The doctrine of unconscionability is notoriously uncertain. The Supreme Court of Canada has not pronounced authoritatively on the subject, leaving provincial appellate courts to deploy a variety of different framework tests. Even within each province, the case law is often impressionistic and plagued by various inconsistencies. Resolving these doctrinal divisions turns largely on a clear understanding of unconscionability’s underlying rationale. Unfortunately, there is little agreement amongst courts or commentators as to the conceptual basis of the claim. Broadly speaking, three different theories can be gleaned from the jurisprudence, namely: unfairness, consent and exploitation. In this paper, I examine the leading Canadian authorities on unconscionability, detailing various doctrinal inconsistencies. I suggest that settling on a uniform framework test requires a clear commitment to a single underlying rationale for the action. I conclude by evaluating the above-mentioned justifications, and explain how each compels a different answer to how the test for unconscionability should be framed.
I. INTRODUCTION

Unconscionability in Contract law is often said to be “terribly uncertain”.¹ Despite signaling general approval of the doctrine on numerous occasions, the Supreme Court of Canada has not settled authoritatively on a framework test.² Provincial appellate courts have deployed a variety of different formulations that operate inconsistently across and even within several jurisdictions.³ Exacerbating this uncertainty is the vague and abstract manner in which various principles are stated. The case law is replete with references to “inequality of bargaining power”, “taking undue advantage”, “gross improvidence or unfairness”, and “commercial morality”⁴—none of which alone or in combination yield particularly clear or predicative criteria for relief. Worse, these phrases often pull in different directions. Some relate to the procedural fairness of the bargaining process, while others pertain to the substantive fairness of result.⁵ For these reasons, critics are justified in lamenting that the Canadian jurisprudence lacks “discernable principle”.⁶

All of this comes at a heavy cost. Critics argue that unconscionability undermines commercial certainty⁷ and freedom of contract⁸ while placing courts in the position of policing contracts for normative fairness, a task sceptics allege they are poorly equipped to perform.⁹ Despite these criticisms, proponents of unconscionability see value in vesting courts with a general power to remedy certain instances of serious unfairness. Uncertainty, they say, “is a price worth paying” to secure “just results”.¹⁰ They note that freedom of contract has never been absolute,¹¹ and courts have long deployed a variety of contractual techniques to control for fundamental unfairness of various kinds.¹² This long history is said to provide a “powerful

² See section III, below.
³ See section IV, below.
⁴ See section V, below.
⁵ See A.A. Leff, “Unconscionability and the Code—The Emperor’s New Clause” (1967) 115 U. P. L. Rev. 485, at 487 (describing the procedural aspect as “bargaining naughtiness” and the substantive aspect as “evils in the resulting contract”).
justification” for “unconscionability now”. Finally, supporters assert that a discrete doctrine of unconscionability may actually militate in favour of transparent and principled decision-making, because it allows courts “to deal openly” with “unfairness” rather than manipulate other doctrines covertly toward that end.

Developing a principled legal framework for analyzing unconscionability requires a clear articulation of the doctrine’s underlying policy basis. Only then can rules respond to the relevant mischief. Unfortunately, for reasons of “inertia or lack of interest”, Canadian judges have paid little attention to the doctrine’s normative foundations. Instead, cases typically proceed by referencing a small cluster of authorities in an “automatic” way, which are often applied impressionistically while “ignoring whatever might lie behind those tests and slogans” at a “justificatory level”.

Broadly speaking, the purpose of this paper is to respond to this last observation, by engaging with underlying theory and reflecting on how different justifications for the doctrine influence the manner in which the rules ought to be framed. In section II, I explain three different conceptions of unconscionability that exist in the academic literature, namely unfairness, consent and exploitation. In section III, I discuss the Supreme Court of Canada’s treatment of unconscionability, both in relation to its underlying rationale and with respect to its doctrinal elements. To varying degrees, some support exists for each underlying conception just mentioned. In section IV, I map the leading statements of principle from provincial appellate courts, detailing the inconsistent manner in which the test has been formulated. In section V, I discuss the manner in which recent lower court decisions have applied the various framework tests, documenting a number of additional inconsistencies. The picture that emerges is one bordering on doctrinal incoherence. In section VI, I revisit the three underlying theories presented at the outset, and suggest that while ‘unfairness’ finds little support in the jurisprudence, ‘consent’ and ‘exploitation’ each resonate to varying degrees with certain decisions, but are belied by others. Finally, in section VII, I reflect on how each underlying theory exerts a different influence on how the test for unconscionability ought to be framed.

II. NORMATIVE FOUNDATIONS

Leading commentators disagree about the policy rationale underpinning unconscionability. At least three distinct conceptions dominate the literature, namely: Unfairness, consent and exploitation. Broadly speaking, with unfairness the focus is on the equality of exchange, on the substantive reasonableness of the transaction itself. With consent, the focus is on the claimant’s understanding and volition. Exploitation shifts attention to the defendant’s wrongful behavior.
1. Unfairness

Thirty years ago Professor Vaver wrote that “all lawyers know” unconscionability is an “obscurantist term simply meaning unfair”.18 Professor Leff argued along the same lines a decade earlier:

…unconscionability means: a bad deal not brought about by any determinable bad conduct (the finding of which would render the use of unconscionability superfluous), but rather bad only because of its intrinsic badness: its out of the ordinary price.19

Professor Waddams has long espoused the same view, and remains its leading contemporary proponent. He argues that “unfairness” is “a useful synonym” for unconscionability; and that “a contract may be set aside if it produces consequences that are very unfair”.20

At first blush, these seem like remarkable propositions, given the long-standing mantra that courts will not evaluate the sufficiency of consideration.21 Waddams notes, however, that this has never been entirely true, for even the first published treatise on English contract law featured a chapter titled “Of the Equitable Jurisdiction in Relieving Against Unreasonable Contracts or Agreements”.22 It was there observed that equity had developed an “unusual” and “very wide” conception of fraud, extending beyond deceit, which justified avoiding agreements “on the ground of inequality…or hardship on one of the parties to a contract…being looked upon as an offence against morality, and as unconscientious”.23 Waddams notes that “equitable fraud” was routinely invoked in the 18th Century to avoid agreements deemed substantively unfair in a variety contexts even where the terms were clear and no pressure or actual deceit existed.24

Unconscionability itself traces most clearly to Chancery decisions in two particular contexts. The first involved cases concerning expectant heirs, loaned money at high rates of interest on the strength of their future inheritance (so called “catching bargains”26). In the classic case Earl of Ayesford v Morris,27 for example, a young man, deeply in debt, borrowed money at a rate of 60% and provided various pieces of security. The Court of Appeal permitted recovery of the security and reduced the interest to 5%, despite finding no indicia of actual fraud or pressure, and even though the borrower was a businessman who

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21 Maynard v. Moseley (1676), 3 Swans. 651, at 665, (“Chancery mends no man’s bargain”).
understood the transaction. While such cases were rationalized on the basis of equitable fraud, on the theory the parties were not of equal bargaining strength due to the “follies and vices of … youth”, Waddams notes this was often a fiction not justified on the facts. It appears that the true basis for relief was oftentimes simply that the revisionary interest was sold for an “inadequate price”.

The second “historical head” of unconscionability concerned the avoidance of substantively unfair contracts involving the so-called “poor and ignorant”. In these cases, typified by Fry v Lane, Chancery again invoked a presumption of fraud, whereby a “large inequality of exchange” was taken as proof that some disability existed or undue pressure was exerted. Waddams observes that, as with the cases involving expectant heirs, there was some suggestion in the case law and in early legal writings that this presumption was “practically irrebuttable”, again suggesting that unfairness itself was oftentimes the true (if unexpressed) basis for relief.

Historical antecedents aside, Waddams sees practical value in courts recognizing a general principle of unconscionability to provide relief for agreements that are “unfair, inequitable, unreasonable or oppressive”. In his view, such recognition would bring to the fore questions of substantive unfairness that continue to drive various discrete doctrines of contract law, such as relief from forfeitures, penalty clauses, deposits, and the judicial control of exemption clauses, among others. More recently, Waddams argues that the Supreme Court of Canada’s recognition in Bhasin of an organizing principle of good faith “suggests approval of a general power …to set aside contracts…that operate very unfairly”, which he asserts could evolve to mean contractual “reasonableness” which would be a “clearer and simpler” way to think about unconscionability.

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29 Earl of Aylesford v. Morris (1873), L.R. 8 Ch. App. 484, at 491 (C.A.).
32 M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham: LexisNexis, 2014), at 521, citing Fry v Lane (1888), 40 Ch. D. 312.
33 Fry v Lane (1888), 40 Ch. D. 312.
2. Consent

Other scholars prefer to anchor unconscionability in defective or vitiated consent. Professor McInnes, taking a taxonomical approach, argues that this integrates best with most of the “plaintiff-sided” reasons for invalidating contracts, such as mistake, undue influence and duress. In each case, the focus is on the claimant. A contract may be avoided out of respect for “personal autonomy”, as the claimant did not “really intend to enrich the defendant”. This approach, concerned as it is with the process of contractual formation, rather than the fairness of outcome, also better respects the liberal conception of freedom of contract, and is said to promote certainty and finality by circumscribing judicial discretion to evaluate the adequacy of consideration.

Professor Duggan justifies a consent based approach by drawing on law and economics scholarship. On this view, contracts are vehicles for both private and public benefit. The former arises when the transaction satisfies each party’s individual preferences, and the latter occurs on the theory that contractual exchanges “improve the allocation of resources…to more highly valued uses”. Both benefits depend on the parties “freely choosing to enter into the contract with full understanding of what they are doing”. Much like duress and undue influence, setting aside a contract for unconscionability is justified on the basis of what Trebilcock and Elliott term “contract failure”. This occurs where one party lacks cognitive capacity to form a “coherent preference structure” due to an impairment of bargaining power of such magnitude that the contract “results from choices that do not reflect underlying preferences”. On this account, unconscionability is justified for instrumentalist reasons, because such failed contracts “represent a social cost in the form of a misallocation of resources”.

3. Exploitation

Exploitation has attracted considerable scholarly support as the basis for unconscionability, though differences exist in how that principle is presented. What these accounts have in common is a general focus on the defendant’s opprobrious behavior during formation. Professor Bigwood has advanced a purely

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procedural model of interparty exploitation.\(^5\) His starting point is that the common law confers a general “immunity” on people not to have their resources transferred without their “agency-responsible consent”,\(^5\) which requires that a person be able to bargain from a position of self-interest, capable of rationally appreciating the “relevant options, predict[ing] their consequences and relat[ing] them to their own values or preferences”.\(^5\) Where the claimant has a “special disadvantage” of the types referred to by Duggan as constituting “contract failure”\(^5\) the “normal” assumptions about free-bargaining underpinning freedom of contract “are incapable of being fairly applied”, and the weaker party may be “excused from observing those levels of self-reliance and individual responsibility otherwise demanded of free contracting parties”.\(^5\)

The thrust of Bigwood’s account thus far presented reflects the consent-based paradigms discussed above;\(^5\) but his conception requires more. There is a difference, he asserts, between a weaker party being vulnerable to exploitation, and one who is actually “exploited”.\(^5\) He argues that the principle of bilateral correlativity, underpinning Professor Weinrib’s\(^5\) account of corrective justice, demands that the interests of both parties be considered before equity intervenes. In Bigwood’s view, “it is the exploitation of vulnerability … that consummates the ‘non-consent’”.\(^5\) Where one contracting party knows the other is “peculiarly disadvantaged by reason of exploitable circumstances” it is unconscionable for the stronger party to proceed; in doing so he uses the exploitee as an instrument of his own economic desires rather than treating him as an “autonomous subject”.\(^6\) It is this conscious using of people that Bigwood argues furnishes the “justificative reason for [equitable] interference”.\(^6\) Importantly, on Bigwood’s account, the defendant must know subjectively of the claimant’s impairment, otherwise he cannot be regarded as an

\(^{56}\) R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 185, stating this conception of “special disadvantage is in effect an equitable extension of the common law’s too narrow ‘incapacity’ idea”; and see 187.
exploiter, properly so-called; and whether the contract itself is substantively unfair is conceptually immaterial.

Professor Enonchong has advanced a similar account. Unlike Bigwood, however, he submits that substantive unfairness in the transaction itself ought to be retained as a criterion for relief, because this has always been a core feature of unconscionability (in England at least) and dispensing with it would alter the doctrine’s character and purpose. Professor Virgo has argued along the same lines, except that for him the defendant can be guilty of the requisite “morally reprehensible behavior” if he ought to have known the claimant suffered from a “special disability.” In his view, such constructive knowledge is consistent with equity’s longstanding approach.

III. TREATMENT BY THE SUPREME COURT OF CANADA

The Supreme Court of Canada has discussed unconscionability in passing on a number of occasions. Mixed messages have emerged concerning the doctrine’s underlying policy basis. The tension is most evident between consent and some version of exploitation in the form of the defendant’s abuse of the plaintiff’s weaker bargaining position. There has also been some suggestion that substantive unfairness in the contract itself may be a basis for relief, although this is ambiguous at best.

1. Underlying Rationales

The tension between consent and exploitation was most evident in Norberg v. Wynrib, which concerned the tort of sexual battery by a doctor against his drug-addicted patient. Justice La Forest, for the majority, said that the principles underpinning contractual unconscionability, which are aimed at “the issue of voluntariness”, provided a “useful framework” for examining when “genuine consent” has been negated in the context of battery.

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63 R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 205-08, although he concedes it might serve a useful evidential function supporting an inference that the person was exploited.
69 Justices Gonthier and Cory concurring.
Although clearly framing unconscionability in relation to consent, later in his reasons La Forest J. stated it “may be argued that an unconscionable transaction does not, in fact, vitiate consent”.71 Rather, the basis for relief may be matter of “social policy” in which contracts can be avoided despite the “weaker party retain[ing] the power to give real consent”.72 On this view, “consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely” even though he or she “retain[ed] the power to give real consent”.73 Furthermore, he suggested that on this latter approach there “must also be exploitation”74 in the sense that the weaker party is “taken advantage of” by the stronger party.75 Notably, it was on this latter basis that La Forest J. ultimately rested his conclusion that the defense of consent to battery was not established.76 Accordingly, while he appeared to validate this broader exploitation rationale, he nevertheless tied its operation back to the primary issue of consent.

Justice Sopinka’s dissenting reasons in Norberg clearly separated unconscionability from consent.77 Unconscionability, he said, does not “vitiate consent” but rather is grounded in the principle that “fairness requires that the transaction be set aside notwithstanding consent”.78 The fairness Sopinka J. had in mind appears to be the avoidance of exploitation, which may arise when the weaker party’s assent has been “[un]fairly obtained”79 by means of an “unfair use of power by the strong against the weak”80 during contractual formation.

Justice Sopinka’s approach finds support in the pre-Norbeg decision Dyck v. Manitoba Snowmobile Ass’n Inc.,81 a tort case which concerned the validity of a waiver of liability clause contained in a snowmobile membership contract. The unanimous court held that the clause was not unconscionable, for it was not a situation in which “the stronger party has taken unfair advantage of the other”.82 The key factual drivers of this conclusion were that the association did not pressure the plaintiff to sign the waiver nor did it take advantage of any “social or economic pressures” to get him to participate in the activities giving rise to the tort.83 The focus here, as in Sopinka J.’s reasons in Norberg, is on the manner in which the stronger party obtained the other’s consent during contractual formation.

In *Hunter Engineering Co v Syncrude Canada Ltd.*,\(^8^4\) also decided pre-Norberg, Dickson C.J. said unconscionability protects the “weak from over-reaching by the strong”.\(^8^5\) While this appears consistent with Sopinka J.’s exploitation approach, Dickson C.J. also stated that unconscionability is concerned with “fairness” and said courts will not blindly enforce a “harsh” bargain even when “freely concluded” by the parties.\(^8^6\) When taken together, these statements may suggest that the type of “over-reaching” Dickson C.J. had in mind was the creation of a manifestly unfair contract, albeit one that flows from unequal bargaining power. If so, this provides some support for Waddams’ thesis.\(^8^7\)

The mixed messaging has continued post-Norberg as well. In *Hodgkinson v. Simms*,\(^8^8\) La Forest J. retreated from his earlier preference for a consent-based approach, and framed the action in terms closer to Sopinka J.’s reasons in Norberg. He contrasted undue influence with unconscionability, observing that the former “focuses on the sufficiency of consent” whereas the latter “looks at the reasonableness of a given transaction”.\(^8^9\) The reasonableness he had in mind concerned the manner in which the contract was formed, as he noted unconscionability protects the “vulnerable” and is “triggered by abuse of a pre-existing inequality in bargaining power between the parties”.\(^9^0\)

More recently, in *Bhasin v. Hynrew*,\(^9^1\) Cromwell J. observed that:

> …considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other.\(^9^2\)

The first part of this passage clearly focuses on the fairness of the bargain itself, rather than on the process of formation. The reference to “taking undue advantage” is ambiguous: in the previous decisions, canvassed above, similar phrasing related to some exploitative conduct or abuse during formation; but in the above passage it appears to relate to the terms of the contract, so that “undue advantage” could arguably be taken to mean a substantial inequality of exchange or an otherwise “harsh” bargain, to use Dickson C.J.’s descriptor from *Hunter*. Recall that Waddams reads *Bhasin* as providing some support for his view that unconscionability can arise because the contract itself is unfair or unreasonable.\(^9^3\)

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2. Tests

The Supreme Court of Canada has not stated the test for unconscionability definitively. As such, divining the claim’s underlying basis from its doctrinal elements remains something of a speculative exercise.

In Norberg, La Forest J. endorsed Morrison v. Coast Finance® and summarized the ingredients of unconscionability as “(1) proof of inequality in the position of the parties, and (2) proof of an improvident bargain”. He also suggested that the following principle, posited by Lambert J.A. in Harry v. Kreutzinger, may be of “some assistance”: “T[he] single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded”.

Justice Sopinka observed that unconscionability is “evolving” and “not completely settled”. He cited the same authorities as La Forest J. while also quoting with apparent approval Davidson v. Three Spruces Realty Ltd.®®® for the proposition that a contract “may be declared to be void as being unreasonable” where it is “unconscionable to bind the parties to their formal bargain”. In Davidson itself, Anderson J. was of the opinion that a contractual provision may be struck down, even when “freely entered into” and “perfectly clear”, if its operation would be “entirely unreasonable” and “offensive to right-thinking persons”. The emphasis here is not on consent or on the abuse of bargaining inequality, but rather on the manifest unfairness of the clause itself. Davidson was also cited by Wilson J. in Hunter Engineering.

In Miglin v. Miglin®®® LeBel J. said a finding of unconscionability requires “both a substantial inequality of bargaining power between the parties that is exploited by the stronger party who preys upon the weaker and substantial unfairness or improvidence in the terms of the agreement”. Finally, in Douez v. Facebook,®®®® Abella J. relied on the two-part Morrison test as paraphrased by Professor McCamus,®®®®® consisting of inequality and improvidence, without mention of exploitation or predatory behavior. She invoked this test to invalidate a forum selection clause ousting Canadian jurisdiction for tortious privacy invasions contained in an online user agreement between an individual and Facebook. In her view, this was a “classic case of unconscionability”, because the online contract afforded Facebook the “unilateral ability” to impose non-negotiated terms that “potentially” operated unfairly.

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IV. FRAMEWORK TESTS BY PROVINCIAL APPELLATE COURTS

In the absence of clear direction from the Supreme Court of Canada, provincial appellate courts remain the leading authorities. While the framework tests surveyed below overlap in many respects, they also present important differences between jurisdictions and even within several provinces themselves.

The seminal modern authority, endorsed countless times across Canada, is the British Columbia Court of Appeal’s decision in Morrison110 in which Davey J.A. observed:

A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker… [T]he material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.111

Subsequently, in Harry,112 Lambert J.A. suggested that Morrison can be reduced to a “single question”, namely: “whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded”.113

It is not clear whether Lambert J.A.’s formulation was intended to operate as a discrete test or simply as a compendious way of expressing a conclusion already reached under the Morrison framework.114 In Smyth v. Szept,115 a majority of the British Columbia Court of Appeal apparently proceeded on the latter basis. However, Gibbs J.A., dissenting, was critical of Lambert J.A.’s formulation, noting it “appears to have grown in stature into an assumed separate, stand alone test of universal application”116 and had introduced “undesirable considerations of a morally subjective nature”.117 Subsequently, in Gindis v. Brisbourne,118 Newbury J.A. endorsed Morrison as the “leading” case,119 and echoed reservations about Lambert J.A.’s formulation,120 before proceeding to apply both Morrison and commercial morality to the facts.121 Justices Prowse and Saunders, concurring, were in “substantial agreement” with Newbury J.A.,122 but wrote separately to emphasize they did not share her “reservations concerning the ‘commercial morality’ formulation”.123 Recently, the same court noted that Lambert J.A.’s single question is a “broader

test” than that in *Morrison*, and appears to have implied it may be an error of law to rely on it exclusively, unless regard is also had to the discrete elements in *Morrison*.124

In *Cain v. Clarica Life Insurance Co.*,125 the Alberta Court of Appeal cited *Morrison* as “Canada’s undoubted leading case”,126 and restated the test as compromising “four necessary elements”:127

1. A grossly unfair and improvident transaction; and
2. Victim’s lack of independent legal advice or other suitable advice; and
3. Overwhelming imbalance in bargaining power caused by victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. Other party’s knowingly taking advantage of this vulnerability.

The same court has endorsed *Cain* on two occasions.128 Curiously, in two recent decisions—*Styles v. Alberta Investment Management Corp.*129 and *Mikkelsen v. Truman Development Corp.*130—it reverted to an earlier articulation131 based on *Morrison*, and referenced Lambert J.A.’s “single question”.132 In both *Styles* and *Mikkelsen* the Court also said unconscionability is “usually founded in some misconduct or sharp practice at the formation of the contract, often when there is an imbalance in bargaining power”,133 yet elsewhere, in both decisions, it appeared to suggest that manifest unfairness alone could possibly justify relief.134

The Ontario Court of Appeal has been similarly inconsistent. In *Titus v. William F. Cooke Enterprises Inc.*,135 it endorsed the *Cain* framework, above:136 however, it also endorsed an older formulation,137 suggesting equity can intervene *either* because of a gross “inadequacy of consideration” or because of a

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134 *Mikkelsen v. Truman Development Corp.*, [2017] A.J. No. 287, 2017 ABCA 99, at para. 25 (A.C.A.); (appellant argued transaction was so “inherently unfair” that it was unconscionable; court did not reject possibility that harshness itself could result in such a finding, and at para. 29 said “There may be some transactions that are so unfair that a trial judge can tell simply by looking at it that it is unconscionable”); *Styles v. Alberta Investment Management Corp.*, [2017] A.J. No. 1, 2017 ABCA 1, at paras. 74-75 (A.C.A.); in which “unconscionable” was equated with a contract the terms of which are “harsh”, and para. 75.
“gross inequality of bargaining power” and “undue advantage” being taken.\textsuperscript{138} Subsequently, a majority of the Court said there “does not appear to be a single articulation” of unconscionability “applicable to all situations”\textsuperscript{139} and emphasized that inequality of power alone is insufficient.\textsuperscript{140} It also observed that references to the “abuse of the bargaining power” are simply “another way of describing substantial unfairness”,\textsuperscript{141} which implies this criterion is without independent force. In \textit{Bank of Montreal v. Javed},\textsuperscript{142} it opted for yet another formulation that “requires a plaintiff to show that the defendant abused its bargaining power, preyed upon the plaintiff, or that the bargain was improvident”.\textsuperscript{143} Subsequently, in a case concerning the enforceability of a large deposit,\textsuperscript{144} the Court again suggested that substantial unfairness alone could in “some circumstances” be unconscionable;\textsuperscript{145} but it then proceeded to list several “indicia of unconscionability”, which presumably are to be applied in the event that gross improvidence, without more, does not justify relief.\textsuperscript{146} In its most recent treatment of unconscionability the Court again endorsed the \textit{Titus} formulation\textsuperscript{147} while acknowledging that it is different than the \textit{Morrison} test followed by Abella J. in \textit{Douez}.\textsuperscript{148}

The Saskatchewan Court of Appeal proposed a three-part test in \textit{Dolter v. Media House Productions Inc.}\textsuperscript{149} consisting of: a (1) “significant inequality in bargaining position” an (2) “unconscionable” use of power by the stronger party, and a (3) “grossly unfair” contract that is “divergent from community standards of commercial morality”.\textsuperscript{150} The Nova Scotia Court of Appeal’s approach is substantially the same as that in \textit{Dolter}, above;\textsuperscript{151} but it has also held that once the first and third elements are satisfied, the “effect is, \textit{prima facie}, to establish the second as well”.\textsuperscript{152} The New Brunswick Court of Appeal has endorsed \textit{Morrison}.\textsuperscript{153}

Finally, there is the Newfoundland Court of Appeal’s decision in \textit{Downer v. Pitcher},\textsuperscript{154} which is the most recent sustained discussion of unconscionability in Canada. The Court noted the “considerable degree of fluidity” in the Canadian authorities,\textsuperscript{155} and proposed a two-part test. First, there must be “an inequality of bargaining power between the parties resulting from or created by a special and significant

\begin{thebibliography}{99}
\bibitem{139} \textit{Birch v. Union of Taxation Employees, Local 70030}, 2008 ONCA 809, 93 O.R. (3d) 1, at para. 41 (Ont. C.A.).
\bibitem{140} \textit{Birch v. Union of Taxation Employees, Local 70030}, 2008 ONCA 809, 93 O.R. (3d) 1, at paras. 44-45 (Ont. C.A.).
\bibitem{141} \textit{Birch v. Union of Taxation Employees, Local 70030}, 2008 ONCA 809, 93 O.R. (3d) 1, at para. 45 (Ont. C.A.).
\bibitem{144} \textit{Redstone Enterprises Ltd. v. Simple Technology Inc.}, 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.).
\bibitem{146} The case concerned the forfeiture of a deposit. Rather than treat it as a penalty, unenforceable at common law, it was classed as a forfeiture which can be set aside in equity as unconscionable. Arguably, the case should be confined to this context, although the Court does not do so.
\end{thebibliography}
disadvantage”156 that has the “potential of overcoming the ability of the claimant to engage in autonomous self-interested bargaining”.157 Second, the “other party unfairly or unconscientiously… takes advantage of that opportunity”,158 which requires proof the defendant “knew or ought …to have known of the of the relief-seeker’s vulnerability” yet proceeded with the contract.159 Importantly, the Court departed from the appellate authorities canvassed above by explicitly eschewing any requirement of substantive unfairness in the contract itself as part of the prima facie case.160

V. APPLICATION OF FRAMEWORKS

Putting aside linguistic differences in expression, there remain important doctrinal tensions evidenced above. First, there is disagreement whether procedural unfairness alone can justify relief. Downer appears to be the only Canadian authority to state so expressly. Second, the question arises whether substantive unfairness in the contract itself is sufficient. While there have been several oblique references to this possibility in the authorities,161 there does not appear to be any decision explicitly proceeding on this basis. Virtually every Canadian case treats both procedural and substantive unfairness as the two necessary conditions, and this is the predominant view of the Supreme Court of Canada.162

Three additional questions require further investigation. The first concerns the nature and focus of procedural unfairness. Is this primarily claimant-focused, so that the critical issue is whether the claimant suffered from a type of disability that impaired his or her ability to engage in self-interested bargaining,163 or is it a relational inquiry requiring only an imbalance of bargaining power?164 Second, uncertainty exists concerning fault on the defendant’s part. Several framework tests omit this from the material ingredients of the action,165 while others make it a necessary condition.166 Finally, there is an apparent lack of agreement about the nature and relevance of Lambert J.A.’s “commercial morality” test. Below, I examine recent jurisprudence to shed further light on the manner in which these latter three issues have developed.

160 Downer v. Pitcher, [2017] N.J. No. 64, 2017 NLCA 13, at para. 54 (N.L.C.A.), although the defendant can rebut a presumption of unconscionability by proving the transaction was fair.
1. Procedural Unfairness

In *Morrison*, Davey J.A. referred to an inequality which leaves the weaker party in the “power of the stronger”.

In *Downer*, the Court referred to a “special and significant disadvantage” that affects the claimant’s ability to protect his or her own interests. Consistent with these directions, various decisions place the claimant’s capacity for self-interested bargaining at the center of the inquiry. In *Ohlson*, for example, the Alberta Court of Appeal relieved an elderly claimant of her obligations under a promissory note. The Court could have justified this result solely by reference to the obvious imbalance of bargaining power coupled with the improvidence of the transaction, both of which were established; but it went further, emphasizing its concerns about her capacity, thereby suggesting that inequality is not simply a relational inquiry, but is relevant to the extent it impairs autonomous decision-making.

Recent decisions rejecting unconscionability are consistent. In *Cope v. Hill*, for example, the Court emphasized that there was no evidence the claimant “suffered from a disability such that he did not properly comprehend the nature of the transaction”. In *Downer*, the trial judge’s finding of unconscionability in relation to a settlement and release following a motor vehicle accident was overturned, because the claimant was not “so unsophisticated that she was incapable of looking out for her own interests”.

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Moreover, numerous trial level decisions have rejected claims for unconscionability, despite obvious disparities in bargaining power, where claimants understood the relevant agreements.\textsuperscript{176} Burby v. Ball\textsuperscript{177} is a good example. An 86-year old farmer, who was beginning to suffer from dementia, sold farmland to family acquaintances for $600,000 only to see it subsequently appraised at several times that amount. The trial judge interpreted \textit{Cain} as requiring proof the seller lacked “decisional capacity” to enter into the agreement,\textsuperscript{178} which was not proved as he understood what he was doing at the material time.\textsuperscript{179}

Other decisions, in contrast, have taken a much looser approach to procedural inequality. In \textit{Gindis},\textsuperscript{180} the British Columbia Court of Appeal considered unconscionability in the context of a contractual settlement of a motor vehicle claim. The first step of \textit{Morrison} was satisfied, albeit only marginally so, because the adjuster was more experienced and the claimant was not well-educated and needed money.\textsuperscript{181} This finding is curious, as the claimant was found to be intelligent, forthright and aggressive in bargaining, and understood the nature of the transaction.\textsuperscript{182} The Court’s relational approach suggests that a “disparity” of “resources and sophistication”\textsuperscript{183} is sufficient to satisfy procedural unconscionability irrespective of the claimant’s capacity, understanding or volition. In Williams v. Boston,\textsuperscript{184} the Alberta Court of Appeal invalidated a settlement following a motor vehicle accident. The claimant was an educated, mature, articulate woman with business experience who had the benefit of medical advice and understood the nature of the settlement. Nevertheless, the Court determined there was an inequality of bargaining power between her and the experienced claims adjuster, as she had no prior experience with settling such claims.\textsuperscript{185} The Ontario Court of Appeal’s recent decision in \textit{Heller}, which invalidated an arbitration clause between Uber


\textsuperscript{179}Burby v. Ball, [2017] A.J. No. 1447, 2017 ABQB 300, at paras. 179-84 (Alt. Q.B.),(he sold at undervalue because he wanted to see a young family continue ranching the land).


\textsuperscript{185}See also \textit{Eager v. Blackburn}, [2002] N.S.J. No. 147, 2002 NSCA 41 (N.S.C.A.). (MVA settlement set aside; claimant understood nature of transaction, but was “ignorant” of her prognosis for recovery; settlement unfair).}
and one of its drivers, is likewise difficult to square with a capacity–type analysis. The Court noted the imbalance of bargaining power between the parties, and emphasized that the driver had no realistic input into the terms of the contract.\textsuperscript{186} There was no suggestion, however, that he was not capable of understanding the terms of the agreement, and it was an entirely free choice to work for Uber.

Several trial decisions are also difficult to square with the high bar to procedural unconscionability contemplated in cases like \textit{Downer}. In \textit{Royal Bank v. Ironmonger},\textsuperscript{187} for example, parents borrowed money from a bank, secured against a mortgage on their property, with a view to advancing those funds to their son to purchase a home. They were not “entirely unsophisticated borrowers”, as they had obtained previous mortgages with the bank; and they “fully comprehended the terms of the transaction” and made a voluntary choice free of any pressure.\textsuperscript{188} Despite these findings, the Court concluded there was an “inequality of bargaining power” sufficient to establish the procedural aspect of the claim.\textsuperscript{189}

\section{2. Fault}

Further tensions exist concerning the question of fault, with apparent differences regarding its relevance and how it is measured.

Recall that framework tests in Alberta,\textsuperscript{190} Ontario\textsuperscript{191} and Newfoundland\textsuperscript{192} require the defendant to “knowingly take advantage” of the plaintiff’s vulnerability.\textsuperscript{193} While in \textit{Morrison} such knowledge was omitted from the “material ingredients” of the action, the court spoke of an “unfair advantage gained by an unconscientious use of power”,\textsuperscript{194} which was satisfied primarily because the defendant knew of the plaintiff’s vulnerability arising from ignorance and inexperience.\textsuperscript{195} Numerous trial decisions are consistent, emphasizing the importance of knowledge of vulnerability when finding unconscionability in various

contexts, including mortgages, commission agreements, rent-to-own contracts, and contracts for settlement upon termination of employment. The necessity of fault in this sense is evident also in cases rejecting unconscionability where the defendant was ignorant of the claimant’s vulnerability.

Sometimes, however, courts apparently treat knowledge in relation to the improvidence of the transaction itself, rather than to the claimant’s vulnerability. In Smyth, a majority of the British Columbia Court of Appeal set aside a settlement and release concerning a motor vehicle accident. The majority did not make any findings in relation to the defendant’s knowledge of the plaintiff’s vulnerability; but in holding that the agreement was substantively unfair, it emphasized the defendant should have known the quantum was too low in light of the plaintiff’s injuries. In Cougle v. Maricevic, the same court upheld a settlement and release, despite finding a serious inequality of bargaining power. It determined the agreement was not improvident in part because the adjuster thought it was fair in light of the medical information known to him at the time. In Woods v. Hubley, also concerning a settlement and release, the Nova Scotia Court of Appeal found an inequality of bargaining power and substantial unfairness, which then cast the onus on the defendant adjuster to show he had not “unconscientiously used a position of power to achieve an advantage”. He failed to discharge this burden, primarily because he knew it was

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197 Ferraton v. Shular, [2012] O.J. No. 5613, 2012 ONSC 6582, at paras. 66-67 (Ont. S.C.), (defendant agreed to sell plaintiff’s house for 50% of profits; defendant “well aware” of plaintiff’s “deep depression and binge drinking” and “took advantage of his passivity and listless attitude toward the property”).


202 Smyth v. Szep, [1992] B.C.J. No. 32, [1992] B.C.W.L.D. 435, at paras. 29, 33 (B.C.C.A.). Gibbs J.A., dissenting, emphasized that that the plaintiff was not vulnerable, in the sense of being in need, distress or ignorant, and she fully understood effect of release. For him, because there was no “obvious disadvantage” in the case, there was no “unconscientious use of power” justifying unconscionability (at paras. 82-83).


improvident for the plaintiff to settle for a low amount given her uncertain prognosis. It is also worth noting that certain trial-level decisions have made findings of knowledge in relation to both vulnerability and improvidence.

A further point of tension concerns whether the defendant’s knowledge is assessed subjectively or objectively. The tests in Alberta and Ontario require the defendant to have actual knowledge of the circumstances making the claimant vulnerable to exploitation. The Manitoba Court of Appeal has required subjective knowledge of vulnerability, and appellate courts in British Columbia and Nova Scotia have proceeded on this basis as well. In contrast, the Newfoundland Court of Appeal held in Downer that constructive knowledge of vulnerability is sufficient, and several trial decisions have likewise used objective tests.

Finally, several decisions have minimized the importance of fault to varying degrees. Above, we saw some suggestions by appellate courts that unconscionability can arise because the contract itself is unduly harsh and unfair, which implies fault on the defendant’s part is not necessary in all cases; and the Nova Scotia formulation has diminished the importance of fault by suggesting that unfair abuse is presumed once inequality and improvidence are established. The Ontario Court of Appeal has minimized the importance of fault by suggesting that references to “abuse of the bargaining power” are simply “another way of


describing substantial unfairness”.216 More concretely, in *Marshall v. Canada Permanent Trust Co.*,217 the court set aside a contract for the sale of land where the plaintiff was “incapable of protecting his [own] interests”218 as he had suffered a stroke and was resident in a care facility. The court held it was “not material” as a matter of law that the defendant was in fact completely unaware of the plaintiff’s vulnerability.219 Finally, it bears noting that other cases have found unconscionability without engaging directly with the question of fault, arguably diminishing its importance by implication.220

3. ‘Commercial Morality’

Recall that in *Smyth*221 a majority of the British Columbia Court of Appeal treated “commercial morality” as simply a compendious way of expressing its conclusion after applying the *Morrison* test. In *Gindis*, Justice Newbury appeared to follow the same approach.222 These decisions, and others,223 suggest the concept has no independent normative content. Indeed, it is arguable that Lambert J.A., in crafting the concept, did not intend to replace the *Morrison* test, but simply to express it differently.224

Furthermore, despite some suggestions, above, that “commercial morality” may operate as an alternative test,225 few cases actually proceed this way. One example is *A & K Lick-A-Chick Franchises Ltd. v. Cordiv Enterprises Ltd.*226 The court invalidated a franchise agreement because of the combination of high pressure tactics deployed by one party coupled with a relative lack of commercial experience by the other, which together rendered the transaction “sufficiently divergent from community standards of commercial morality”.227 In *Haymour Holdings Ltd. v. B. C. (Government)*,228 the court set aside a contract for the sale of land by an individual to the government. Lambert J.A.’s formulation seemingly drove the court’s analysis, which emphasized the government’s systemic bad faith efforts to prevent the plaintiff from

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securing various permits in the years preceding the sale in order to obstruct his development of the lands and depress the price, before it purchased the property.229

Rather than invoking “commerciality morality” as an expression of a conclusion, or as a separate test, courts more typically fold this question into other elements of the unconscionability framework. Sometimes, this question relates to the substantive unfairness in the contract itself.230 In Rubin v. Home Depot Canada,231 for example, the court set aside a release awarding a month’s notice to an employee terminated without cause. It determined the notice amount was “far removed from what the community would accept” and therefore grossly unfair.232 In McNeill v. Vandenberg,233 the court found a consent judgement entered into by the defendant whereby he agreed to repay a large loan to his father-in-law was not sufficiently divergent from community standards, and hence not “substantially unfair”, primarily because he had benefited from the loan.234 Other recent cases have used community standards to find no substantive unfairness in a contract containing a deposit forfeiture provision printed on standard industry form,235 and in relation to a provision permitting the seller to waive a subject-to financing clause in a real estate contract.236 Finally, the Nova Scotia Court of Appeal has twice deployed the concept to set aside releases in personal injury actions, where the plaintiffs settled before their prognosis for recovery was known, finding this was “improvident, substantially unfair and divergent from community standards of commercial morality” as “no informed person would countenance settlement at such an uncertain stage”.237

Other decisions have treated considerations of commercial morality in relation to whether there was unfair abuse of bargaining power. In Gates v. Croft,238 the court directed itself to consider whether there were “factors involved in the process of negotiation and the entering into the agreement [that were] so abhorrent to commercial fairness, morality and fair dealing that the Court should, on that ground alone,

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rescind…the contract”. 239 In *Ohlson*,240 the Alberta Court of Appeal followed Lambert J.A.’s direction and examined provincial legislation for guidance “as to what the community standard requires” in terms of fair dealing when a bank had an elderly customer sign a promissory note for the past indebtedness of her son.241 Finally, in *Gindis*, two members of the British Columbia Court of Appeal, after endorsing Lambert J.A.’s approach from *Harry*, used the concept to establish a standard of fair dealing for the public insurer when settling personal injury claims.242

VI. REVISITING THEORY IN LIGHT OF DOCTRINE

In this section, I revisit the underlying conceptions of unconscionability outlined at the beginning of this paper. My purpose is to consider the extent to which each theory resonates with the jurisprudence, above, and to reflect on the relative merits of each approach.

1. Unfairness

Equating unconscionability with substantive unfairness creates significant challenges. Even if it is true that certain historical cases were motivated by substantive unfairness, they nevertheless proceeded, formally at least, on the basis of equitable fraud which is a process-related concern.243 Moreover, while there has been the occasional passing reference to the notion that harshness of terms alone can justify relief,244 there does not appear to be any modern authority unambiguously endorsing this approach.245 To the contrary, the cases are replete with cautions that improvidence alone is not sufficient.246 This is the

239 *Gates v. Croft*, [2009] N.S.J. No. 263, 2009 NSSC 184, at para. 7 (N.S.S.C), (court found no such factors, noting the defendant treated the plaintiff fairly throughout).


241 *Canadian Imperial Bank of Commerce v. Ohlson*, [1997] A.J. No. 1185, 1997 ABCA 413, at para. 51 (A.C.A.). (bank sought promissory note, rather than guarantee, thereby avoiding legislative requirement that guarantees require independent advice; bank had already loaned money to the son, and therefore there was “nothing to gain and everything to lose” (para. 47) for the mother in signing note; court suggested she would likely have been advised against signing had she consulted a lawyer); cf. *Mikkelsen v. Truman Development Corp.*, [2017] A.J. No. 287, 2017 ABCA 99, at para. 25 (A.C.A.), (no imbalance of bargaining power, as plaintiff had previous business experience and had input into terms of impugned transaction; commercial morality discussed in relation to procedural inequality).

242 *Gindis v. Brisbourne*, [2000] B.C.J. No. 162, 2000 BCCA 73, at para. 48 (B.C.C.A.), and see para. 50 (ultimately concluding this standard was not breached as the release was not obtained in an “unconscionable manner”).


244 See footnote 161 above.

245 Recall that S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at 381 reads *Bhasin v. Hynrew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494 (S.C.C.) as suggesting approval of a “general power” to set aside contracts “that operate very unfairly”. The difficulty with this is, first, that the duty of good faith in *Bhasin* applies to contractual performance, whereas unconscionability applies to contractual formation; and, second, the breach of good faith is a breach of an implied term of contract, sounding in damages, whereas a finding of unconscionability is a basis for avoiding the contract in equity.

position taken by the Privy Council as well.\textsuperscript{247} It also bears emphasizing that in Downer the Newfoundland Court of Appeal dropped the requirement of substantive unfairness after a careful review of the authorities.\textsuperscript{248} In doing so, it clearly focused the doctrine on concerns about procedural abuse. The Australian courts have likewise long proceeded on this basis.\textsuperscript{249}

There are other objections to anchoring unconscionability in substantive unfairness. As a practical matter, concentrating solely (or even primarily) on the equality of exchange would represent a “sweeping” expansion of the law.\textsuperscript{250} This is partly true because it would eliminate several doctrinal hurdles that operate to constrain relief.\textsuperscript{251} More importantly, it would focus the inquiry on a question courts are poorly equipped to answer. Outcome fairness depends on a multiplicity of factors, each assessed in the context of individual standards and preferences, including “risk, opportunity costs, investment, hidden costs, sunk costs” and so on.\textsuperscript{252} Professor Bigwood asserts: “[A]ny chance of ever finding an unproblematic… principle for fairly dividing the gains of trade between contracting parties is immediately lost” the moment “substantive unfairness” is made a “touchstone for equitable intervention”.\textsuperscript{253} Inevitably, the consequence is likely to be intolerable uncertainty, which threatens transactional finality and the security of receipts.\textsuperscript{254} Of course, policing contracts for distributive fairness also threatens freedom of contract, and the liberal conception of party autonomy that underpins it.\textsuperscript{255} Professor McInnes puts it well: “Freedom of choice” entails “the right to choose well and to choose poorly. In terms of material outcomes, success and failure are inevitable incidents of liberalism and therefore provide no basis for state intervention”.\textsuperscript{256}

2. Consent

While many decisions discussed above resonate with a consent paradigm,\textsuperscript{257} others do not. In particular, those taking a loose relational approach to procedural inequality,\textsuperscript{258} and especially those granting relief where the claimant understood the transaction and was not subjected to pressure,\textsuperscript{259} are difficult to square

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\item \textsuperscript{247} Hart v. O’Connor, [1985] 2 All E.R. 880 (P.C. N.Z.).\textsuperscript{247}
\item \textsuperscript{248} Downer v. Pitcher, [2017] N.J. No. 64, 2017 NLCA 13, at para. 54 (N.L.C.A.).\textsuperscript{248}
\item \textsuperscript{249} Australian Competition and Consumer Commission v. C.G. Berbatis Holdings Pty. Ltd. (2003), 197 A.L.R. 153, at para. 179 (H.C.A.); Louth v. Diprose (1992), 175 C.L.R. 621, at 630 (H.C.A.).\textsuperscript{249}
\item \textsuperscript{250} J.D. McCamus, The Law of Contracts, 2d ed (Toronto: Irwin Law Inc., 2012), at 432.\textsuperscript{250}
\item \textsuperscript{251} See B. Crawford, “Restitution—Unconscionable Transaction—Undue Advantage Taken of Inequality Between Parties” (1966) Can. Bar Rev. 142, at 147 (emphasizing the need to restrict relief to cases where both improvidence and inequality are compelling).\textsuperscript{251}
\item \textsuperscript{253} R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 208.\textsuperscript{253}
\item \textsuperscript{255} See J.A. Manwaring, “Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law” (1993) 25:2 Ottawa L.R. 235, at 284.\textsuperscript{255}
\item \textsuperscript{257} See cases at footnotes 167-177 above.\textsuperscript{257}
\item \textsuperscript{258} See cases at footnotes 180-189 above.\textsuperscript{258}
\item \textsuperscript{259} See cases at footnotes 180-189 above.\textsuperscript{259}
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with this model. Indeed, it has been argued that even the seminal 19th century decision Fry v. Lane,\textsuperscript{260} which concerned two brothers found to be “poor and ignorant” who sold their revisionary interest in property at considerable undervalue, cannot be explained on the basis of vitiated consent.\textsuperscript{261} They understood the transaction, were not subjected to pressure, and were free to transact with anybody else they chose. Their decision to contract was consensual, whether one takes a “thin” or a “thick” approach to that concept.\textsuperscript{262}

Moreover, a purely consent-based approach is ostensibly discordant with the requirement of fault, which features prominently in the jurisprudence surveyed above.\textsuperscript{263} Fault lies at the heart of the leading Privy Council\textsuperscript{264} decision and drives the analysis in Australia as well.\textsuperscript{265} Moreover, if the law is concerned with defective consent, it is unclear why substantive unfairness is a requisite element of unconscionability in nearly all Canadian appellate authorities. Even in Downer, where it is no longer required as part of the prima \textit{facie case}, a presumption of unconscionability will be rebutted where the defendant demonstrates the transaction was fair and reasonable.\textsuperscript{266}

The consent paradigm is difficult to square with Supreme Court of Canada’s treatment of unconscionability. The strongest support comes from La Forest J.’s reasons in \textit{Norberg}, though he also conceded in that case that consent may not in fact ground the doctrine, and appeared to subsequently retreat from the consent approach in \textit{Hodgkinson}.\textsuperscript{267} Sopinka J. was explicit in \textit{Norberg} that unconscionability is not anchored in vitiated consent.\textsuperscript{268}

Finally, it is worth emphasizing that in \textit{Morrison}, Davey J.A. contrasted unconscionability with undue influence, noting the latter was concerned with consent, whereas the former was not. These prefatory comments have been cited countless times by Canadian courts. Consequently, it is fair to say that many—perhaps most—Canadian judges are in fact approaching unconscionability cases with this caution well in mind, and hence analyzing the pleadings through a lens other than defective consent.

3. Exploitation

Anchoring unconscionability in wrongful exploitation has certain advantages. The label unconscionability itself implies some form of ethical opprobrium on the defendant’s part, describing

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\item \textsuperscript{260} Fry v Lane (1888), 40 Ch. D. 312.
\item \textsuperscript{264} Hart v. O’Connor, [1985] 2 All E.R. 880, at 1028 (P.C. N.Z.); G. Virgo, The Principles of the Law of Restitution, 3d ed. (Oxford: Oxford University Press, 2015), at 280 interprets Hart as requiring that the defendant “acted in a morally reprehensible manner”.
\item \textsuperscript{265} Most recently, Kakavas v. Crown Melbourne Ltd., (2013) 298 ALR 35, at para. 161 (H.C.A.), (requiring subjective knowledge of claimant’s disability and a “predatory state of mind”).
\item \textsuperscript{266} Downer v. Pitcher, [2017] N.J. No. 64, 2017 NLCA 13, at para. 54 (N.L.C.A.).
\end{itemize}
“deliberate or particularly contumelious moral transgressions”. As we have seen, the cases are replete with references to the defendant’s wrongdoing. In Hodgkinson, La Forest J. observed that the doctrine is “triggered by abuse of a pre-existing inequality in bargaining power between the parties.” In Morrison, the court spoke of an “unconscientious use of power”. The Alberta Court of Appeal recently stated unconscionability typically requires “misconduct” during contractual formation. Moreover, most of the appellate frameworks above require some knowledge of the claimant’s vulnerability as a prerequisite to relief, which is most easily rationalized in terms of exploitation. Finally, it bears noting that this conception underpins the modern English and Australian jurisprudence. These cases speak of “victimization” and search for some morally reprehensible behavior on the defendant’s part, either in the form of active exploitation or knowledge of vulnerability, as in the case of England, or, more recently, of the defendant’s “predatory state of mind” in Australia.

While exploitation thus resonates with much of the language used in the case law, it nevertheless faces challenges as a complete justification for the doctrine. If, as most theorists suggest, some form of fault on the defendant’s part is the touchstone of exploitation, then those cases explicitly eschewing or ignoring it, despite granting relief, undermine this paradigm. Recall also that certain appellate courts have suggested unconscionability can arise because the contract itself is unduly harsh and unfair, and the Nova Scotia formulation has diminished the normative importance of fault by suggesting that unfair abuse is simply presumed once inequality and improvidence are established. Various scholars have noted, moreover, that in some of the earliest unconscionability cases there was no suggestion of fault or other...


impropriety on the defendant’s part, thereby casting doubt that exploitation was the initial justification for equitable interference. Indeed, those cases, both historic and modern, that take a loose relational approach to procedural inequality also belie an exploitation rationale to varying degrees, for absent some significant impairment there is arguably no real vulnerability to exploit.

Another difficulty with exploitation is that it appears anomalous within the law of obligations to speak of wrongdoing as a basis for relief without first determining that the defendant owed a primary legal duty to the plaintiff. The courts have never held that such a duty exists in unconscionability cases; and if they did, one would expect the action would entitle the victim to damages for losses suffered, again something that appears never to have occurred. Unconscionability operates to vitiating a contract, thereby furnishing a claim for unjust enrichment. It does not constitute an independent actionable wrong, and speaking of unconscionability in terms of wrongful exploitation arguably muddles the distinction between primary and secondary obligations.

VII. REVISITING DOCTRINE IN LIGHT OF THEORY

No single policy justification adequately explains the Canadian law of unconscionability; and the failure to settle on a single policy basis has no doubt encouraged the inconsistency explored above. In this section, I briefly evaluate the doctrinal implications of each theoretical approach.

Underlying theory affects the procedural aspect of unconscionability. If substantive unfairness is the action’s raison d’être, there is no reason in principle to require an inequality of bargaining power, let alone a special disability on the claimant’s part, during the process of formation. The action instead remains focused on the unfairness of exchange. If, however, defective consent underpins the action, then the procedural aspect of the test becomes central. Cases could be analyzed similarly to those involving undue influence or duress, or loosely capacity or mistake, where the primary concern is whether the contract reflects the claimant’s true assent. On this theory, those decisions, canvased above, that take a loose relational approach to bargaining inequality should be eschewed; and those, like Downer, requiring the

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281 Such as Fry v Lane (1888), 40 Ch. D. 312.
282 See cases at footnotes 180-189 above.
286 To keep unconscionability distinct from these other actions, the degree of impaired consent should be less extreme than in the case of these other doctrines, and relief should also require some knowledge—either actual or constructive—on the defendant’s part capable of supporting an inference of exploitation: see M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham: LexisNexis, 2014), at 543.
287 For other criticisms of a relational approach to inequality (as opposed to one concentrating on bargaining disability), see: S.N. Thal, “The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness” (1988) 8 Oxford J. L. Stud. 17, at 29-30 (courts are poorly positioned to make this inquiry because it requires examining broader market forces beyond the capacity of the claimant); R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 195, (arguing this undermines the liberal conception of contract by reducing the incentives for individuals to “capitalize on their industry, natural advantages. 
claimant to demonstrate a “special and significant disadvantage”\textsuperscript{288} that affects his or her ability to “engage in autonomous self-interested bargaining”\textsuperscript{289} should be preferred. The exploitation paradigm compels a similar approach to the procedural aspect of the test, because the claimant must have some exploitable condition capable of compromising his or her independence that the defendant preys upon.\textsuperscript{290}

Underlying theory also affects approaches to the criterion of substantive unfairness. If unfairness is the animating rationale for unconscionability, then substantive unfairness in the contract itself becomes the essential condition for relief. On this view, Downer, which eschewed this requirement, should not be followed. To minimize the inevitable trenching on freedom of contract that this approach would entail, and to protect the security of receipts, courts proceeding on this basis should insist on a very high degree of substantive unfairness. On this view, perhaps unconscionability cases could be analysed in a manner analogous to the doctrine of fundamental breach in the context of exclusion clauses.\textsuperscript{291} On the other hand, if defective consent underpins the action, then it becomes difficult to justify substantive unfairness as a necessary condition. With consent, the focus is on the claimant’s volition; the fact the contract may also be improvident is conceptually immaterial.\textsuperscript{292} Other consent based claims, such as duress, undue influence, or indeed species of mistake, do not require outcome unfairness.\textsuperscript{293} Furthermore, as McInnes has argued, such a requirement has the potential to work real injustice, for it would be “repugnant”, from the perspective of consent, “to deny relief”, for example, “to the befuddled pensioner who was duped into selling her family home at market value”.\textsuperscript{294} Whether substantive unfairness should be required under the exploitation theory depends on one’s understanding of that concept. As we have seen, Bigwood’s approach to exploitation is entirely process-related,\textsuperscript{295} and for him it is no answer to a claim of exploitation that an impugned or opportunities relative to others whom they legitimately encounter in the marketplace”\textsuperscript{2}); similarly, see A.A. Leff, “Thomist Unconscionability” (1980) 4 Can. Bus. L. J. 242, at 424.\textsuperscript{288} Downer v. Pitcher, [2017] N.J. No. 64, 2017 NLCA 13, at para. 54 (N.L.C.A.).\textsuperscript{289} Downer v. Pitcher, [2017] N.J. No. 64, 2017 NLCA 13, at para. 39 (N.L.C.A.). This requirement mirrors the experience in Australia (Kakavas v. Crown Melbourne Ltd., (2013) 298 ALR 35 (H.C.A.)) and England (Hart v. O’Connor, [1985] 2 All E.R. 880 (P.C. N.Z.)); G. Virgo, The Principles of the Law of Restitution, 3d ed. (Oxford: Oxford University Press, 2015), at 280.\textsuperscript{290} R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 213-14, and see 186-87 N. Enonchong, “The Modern English Doctrine of Unconscionability” (2018) 34 J. of Contract L. 211, at 229; G. Virgo, The Principles of the Law of Restitution, 3d ed. (Oxford: Oxford University Press, 2015), at 280.\textsuperscript{291} See Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 (S.C.C.), (where Dickson C.J. suggested that fundamental breach and unconscionability “will often lead to the same result”); cf. M.H. Ogilvie, “Exemption Clauses and Fundamental Breach in Contract: Tercon Contractors Ltd. v. British Columbia” (2010) Can. Bar. Rev. 211, (noting fundamental breach simply means unfair); cf. Angela Swan, Jakub Adamski and Annie Y. Na, Canadian Contract Law, 4th ed. (Toronto: LexisNexis, 2018), at 982 (noting unconscionability is a “similar dispensing power” to fundamental breach allowing a court to “deal openly and directly with the kind of unfairness that originally motivated the courts to develop fundamental breach”). While the Supreme Court of Canada has rejected fundamental breach in recent years, it appears that vestiges of the doctrine continue to influence the jurisprudence: see C. Hunt and M. Javdan, “Apparitions of Doctrines Past: Fundamental Breach and Exculpatory Clauses in the Post-Tercon Jurisprudence” (2018) 60 Can. Bus. L.J. 309.\textsuperscript{292} Although gross improvidence in result can serve an evidential function motivating a court to carefully scrutinize the fairness of the bargaining process, on the assumption something must have gone wrong: P.S. Atiyah, “Contract and Fair Exchange” (1985) 35 U. of Toronto L. J. 1, at 5-6, 14-17.\textsuperscript{293} M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham: LexisNexis, 2014), at 552.\textsuperscript{294} M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham: LexisNexis, 2014).\textsuperscript{295} R. Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84 Can. Bar Rev. 171, at 205-08.
transaction happened to be fair. That approach is reflected in Australia. Professors Enonchong and Saprai, in contrast, argue that substantive unfairness must be a material ingredient of exploitation because it animates the very concept itself. This reflects the Privy Council’s approach.

The necessity, assessment and relevance of fault are each affected by the view one takes of unconscionability’s underlying rationale. In terms of necessity, if substantive unfairness in the contract itself grounds equity’s jurisdiction, then fault on the defendant’s part is not essential. The same is true for a consent-based paradigm, as the focus there remains squarely on the claimant. That said, commentators have argued that, even if fault is conceptually unnecessary, it can be justified for practical reasons, including commercial certainty, contractual finality and protecting the security of receipts. If one adopts an exploitation rationale, in contrast, the requirement of fault is not simply a practical requirement; rather, it becomes indispensable, as a matter of principle, because it furnishes the “justificative reason” for equitable “interference”.

Whether fault should be assessed on an objective or a subjective basis has divided academics. If fault is simply a practical limitation on the scope of the action, but not compelled by the underlying normative basis of the claim itself (as I have just suggested may be the case with unfairness and consent models), it can be tested on either basis. Fault in these contexts is a policy choice, and so too is the decision about how it is assessed. The answer will depend on how wide or narrow courts desire unconscionability to be, in light of the competing interests of avoiding substantively unfair contracts or those lacking meaningful consent, on the one hand (militating in favour of a wider objective approach to fault), versus certainty and protecting the security of receipts, on the other (supporting a narrower subjective test of fault). With exploitation, however, wrongdoing on the defendant’s part is central. Proof of personal culpability in the

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304 See Report on Proposal for Unfair Contracts Relief, BCLI Report No. 60, 2011, at 26, preferring a subjective approach, as it narrows the scope of the action and resonates better with the principle of exploitation, whereas an objective test is less certain as it introduces a “more open-ended, normative idea”.
305 For an excellent discussion, from which I have borrowed the above observations, see M. McInnes, The Canadian Law of Unjust Enrichment and Restitution (Markham: LexisNexis, 2014), at 546-48.
form of subjective knowledge should be required, because with exploitation the “gist of the claim is not
carelessness” but rather equity’s desire to sanction ethically opprobrious procedural abuse.307

In terms of the relevance of fault, we have seen certain cases examine the defendant’s knowledge in
relation to the claimant’s vulnerability, while others have examined it in relation to the fairness of the
transaction itself. I have suggested that knowledge of any sort is not strictly necessary under the unfairness
or consent paradigms; nevertheless, knowledge either of vulnerability or of improvidence (or both) could
serve as additional policy-based requirements in these contexts. Super-adding some knowledge requirement
constricts the claim, which may be justified for reasons of commercial certainty and contractual finality.
With exploitation, however, the focus must be on the defendant’s knowledge of the claimant’s vulnerability,
because the *sine qua non* in this context is the deliberate choice to prey upon another’s known
vulnerability.308 That said, knowledge of improvidence alone could serve an important evidential function,
capable of substantiating a finding of deliberate exploitation, if used to support the inference that the
defendant must actually have known the claimant was not capable of protecting his or her own interests
because no sensible person would make such a deal. There is some support for this approach in the
jurisprudence.309

Above, we saw that Lambert J.A.’s commercial morality test rarely operates as a stand-alone criterion
for relief. Typically, it is simply the expression of a court’s conclusion after applying a different test, or it is
folded into another element of the *Morrison* test. As such, it does not appear to have any independent
normative content capable of assessment in light of the different theoretical conceptions of unconscionability.
The desirability of Lambert J.A.’s single question turns on other considerations. To the extent it is being used simply to reproduce other elements of the test, it is redundant and should be discarded.
If it was intended to operate as an alternative test, lying alongside the *Morrison* approach, it is likely to
undermine certainty. Judges and lawyers are better served by having a single framework test, whichever
one that may be.310 If it was designed to replace *Morrison* with a single question (which is doubtful),311 it
may be criticized for being vague, insofar as it buries discrete questions under one elastic concept,312 and,

307 N. Bamforth, “Unconscionability as a Vitiating Factor” (1995) L. M. C.L.Q. 538, (subjective fault is key to moral
wrongdoing under exploitation rationale); cf. S. Agnew, “The Meaning and Significance of Conscience in Private
Oxford University Press, 2015), at 280.
at 191.
309 See M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis, 2014), at 551,
(2d) 710 (B.C.C.A.), and *Floyd v Couture*, 2004 ABQB 238 (Alta. Q.B).
perhaps more troubling, it invites subjective moralizing\textsuperscript{313} or “unreasoned intuition”\textsuperscript{314} about overall transactional fairness,\textsuperscript{315} an approach unlikely to produce a consistent, principled body of jurisprudence.\textsuperscript{316}

\section*{VIII. CONCLUSION}

The doctrine of unconscionability is in desperate need of repair. While most decisions require both procedural and substantive unfairness, \textit{Downer} concentrated the action entirely on the former consideration, whereas other courts have suggested that the latter basis alone can justify relief. Further divisions exist in the manner in which various elements of the action are applied. Some cases take a loose relational approach to procedural unfairness, comparing the relative experience and sophistication of the parties, while others have treated this branch more strictly, requiring the claimant to have been labouring under some type of disability that impairs autonomous decision-making. Uncertainty exists also on the question of fault. Some decisions treat fault on the defendant’s part as necessary for relief, while others have omitted this requirement or minimized its importance by simply presuming it once the other elements of the claim have been proved. Sometimes fault requires the defendant to know of the claimant’s vulnerability; other times the defendant’s knowledge that the contract was improvident is sufficient. Such knowledge on the defendant’s part is sometimes tested objectively, but other times subjectively. Finally, the case law is replete with references to “commercial morality”, though it is unclear whether this serves as a discrete test, or simply another way of describing a court’s conclusions reached on one or another branch of a different test.

Courts and commentators are divided on the underlying policy basis of the action. Three different conceptions dominate the literature, each of which finds varying degrees of support in the jurisprudence. I have suggested that settling on a single underlying theory would help resolve many of the doctrinal debates explored above, as each exerts a different pressure on how the action should be framed, as a matter of principle. Broadly speaking, with unfairness the focus is on the equality of exchange. With consent, the claimant’s capacity and volition are central. Exploitation shifts the focus to the defendant’s wrongdoing during formation.

\begin{itemize}
\item \textsuperscript{314} M. McInnes, \textit{The Canadian Law of Unjust Enrichment and Restitution} (Markham: LexisNexis, 2014), at 532.
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