be quite a different situation had B given A intentionally bad directions, or, more poignantly, if B had started to rescue A and then made the contract.

It still might be asserted, however, that practical compulsion turns not on what the defendant has done to secure the bargaining advantages she has but rather on what bargaining advantages are naturally (i.e., through no act of the defendant) in place. I would suggest, in this case, that practical compulsion would better be construed not as a branch of undue influence but of unconscionability, since the former turns on the bargaining advantages the defendant has, through her own efforts, secured for herself: see Leff, *supra* note 2 at 425.

95 A similar analysis would apply should B attempt to obtain damages for the breach: see note 16, *supra*.

96 *Supra* note 14; discussed in Part II(C)(1)(i).

apply unconscionability with any sort of regularity. This, of course, is the unhappy concomitant of flexibility. The crux of the objection is this: how are we ever to govern ourselves and order our lives and affairs when we cannot know whether some given contract will be set aside on the basis of unconscionability? Paradoxically, one might be better off by refraining from making a provident agreement, especially when considerations of reliance on the part of the stronger party are canvassed.[97] I remind the reader of the difficulty noted at the beginning of Part II—the distinction between semantic and heuristic unconscionability. Conceptually, unconscionability might well be a useful and perhaps even humane way to police what would otherwise be enforceable agreements, I take it as common ground that the inability to arrive at a functional and predictive model of unconscionability might be worse than the contractual unfairness which we are attempting to remedy. In spite of its virtues, present-day unconscionability remains too capricious and uncertain a doctrine to be wholeheartedly endorsed. As one proponent has admitted, "[u]nconscionability is not a highly predictable doctrine even with the fullest exposition of the facts."[98] Harsher words come from one of unconscionability's more strident detractors:

> Courtwatchers 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 on one's starting point. ... 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 [Ontario Law Reform Commission Report] is talking.[99]

If the judiciary begins to apply a general doctrine of unconscionability with any sort of regularity, conceivably, our failure to articulate clear and specific guidelines will stultify the very market we were attempting to protect. Transactions in which an inequality of bargaining power occurs would be viewed with suspicion and, I suspect, general disdain by the "stronger" parties. Such parties would be perennially fearful of striking good bargains, and might—though this is admittedly a worst case scenario—eventually remove themselves from the fray altogether.

2. Unfairness

While it might at first blush seem contradictory that a principle predicated on and steeped in equity could work even moderate inequities, closer examination reveals that at least two substantial inequities could result from the application

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97 See the discussion under "Unfairness" in Part 2 of this section.

98 J. Mallor, "Unconscionability in Contracts Between Merchants" (1986) 40 Sw. L. Rev. 1065 at 1087.

99 Vaver, *supra* note 4 at 68.

of a general doctrine of unconscionability. First, it is eminently forseeable that the judicial avoidance of an unconscionable bargain might work an unfairness if the stronger party has *relied* on the contract to her detriment. Suppose, for example, that A, a used-car salesperson, decides to sell her own used car in her personal capacity, and places an advertisement in the newspaper. B, a grandmother years and meager means, reads A's ad and, pining for her own independence, decides to purchase the car. B then contacts A and, completely unaware of the car's worth, offers her a price which exceeds its market value by $20 000. After limited protest, A accepts B's offer, and B's monies (obtained by taking out a first mortgage on her home) are exchanged for A's car. It is only when B picks up her son to take him for a ride that B becomes aware that she has made a very bad bargain. When she contacts A to get her money back, A informs her that she cannot return the money—apparently, the dramatic increase in her bank balance prompted A to quit her job and place a down-payment on a plot of land on which she hopes to erect her own used-car business. In light of the *Morrison*[100] decision, I think it is fairly certain that this contract would probably be set aside: both an inequality of bargaining power, as well as an improvident agreement, are present. But what about A? Are her interests not worth protecting? Or, alternatively, do we care so much about the protection of B's interests that we would be willing to avert our attention from any inequities—such as difficulties she will surely have in meeting the payments on the land—that the setting aside of the contract might work on her?[101] Either way, it appears that A, absence of nastiness notwithstanding,[102] will be forced to bear the brunt of the avoidance of the contract.

The second unfairness that unconscionability seems to work on the stronger party is that it forbids one from "reap[ing] material gain from some advantage for which one is not responsible, that is, which one did not, commendably *or* evilly, cause."[103] The "stronger" party seems to be prevented from arrogating to herself the fruits of being more clever, possessing a naturally better head for business, or just being in a better bargaining position than the "weaker" person with whom she contracts.[104] Should we prevent a party from gaining from her

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100 *Supra* note 13. It is difficult to see how such a plaintiff could ever *not* succeed in this connection.

101 As Professor Fried has questioned when exploring a similar hypothetical, "[w]hy should just this one representative of the more fortunate classes be made to bear the burden of our redistributive zeal?" See C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981) at 105.

102 Surely we cannot hold that A should have compelled B to obtain independent advice!

103 Leff, *supra* note 2 at 424.

104 *Ibid.*

"natural" position so that we may protect those who cannot look after their own interests? There is of course no technical solution; the answer turns not on intelligent application of the two criteria set out in *Waters* v. *Donnelly* or other formalistic legal doctrine, but rather on what sort of society we wish to carve out for ourselves. It turns, as Professor Leff's ambivalency thesis posits, on the non-technological question of *values*.

3. *Slippery Slopes*

Perhaps the most legitimate concern which has been lodged against a general doctrine of unconscionability is this: it marks the beginning of an unwelcome erosion of the first principles of contract, the first principles on which we rely to govern our lives and practices. Sceptics of unconscionability can easily envision a court of the near future which, on the basis of an evolved and "progressive" doctrine of unconscionability, routinely sets aside contracts merely because they were entered into for what the court considers inadequate consideration, or because the contracts *now* adversely impact the plaintiff, notwithstanding that the conditions giving rise to the adversity were not known at the time the bargain was struck.

This latter possibility was canvassed by the Manitoba Law Reform Commission in their working paper "Extension of the Unconscionable Transactions Relief Concept to all Contracts."[105] The Commission argued—rightfully, in this spectator's estimation—that to relieve a contract which was conscionable at the time of formation but, due to some "calamitous future event," would work an unconscionable unfairness upon one of the parties would give rise to tremendous uncertainty and would constitute a cure worse than the purported malady.[106]

It appears, however, that the Law Reform Commission's worst fears have been realised. In *McCullough* v. *Hilton*,[107] the plaintiff accepted the Insurance Corporation of British Columbia's $1 000 offer to settle her claim for neck injuries arising from a 1994 automobile accident. Unbeknownst to both the plaintiff and the adjuster, the plaintiff was suffering not from whiplash but from asymptomatic degenerative disc disease, and in fact had suffered a serious disc defragmentation in the accident. In the course of his judgment setting aside the settlement, Mr. Justice Oppal of the British Columbia Supreme Court found that since the plaintiff was "unsophisticated in matters involving personal inju-

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[105] *Supra* note 73.

[106] *Ibid.* at 11. Compare *Cougle* v. *Maricevic* (1983), 64 B.C.L.R. (2d) 105 (C.A.), where it was held that in order to assess the providency and reasonableness of a transaction, it becomes necessary to examine the circumstances known to the parties at the time of formation.

[107] (1997), 41 C.C.L.I. (2d) 315 (B.C.S.C.).

ries, damages and the law,"[108] and since she had "no means by which to determine whether the offer was fair and reasonable,"[109] the parties were in unequal bargaining positions, meeting the first criterion of unconscionability. However, when dealing with the second criterion—the improvidency of the bargain—Oppal J. held that "... *evidence of subsequent events will often be relevant in order to assess the reasonableness of the bargain*, and that it was made in the belief that it was reasonable" [emphasis added].[110] If this is the direction in which the courts are headed, one can only wonder what lies at the base of Mount Unconscionability.[111]

4. Obfuscation

That a court could conceivably refrain from applying all of unconscionability's kindred—duress, undue influence, and coercion, as well as the previously discussed statutory provisions—and elect instead to implement a general doctrine of unconscionability in all cases truly gives one pause. While such a practice admittedly has a seductive, "simplicity of the one"[112] feel about it, I fear that even greater uncertainty than that which unconscionability has already enjoyed would result. By way of prognostication, I would submit that such a widespread and wholesale adoption of unconscionability would lead not to blissful clarification and justice for all, but to the bloating and obfuscation of the doctrine, as well as a corresponding diminution of other doctrines which seemed to be doing a perfectly adequate job of getting us where we wanted to go.[113] As Leff writes:

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[108] *Supra* note 73 at 320.

[109] *Ibid.*

[110] *Ibid.* at 320. One wonders, though, if unconscionability need have been invoked in this situation. It is at least arguable that the same result might have been reached by the application of the doctrine of fundamental mistake as it was enunciated in such cases as *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161 (H.L.) and *T.D. Bank* v. *Fortin (No. 2)*, [1978] 5 W.W.R. 302 (B.C.S.C.). This, of course, is merely suggestive.

[111] There is other evidence of erosion, though not as pronounced as in the *McCullough* decision, in unconscionability's apparently steady ascent in the business community: see *Atlas Supply Co. of Canada Ltd.* v. *Yarmouth Equipment Ltd.* (1991), 103 N.S.R. (2d) 1 (N.S.C.A.), the first Canadian case to find unconscionability in a commercial context. See also Vern DaRe's comment on the case: V.W. DaRe, "*Atlas* Unchartered: When Unconscionability 'Says it All'" (1996) 27 Can. Bus. L.J. 426.

[112] The reader will be reminded of Ockham's famous razor: *entia non sunt multiplicanda praeter necessitum* [never multiply entities beyond necessity].

[113] As Professor Vaver humourously writes, "[t]rade 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.'" Vaver, *supra* note 4 at 43.

> [W]hen you forbid a contractual practice, you ought to have the political nerve to do so with some understanding (and some disclosure) about what you are doing. ... Subsuming problems is not as good as solving them, and may in fact retard the solutions instead.[114]

IV. CONCLUSION: PRAGMATIC UNCONSCIONABILITY

AT ITS BEST, UNCONSCIONABILITY is a wonderfully adaptive and flexible doctrine, capable of remedying all manner of distasteful agreements otherwise immune from judicial scrutiny. At its worst, it is as capricious and uncertain as any doctrine in equity or the common law.[115] Ought we to call for its abolition? I suggest we should not. The courts have for centuries been imposing public—the cynic would say "personal"—values on private transactions under the rubric of "unconscionability," and I see no reason why they will not continue to do so. If nothing else, unconscionability makes such an imposition clear, and does not tend to the judicial deformation and stretching of other rules and doctrines which, if properly applied, would not have had application in the first place.[116]

This is not to say, however, that we cannot do better. As Professor Vaver has reminded us, just because we cannot identify all the situations in need of statutory reform does not mean we should not or cannot attempt to find *some*.[117] We should not, following the lead of the *Unconscionable Transactions Relief Act*, be hesitant to draft and enact legislation which identify and resolve specific problems. If, for instance, we think in order for banks and financial institutions to enforce their rights under a mortgage or similar charge against a party deserving of judicial protection we ought to require that the party receive independent legal advice, we should have the courage to say as much explicitly and in no uncertain terms.[118]

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[114] Leff, "Unconscionability and the Code," *supra* note 13 at 557–59.

[115] The doctrine of "fundamental breach"—that is, where an otherwise binding contract would be set aside when one party deprives the innocent party or parties of the whole benefit it was intended should be obtained under the contract—would seem unconscionability's closest rival. See generally *Hunter Engineering*, *supra* note 36, as well as Professor Flannigan's thoughtful comments on the case and the problems raised thereby: Flannigan, *supra* note 39.

[116] *Cf.* Mr. Justice Dickson's words in *Hunter Engineering*, *ibid.* at 462: "[e]xplicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the *real* grounds for refusing to give force to a contractual term said to have been agreed to by the parties" [emphasis added].

[117] Vaver, *supra* note 4 at 73.

[118] This, indeed, was the conclusion of Lord Scarman, writing for the House of Lords in *National Westminster Bank* v. *Morgan*, *supra* note 5 at 830: "[a]nd even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief

Equally, we should not shy in the interim from working towards what I have termed a heuristic model of unconscionability. If we become able to discern a pattern in the jurisprudence which clarifies and increases the predictive power of the doctrine, judges and academics alike should not be hesitant to expound *critically* upon that pattern. With respect, the mere recitation of leading cases will not bring the doctrine into focus, and only confuses matters when no attempt is made to choose between or synthesise competing theories. Clear and critical thinking—and less expository—are required.

Yet, until all our precise problems are legislated away, or until we arrive at a sufficiently predictive model, we have present-day unconscionability—an inconsistent, unpredictable, and uncertain doctrine which will have to do in the meantime, which I would suggest be used sparingly—when nothing else suffices, lest we lose control of the reins.

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against inequality of bargaining power. Parliament has undertaken the task (and it is essentially a legislative task) of enacting such restrictions on freedom of contract as are in its judgment necessary to relieve against the mischief ... . I doubt whether the courts should assume the burden of formulating further restrictions." However, as Professor Clark points out in the last sentence of his treatise, "the case-law, particularly in Canada, Australia and Ireland, repudiates this basic position": Clark, *supra* note 15 at 252.