THE PENALTY DOCTRINE IN CANADA

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The penalty doctrine, which denies enforcement to oppressive remedy clauses, is alive and well in Canada. I demonstrate this with a review of decisions from all common law provinces. I then defend two claims about the doctrine. First, the penalty doctrine fills a role that bargaining unconscionability—the combination of procedural and substantive unfairness—cannot. Because remedy clauses only trigger on the future contingency of breach, applying unconscionability to remedy clauses would require impracticable probabilistic calculations, which I describe. Second, the doctrine should distinguish between what I call "heaps" and "schemes"—that is, between clauses that seek to compensate for loss and clauses designed to uphold a punitive scheme without regard to loss. Heaps and schemes both need a special rule, but raise distinct policy issues.

La doctrine pénale, qui rejette la mise à exécution de clauses réparatrices oppressives, est bien vivante au Canada, thèse que l'auteur démontre par une analyse de jugements rendus dans toutes les provinces de common law. Il défend ensuite deux assertions portant sur la doctrine pénale. Premièrement, qu'elle a une fonction que le test de l'iniquité d'un marché—au recoupement entre l'injustice de procédure et de fond—ne saurait remplir. En effet, comme les clauses réparatrices ne s'appliquent que dans l'éventualité d'une rupture de contrat, les soumettre au test de l'iniquité exigerait, comme il l'argumente, des calculs probabilistes impossibles. Deuxièmement, que la doctrine devrait faire la distinction entre ce que l'auteur appelle le « tas » et le « bâton », c'est à dire, entre les clauses qui cherchent à compenser une perte et les clauses qui sont conçues pour maintenir un régime punitif, sans égard à la perte. Le « tas » et le « bâton » nécessitent tous deux une règle spéciale, mais soulèvent chacun des problèmes de fond distincts.

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1. Introduction

It's been said that the penalty doctrine no longer exists in Canada.[1] I refer to the rule that a contractual clause stipulating a certain amount be payable on breach will not be enforced if oppressively penal.[2] That the doctrine is supposedly dead[3] has not put an end to attempts to kill it.[4] This is in contrast to the vigour of the doctrine elsewhere in the Commonwealth, where top-court decisions[5] spur renewed scholarly interest.[6] The Supreme Court of Canada had an opportunity to address the penalty doctrine in the

1 Geoff R Hall, *Canadian Contractual Interpretation Law* (Markham: LexisNexis, 2007) at 263–268 ("There is no longer a rule rendering penalty clauses unenforceable"). Hall moderated the claim in the newer editions: Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Markham: LexisNexis, 2016) at 356 and 4th ed (Toronto: LexisNexis, 2020) at 386 ["Hall, 4th Ed"].

2 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1915] AC 79, 23 CLT 106 (HL) [*Dunlop*].

3 Other Canadian authors have hesitated to pronounce death, while typically being skeptical that we should maintain a penalty doctrine that stands apart from unconscionability: SM Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) (loose-leaf November 2019 update) ch 8 [Waddams, "Damages"]; SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) paras 456–469 [Waddams, "Contracts"]; Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 1041–1048, paras 9.283–9.302; John Enman-Beech, *Three Essays on the Penalty Doctrine* (LLM thesis, University of Toronto, 2016) at 12, n 6.

4 See the dissent in *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32 [*Chandos*].

5 *Andrews v Australia and New Zealand Banking Group Ltd*, [2012] HCA 30 [*Andrews*]; *Cavendish Square Holding BV v Talal El Makdessi*, [2015] UKSC 67 [*Cavendish Square*]; *Denka Advantech Private Ltd v Seraya Energy Pte Ltd*, [2020] SGCA 119 (Singapore), *127 Hobson Street Ltd v Honey Bees Preschool Ltd*, [2020] NZSC 53, *M/S. Kailash Nath Associates vs Delhi Development Authority & Anr* (2015) 4 SCC 136 (India) (interpreting

case of *Chandos Construction v Deloitte Restructuring*.[7] That case could have been decided on either a bankruptcy issue or a penalty doctrine issue. The appeal-level decision featured a remarkable 55,000-word dissent largely devoted to dealing the doctrine a death blow, by Justice Wakeling of the Court of Appeal of Alberta. Perhaps overwhelmed, the Supreme Court chose to decide the case on the basis of bankruptcy, and ignored the penalty doctrine entirely. The upshot is that there has been no pronouncement on the doctrine from our Supreme Court in over forty years.[8]

While the doctrine continues to be taught and applied,[9] the cases will leave one scratching one's head about several questions:

- Is the doctrine concerned with unconscionability[10] or with the court's policy of compensation?[11]

- If unconscionability, what does unconscionability mean? A broad name for unfairness,[12] a narrow test requiring inequality of bargaining power?[13]

- Is the situation to be assessed at the time of contract formation or at breach?[14] Or both?[15]

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a statutory relative of the doctrine); *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* (2003) 5 SCC 705 (India) (interpreting a statutory relative of the doctrine).

6 Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford: Oxford University Press, 2018); Nicholas A Tiverios, *Contractual Penalties in Australia and the United Kingdom* (Sydney: Federation Press, 2019).

7 2020 SCC 25. Only the appeal level decision is discussed through the rest of this article.

8 *HF Clarke Limited v Thermidaire Corp Ltd* (1974), [1976] 1 SCR 319, 54 DLR (3d) 385 [*HF Clarke*, cited to SCR]; and *Elsley v JG Collins Ins. Agencies*, [1978] 2 SCR 916, 83 DLR (3d) 1 [*Elsley*, cited to SCR].

9 Laurence M Olivo & Jean Fitzgerald, *Fundamentals of Contract Law*, 3rd ed (Toronto: Emond, 2013) 145–146; Bruce MacDougall, *Introduction to Contracts*, 3rd ed (Toronto: LexisNexis, 2016) at 368–375 (two textbooks teaching the doctrine). For application, see Part 2.

10 *Elsley*, *supra* note 8, is read this way.

11 *HF Clarke*, *supra* note 8, is read this way; Swan, *supra* note 3 at 1045–1046; Waddams, "Contracts", *supra* note 3 at 315. For my own reading of *Elsley* and *HF Clarke,* see Part 2A.

12 *Redstone Enterprises Ltd v Simple Technology Inc*, 2017 ONCA 282.

13 *Uber v Heller*, 2020 SCC 16 [*Uber*].

14 *Doman Forest Products Ltd v GMAC Commercial Credit Corp-Canada*, 2007 BCCA 88 at paras 62–67.

15 *McKeen v The Mortgage Makers Inc and Libby*, 2009 NBCA 61 at paras 38, 42 [*McKeen*].

- If a comparison is to be made between the remedy clause and something else, what is the comparator? Actual loss?[16] Genuinely estimated damages?[17] A "legitimate interest"?[18]

- Is "penalty" the name of a kind of clause that the penalty doctrine will not enforce,[19] or is finding a clause to be a "penalty clause" just one step in a longer test so that penalty clauses can sometimes be enforced?[20] This issue is regularly confused by drafters inserting language insisting that a clause acts "as a genuine pre-estimate of liquidated damages and not as a penalty",[21] despite over a century of courts saying the choice of label is not relevant.[22]

- If the doctrine denies clauses that are penal and/or unfair, is it "and" or "or"?[23] If the clause is unfair, why bother with whether it is penal? If it is penal, why bother with whether it is unfair?

- Is the doctrine one of equity or of law?[24]

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16 *HF Clarke*, *supra* note 8; Paul-Erik Veel, "Penalty Clauses in Canadian Contract Law" (2008) 66:2 UT Fac L Rev 229.

17 The "genuine" pre-estimate language has propagated through *Dunlop*, *supra* note 2, though *Dunlop* also says that an enforceable remedy clause should not be "unreasonable, unconscionable, or extravagant." Courts since have often said "reasonable" pre-estimate of damages: e.g., in *Save Max Real Estate Inc v Dutta*, 2019 ONSC 6116 [*Save Max*].

18 *Cavendish Square*, *supra* note 5 (starting to make its way to Canada through decisions like *Super Save Disposal (Alberta) Ltd v Shenwei Enterprises Ltd*, 2017 ABQB 805 [*Super Save*] which cites *Cavendish Square* while also citing the usual Canadian sources and doing both tests to cover bases).

19 See e.g. *Bankers Mortgage Corporation v Plaza 500 Hotels Ltd*, 2017 BCCA 66 [*Bankers Mortgage*].

20 *Peachtree II Associates-Dallas LP v 857486 Ontario Ltd*, 256 DLR (4th) 490, 2005 CanLII 23216 (ONCA) [*Peachtree* cited to CanLII].

21 *Emkay Canada Fleet Services Corp v Gemini Corporation*, 2020 ABCA 245 at para 62 [*Emkay*].

22 *Dunlop*, *supra* note 2, is often cited on this point.

23 *Peachtree*, *supra* note 20, implied that application of the doctrine required both, while *McKeen*, *supra* note 15 will deny a clause in the presence of either, at para 38.

24 Supreme Court authority from both *HF Clarke*, *supra* note 8, and *Elsley*, *supra* note 8, explicitly tie the doctrine to equity, though it is not clear that they are saying the doctrine is currently equitable or only historically rooted in equity. The latter is certainly correct: William H Loyd, "Penalties and Forfeitures Before *Peachy v The Duke of Somerset*" (1915) 29:2 Harvard L Rev 117. In contrast, see *Peachtree*, *supra* note 20, making an explicit penalty-common law forfeiture-equity dichotomy.

- What is its relationship with the equitable doctrine of relief from forfeiture?[25]

Some of these disagreements are verbal. The dynamic has been in place for over a hundred years. A remedy clause will not be enforced if it is too extreme. How extreme?—"Unconscionably" so. Unconscionable is used in this context, as it has long been in the common law,[26] in the middle of a familiar blue streak—no attempt is made to distinguish it from "unreasonable", "extravagant", or "oppressive."[27] Some judges have said that any penalty clause is unenforceable, others that only unconscionable penalty clauses are unenforceable, but ask the first group what makes a remedy clause into a penalty clause, and they say something like "[i]t will be held to be [a] penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."[28] It is thus essential in discussing the penalty doctrine to keep in mind that unconscionability can mean more than one thing.

In Part 2, I review the foundational cases on the penalty doctrine as well as local developments over the last twenty years at all court levels across all common law provinces. This review shows that the penalty doctrine in Canada is alive and kicking, with provincial variations, in roughly its traditional form.

In Part 3, I explain why the doctrine haunts us still, its unfinished business. My target is not the moral or political bases of the doctrine, which I describe. Rather, I present a formal analysis of the hole the penalty doctrine fills, key to which is a distinction between what I will call "heaps" and "schemes" (with no devious connotation implied). These are two different types of remedy clause. A heap is a remedy clause where the remedy amount is meant to compensate for losses, but where the contribution of a given breach to that loss is unknown. I call it a "heap" because the difficulty it raises is related to an ancient paradox, the heap paradox, which I will explain. Schemes, on the other hand, are designed

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25 Some cases freewheel between forfeitures and penalties: *Bowlen v Digger Excavating (1983) Ltd*, 2001 ABCA 214; *Liu v Coal Harbour Properties Partnership*, 2006 BCCA 385; *Comonsents Inc v Hetherington Welch Design Ltd*, 2006 CanLII 33779, [2006] CarswellOnt 6173 (ON SC) [*Comonsents*].

26 Stephen Waddams, *Principle and Policy in Contract Law* (Cambridge University Press, 2011) ch 4.

27 *743513 Ontario Limited v Huang*, 2013 ONSC 7842 at para 16 (all four words in a single sentence at the same time); see also *869163 Ontario Ltd v Torrey Springs II Associates Limited Partnership*, 243 DLR (4th) 502, 2004 CanLII 66298 (ON SC) at para 18 [*869163*].

28 *Dunlop*, *supra* note 2 at 87, per Lord Justice Dunedin.

to maintain some business plan by punishing people who deviate. For example, a remedy clause that requires someone to pay $100 if they stay past their allotted parking time might be a scheme designed to maintain an open lot. The lot does not lose a hundred dollars, or any dollars, if someone stays late, but that is not the point of this kind of clause. Heaps seek to cover actual or expected losses, but schemes have no regard to actual or expected losses. Evaluating heaps involves comparing them to actual or expected losses to see if they are disproportionate. Evaluating schemes involves a different comparison, if they are enforceable at all.

In Parts 3A and 3B, I explain why a distinct equitable rule is needed for remedy clauses, before discussing heaps and schemes in 3C. The penalty doctrine has been criticized on the basis that it is rendered redundant by unconscionability—but not just any unconscionability, a specifically Canadian take on unconscionability rooted in equity that puts it more broadly and flexibly than one finds elsewhere in the Commonwealth.[29] If Canadian jurists could fully accept the broad understanding of unconscionability, the penalty doctrine would indeed be redundant. But there has been a largely successful attempt to curb unconscionability, limiting it to cases of inequality of bargaining power plus a resulting improvident deal.[30] This test for unconscionability, which I call "bargaining unconscionability" to distinguish it from unconscionability in general, does not capture penalty clauses currently defined, simply because such clauses can result from a deal between bargaining equals and without improvidence.[31] More powerfully, bargaining unconscionability cannot do what the penalty doctrine does because the first compares expectations (the values of contract terms) while the second compares realized expectations (the values of terms given breach). Comparing a contingency to an actuality requires impracticable probabilistic calculations, which I describe. I conclude that unless and until Canadian jurists accept the broad understanding of unconscionability, which now seems unlikely, the penalty doctrine will continue to play a role, and we should recognize that role. We want the penalty doctrine dead or alive—not in between.

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29 SM Waddams, "Unconscionability in Contracts" (1976) 39:4 Mod L Rev at 369 [Waddams, "Unconscionability in Contracts"] (Waddams, starting in 1976, forwarded this take on unconscionability; early Canadian cases also include some very broad statements of the doctrine).

30 This test was sanctioned in *Uber*, *supra* note 13.

31 As noted by Chief Justice Laskin in *HF Clarke*, *supra* note 8, at 330.

2. The Law

The penalty doctrine applies to contractual clauses that require a payment for failure to meet some obligation, which I refer to as remedy clauses.[32] The specifics of when this doctrine applies, and why it should prevent the enforcement of remedy clauses happily agreed-upon by the parties, are debated. In Canada, discussion of the doctrine still begins with the 1915 House of Lords decision, *Dunlop Pneumatic Tyre v New Garage*,[33] which was adopted by the Supreme Court of Canada that same year.[34] The doctrine has not been treated with Supreme Court attention in the forty years since the cases of *HF Clarke Limited v Thermidaire Corp Ltd* and *Elsley v JG Collins Ins. Agencies*,[35] and some have detected a trend of skepticism at provincial appeals courts.[36] The law on penalties across Canada is, however, not uniform, and the doctrine is quite alive. Claims of a "trend" against the penalty doctrine are sometimes made on the basis that some judge or other said there was a trend, without any apparent attempt at a systematic survey of decided cases. As there is nothing in Canada like the explosion of academic interest that has followed recent cases from the UK and Australia's highest courts[37]—*Andrews v Australia and New Zealand Banking Group Ltd* and *Cavendish Square Holding BV v Talal El Makdessi*[38]—an up-to-date review of the case law is needed. In this section I discuss the foundational cases of *Dunlop*, *HF Clarke*, and *Elsley*, together with the recent restatement of the doctrine from the Supreme Court of the United Kingdom in *Cavendish Square*, before turning to a review of lower court decisions from the past twenty years.

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[32] For ease of exposition, I will write as though remedy clauses always stipulate a dollar amount to be paid, the remedy amount. In fact the doctrine applies to any clause that triggers on breach, and my arguments apply to all such clauses.

[33] *Supra* note 2. The following are just a few recent appeal level cases that begin their discussion of the doctrine with *Dunlop*: *Kechnie v Sun Life Assurance Company of Canada*, 2016 ONCA 434 at para 18; *Bankers Mortgage Corporation*, *supra* note 19 at paras 43–46; *Bidell Equipment LP v Caliber Midstream GP LLC*, 2020 ABCA 478 at para 24 [*Bidell Equipment*]; Swan, *supra* note 3 at para 9.291, n 544. (As Justice Robertson put it in *McKeen, supra* note 15, at para 18 "[i]nevitably, everyone turns to the reasons of Lord Dunedin in *Dunlop*").

[34] *Canadian General Electric Co v Canadian Rubber Co*, (1915) 52 SCR 349, 27 DLR 294 [*Canadian Rubber* cited to the SCR] (it is interesting to note that the Supreme Court in fact quoted Robert Joseph Pothier while citing *Dunlop*).

[35] *Supra* note 8.

[36] Hall, 4th Ed, *supra* note 1 at 390-391.

[37] See e.g. Veel, *supra* note 16; Kevin E Davis, "Penalty Clauses through the Lens of Unconscionability Doctrine: *Birch v Union of Taxation Employees, Local 70030*" (2010) 55 McGill LJ 151; Connor Bildfell, "Exculpatory Clauses and Liquidated Damages Clauses: Two Sides of the Same Coin" (2015) 78:2 Sask L Rev 347; Enman-Beech, *supra* note 3.

[38] *Andrews*, *supra* note 5; *Cavendish Square*, *supra* note 5.

A) The Foundational Cases and Cavendish Square

Dunlop concerned a pricing scheme for tyres and related goods. The manufactor of the parts, Dunlop, had its distributors, such as New Garage, agree to sell the parts at no less than certain minimum prices. The agreement included a remedy clause: if the products were sold for a lower price, New Garage owed Dunlop 5£ per item sold. New Garage went ahead anyway, and faced 250£ in damages. At the Court of Appeal, the penalty doctrine was applied, the remedy clause not enforced, and 2£ in nominal damages ordered. The House of Lords in contrast enforced the clause and restored the 250£ damages. *Dunlop* includes, in Lord Dunedin's judgment, a numbered list of statements about the penalty doctrine. These have been variously interpreted, but often the takeaway has been simple. A remedy clause will be enforced if it reflects a genuine pre-estimate of damages likely to result from breach, and otherwise it will not. I will discuss the limitations of this reading below, together with *Cavendish Square*'s re-reading of the case. But for now, the important take-away is that *Dunlop* is often quoted simply for "the *Dunlop* test"[39]: that based on a genuine pre-estimate of damages.

Dunlop is a rich case, containing in its four judgments the seeds of the next century of controversy over the doctrine. One finds here not only grounds for various formulations of the test, but also for various justifications. One can find a repeated concern for unconscionability broadly defined, as well as hints of bargaining power.[40] One even finds the skepticism that has dogged the doctrine already matured, with Lord Parmoor lamenting that it was "too late" to bother justifying it.[41] That said, as a rule Canadian courts reading *Dunlop* have not got far past Lord Dunedin's second bullet point: "the essence of liquidated damages is a genuine covenanted pre-estimate of damage."[42] This has caused problems here, as it did in Australia.[43]

HF Clarke in 1974 involved a contract prohibiting the selling of competing products, for the breach of which HF Clarke would owe

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[39] John Carter & Elisabeth Peden, "A Good Faith Perspective on Liquidated Damages" (2007) 23:3 J Contract L 157 ("the *Dunlop* principles"); Veel, *supra* note 16 ("the *Dunlop* framework"); Bildfell, *supra* note 37 ("the *Dunlop* test").

[40] *Dunlop*, *supra* note 2 (by negative inference: Lord Atkinson notes that the parties are "most probably good business men", and Lord Parmoor implies the principle is one against "extortion").

[41] *Ibid* ("[i]t is too late to question whether such interference with the language of a contract can be justified on any rational principle").

[42] *Canadian Rubber*, *supra* note 34 at 370–371.

[43] Paula D Baron, "The doctrine of penalties and the test of commercial justification" (2008–2009) 34:1 UWA L Rev 42.

Thermidaire its gross profits on any such sales.[44] Thermidaire pled actual loss in an alternative, thus "putting its best foot forward to show its actual loss" and opening itself up to attack. Thermidaire came up with a figure around 40% of the remedy clause amount. The disproportion between actual loss and the remedy amount was a fact the court considered to be "of considerable significance."[45]

At the Court of Appeal for Ontario, whose reasons were adopted in dissent at the Supreme Court by Justice Dickson and Justice Martland, the *Dunlop* question was asked and answered: "Does the formula [used in the remedy clause] represent a genuine attempt by the parties to pre-estimate the loss as best they could within their special knowledge of the circumstances? … [T]he employment of a formula … was adopted by two keen business firms as the best method of determining the loss resulting from a breach of the covenant – a covenant into which they entered with their eyes open."[46] Later, reiterating: "I am convinced that [the parties] agreed upon a method which they both regarded as one which would lead to a fair and just determination of Thermidaire's damages and losses in the event of a breach of the covenant."[47] We can see a concern for the bargaining power or sophistication of the parties, in the emphasis on their being "business firms" entering the deal with open eyes.

Chief Justice Laskin's judgment is messy and has not been well-regarded, particularly because it is apparently in tension with *Elsley*, decided four years later by a larger and unanimous panel.[48] But it is worth noting that several ongoing confusions about the doctrine are manifested here. Laskin says he is applying a head of equity[49] citing *Snell's Principles of Equity*,[50] and implies that the test looks to the time of breach rather than the time of formation.[51] The test itself, in Laskin's view, is based on a disproportion between the amount in the remedy clause and

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44 "Gross profit" is an unusual term but its meaning was agreed by the time of the appeals.

45 *HF Clarke*, *supra* note 8 at 332 (the figures considered by the court were $239,449.05 compared with $92,017 in claimed actual damages).

46 *HF Clarke Limited v Thermidaire Corp Ltd*, 33 DLR (3d) 13 at 25, 1973 CanLII 41 (ON CA).

47 *Ibid* at 26.

48 Swan, *supra* note 3, at 1045 ("a bad detour"), and Waddams, "Contracts", *supra* note 3, at 315 ("insufficient").

49 *HF Clarke, supra* note 8 at 330.

50 *Ibid* at 338; Sir Robert Megarry & PV Baker, *Snell's Principles of Equity,* 27th ed (London: Sweet and Maxwell, 1973).

51 *HF Clarke*, *supra* note 8 at 331–332 (Chief Justice Laskin is vague here).

"actual loss"[52]—an "extravagant and unconscionable" disproportion.[53] In explaining the doctrine, Laskin gave a characteristically penetrating account:

> The primary concern in breach of contract cases … is compensation, and [the penalty doctrine] is simply a manifestation of a concern for fairness and reasonableness … whenever the parties seek to remove from the courts their ordinary authority to determine not only whether there has been a breach but what damages may be recovered as a result thereof.[54]

Two points here: we have overlapping concerns for compensation and for fairness and reasonableness. But also, a remedy clause that goes too far involves the parties assuming the court's authority over determining the outcome of breach. I will discuss these points in my analysis.

There is something odd about the notion that *Elsley* is a contrast to *HF Clarke*, let alone that *Elsley* "implicitly reject[s]" its approach.[55] *Elsley* barely touches on, and certainly does not elaborate or apply, the penalty doctrine. The primary issues in *Elsley* were restraint of trade and the intersection of damages and injunctions.[56] An unusual feature of the case was a remedy clause triggering on breach of a noncompetition clause that was "a gross *underestimate* of damages",[57] most likely due to a drafting error.[58] Thus the penalty doctrine only became relevant in the final section of the judgment, where the court considered whether a remedy clause might *limit* damages that would otherwise be recoverable when they turn out to be larger than the stipulated amount. The court considered and rejected the notion that a remedy clause would limit damages recoverable if it were a valid liquidated damages clause but not if it were an unenforceable penalty clause, finding that a remedy clause would limit damages "whether the sum is a penalty or a valid liquidated damages clause."[59] The reason given is in Justice Dickson's oft-quoted dictum:

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52 *Ibid* at 338–339.

53 *Ibid* at 338 citing Megarry & Baker, *supra* note 50.

54 *Ibid* at 331.

55 Swan, *supra* note 3 at 1046 (Justice Wakeling in *Chandos*, *supra* note 4, said that *Elsley*, *supra* note 8, "jettisoned" *HF Clarke* and also "did it in" at para 181, n 124).

56 *Supra* note 8 (Sections II through IV cover other substantive issues; only section V addresses the penalty doctrine).

57 *Ibid* at 935 [emphasis added].

58 *Ibid* at 920 (The words "for each and every breach" mysteriously disappeared between successive versions of the contract, so that a remedy clause of $1,000 per breach became a small one-time payment. The drafting solicitor had died and there was not the evidence needed to prove that this was a mutual mistake meriting rectification).

59 *Ibid* at 937.

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.[60]

It is clear from the given context that Dickson was not making some grand claim about the appropriate test to determine the applicability of the penalty doctrine, much less rejecting any existing jurisprudence. Remember that Dickson's dissent in *HF Clarke* was an endorsement of the *Dunlop* approach of the Court of Appeal for Ontario. Dickson was rather saying that, because the doctrine's goal is to protect breaching parties from extreme remedy clauses, it would make little sense to have the doctrine work *against* breaching parties in cases like *Elsley*. Indeed, Dickson immediately continues:

> If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount.[61]

The last sentence quoted there is another affirmation of the penalty doctrine—if a remedy clause is a penalty clause, it will not be enforced and only damages for actual loss will be recoverable. Since the applicability of the remedy clause in *Elsley* did not turn on whether it would succumb to the penalty doctrine, the penalty doctrine was not in the end at issue.[62] Dickson's dicta are perfectly compatible with Laskin's claim that the penalty doctrine turns on whether a stipulated sum is "extravagant and unconscionable", and not "fair and reasonable."[63] The question remains, what test is to apply to determine when we have found oppression, unconscionability, extravagance, unfairness or unreasonableless. Laskin says it turns on the disproportion between the remedy clause and actual loss; Dickson does not address the point, because it was not at issue.

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60 *Ibid*.

61 *Ibid*.

62 See *Chandos*, supra note 4 at para 181, n 114 (Justice Wakeling argues that none of the bits I have quoted are *obiter dicta*; I say these statements are consistent with *Dunlop*, *supra* note 2, whether or not they are *obiter*).

63 GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) also read *Elsley*, *supra* note 8, and *HF Clarke*, *supra* note 8, as consistent.

All this is to say, the Supreme Court of Canada's jurisprudence on the penalty doctrine could use an update. Last we heard, the doctrine is an equitable rule that denies enforcement to a remedy clause if, at time of breach, it is so disproportionate to actual damages that it would be unconscionable to enforce it.[64] Though the Court used the word "unconscionability", it did so to amplify a test cobbled together from *Dunlop* and *Snell's Principles of Equity*.[65]

I have mentioned that *Dunlop* is often reduced to a single test—the penalty doctrine is a rule of law that looks to the time of formation and asks whether a remedy clause is a genuine pre-estimate of damages. If not, it is a penalty and unenforceable. But another interpretation of *Dunlop* has come along, now ensconced by the UKSC in *Cavendish Square*.[66] This reading focusses not on expected damages but on the legitimate interests of Dunlop—here, including an interest in maintaining its pricing plan.[67] It was proved to the court that the pricing scheme was of some value to Dunlop as a whole, even though a single instance of undersale could never occasion five pounds' loss. New Garage underpricing car parts would eventually put a big hole in Dunlop's profits, a hole greater than the sum of the parts. If the remedy amount were out of proportion to that necessary to maintain the pricing plan, the remedy clause would be unreasonable and unconscionable—and so not enforced. The UKSC was quite justified in rereading *Dunlop* this way. Lord Atkinson for instance precisely performed the *Cavendish Square* test, identifying an "interest" in protecting Dunlop's "trading system", and confirming that the interest was not "incommensurate" with the amount to be paid.[68]

An illustration of a different kind of scheme that is more than the sum of its parts is drawn out in *Cavendish Square*'s companion case of

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64 While in the interest of economy I will not discuss them at depth, this interpretation is consistent with the other relevant SCC cases since *Dunlop*, *supra* note 2, of which there are two: *Waugh v Pioneer Logging Co*, [1949] SCR 299, 2 DLR 577; *Dimensional Investments Limited v The Queen*, [1968] SCR 93, 64 DLR (2d) 632. Both were forfeiture cases that blur the line between penalties and forfeitures; both cite the genuine pre-estimate test to establish penality, based on the construction of the contract and therefore considered at time of formation, but *Dimensional Investments* goes on to ask whether, at time of breach, it would be unconscionable for one party to maintain the forfeiture, following *Stockloser v Johnson*, [1954] 1 QB 476, 1 All ER 630 (England and Wales, Court of Appeal).

65 Megarry & Baker, *supra* note 50.

66 *Cavendish Square*, *supra* note 5.

67 *McKeen*, *supra* note 15, at para 23 (Justice Robertson saying it was "too late to advance" this reading of *Dunlop*).

68 *Dunlop*, *supra* note 2 (per Atkinson).

ParkingEye v Beavis.[69] There, free parking was offered at a mall. Signage created a contract that allowed free parking provided the customer did not stay longer than two hours. Stay a minute over two hours, and you would owe 85£. Such parking schemes are common in Canada as well.[70] Clearly, 85£ is no attempt to measure the damage from 121 instead of 120 minutes of parking. However, many small breaches of this sort might result in an overfull parking lot and an under-full mall. The clause was enforced as the judges thought that 85£ was a reasonable amount to manage the mall parking lot. The UKSC has admirably clarified the penalty doctrine for its jurisdiction, and time will out how Canadian courts might benefit from *Cavendish Square*.[71] In the UK at least, the penalty doctrine will deny enforcement to clauses stipulating an amount out of all proportion to the legitimate interests of the disappointed party.

B) Provincial Cases

Since the Supreme Court jurisprudence is many decades old and potentially out of date, I turn to the provinces. The penalty doctrine has recent appellate support in Alberta and BC. In Ontario, there has been no appellate-level statement of the doctrine since *Infinite Maintenance Systems Ltd v ORC Management Limited* [72] twenty years ago—though there have been statements *about* the doctrine since which have caused unrest and confusion. The doctrine is still often, though not always, applied in Ontario in its traditional shape. The Court of Appeal of Manitoba has also recently upheld the doctrine,[73] while in New Brunswick it has been supervened by a statutory rule.[74] I will briefly discuss these cases in turn. For the most part, I confine myself to roughly the past twenty years.[75]

I have already mentioned the unusual dissent at the Court of Appeal of Alberta in *Chandos*, but the view taken on the penalty doctrine in that judgment was far from typical of the province. Equal and opposite was a crisp concurrence in *Emkay Canada Fleet Services Corp v Gemini*

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69 [2015] UKSK 67.

70 Consider the legal sagas of Imperial Parking, sometimes "Impark", which appears in over fifty styles of cause on CanLII, e.g. *Graham v. Impark*, 2010 ONSC 4982 at paras 125–139 [*Graham* SCJ], confirmed by the Divisional Court in *Stephanie Graham v. Imperial Parking Canada Corporation*, 2011 ONSC 991 at paras 37–39 [*Graham* Div Crt].

71 At time of writing, no reported Canadian decision has cited *Cavendish Square*, *supra* note 5, in order to consider the "legitimate interest" test. *Super Save*, *supra* note 18 cited *Cavendish Square* on other points.

72 139 OAC 331, 2001 CanLII 24082 (ON CA).

73 *Dundas v Schafer*, 2014 MBCA 92.

74 *McKeen*, *supra* note 15.

75 For earlier cases see Veel, *supra* note 16 (with whose readings I generally agree).

Corporation, one year later.[76] This concurrence is as authoritative as the dissent in *Chandos*: neither judge was speaking for their panel, and in both cases the result had been decided on other grounds by the majority so that anything to be added about the penalty doctrine would be obiter even if they were speaking for the panel.[77] *Emkay* notes only that the penalty doctrine could well apply to its facts, citing and applying the *Dunlop* pre-estimate test with some *Cavendish Square* wrinkles. That *Emkay* better represents the law in Alberta is consistently shown by the mine run of cases in that province, many of which have denied a clause based on extreme quantum alone.[78]

The situation is clearer in British Columbia, where recent appellate cases have applied the doctrine more or less in the form it took in *Dunlop*.[79] The other common law provinces have less appellate jurisprudence and only two cases are prominent in the last twenty years. Manitoba has *Dundas v Schafer*, a pristine application of the penalty doctrine to deny a clause following *Dunlop*.[80] New Brunswick has *McKeen v Mortgage*

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76 *Supra* note 21.

77 *Chandos*, *supra* note 4 at para 56; *Emkay*, *supra* note 21 at para 81.

78 At the appellate level, the last twenty years includes only *Bidell Equipment*, *supra* note 33 citing *Emkay*, *supra* note 21 for the penalty doctrine, though it turns on the preliminary issue of whether the clause in question is a remedy clause at all; *Bowlen v Digger Excavating (1983) Ltd*, 2001 ABCA 214 (applying the mixed penalty-forfeiture approach found in *HF Clarke*, *supra* note 8, to uphold a clause). The reported lower decisions from the past five years that considered the doctrine are: *Canadian Linen v Taurus*, 2020 ABPC 74 (applying a mixed penalty-forfeiture approach from HF *Clarke*, *supra* note 8, considering quantum as well as party sophistication and bargaining position as relevant factors to uphold clause); *Whitecap Resources Inc v Canadian Natural Resources Limited*, 2019 ABQB 698 (citing *HF Clarke*, *supra* note 8, focussing only on the proportion of quantum "to the problem the clause is intended to address" para 122 to deny clause); *Super Save*, *supra* note 18 (also focussing only on quantum to deny clause); *Swan City Taekwon-Do Club v Podolchyk*, 2017 ABPC 244 (focussing only on quantum to uphold clause); *416566 Alberta Ltd v Fothergill*, 2017 ABPC 96 (focussing only on quantum to deny clause); *RCAP Leasing Inc v Martin*, 2016 ABQB 542 (focussing only on quantum to deny clause); *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2016 ABQB 365 (focussing only on quantum to uphold clause, though implying that equal bargaining power would also be relevant, para 68); *Jones v Gerosa*, 2016 ABQB 207 (applying rule on restraint of trade in context of which clause was found "reasonable", judge concluding therefrom that it was reasonable for the purposes of the penalty doctrine also, para 242).

79 See *Bankers Mortgage Corporation*, *supra* note 19 (applying *Dunlop*, *supra* note 2, to uphold clause as a genuine pre-estimate); *Habitat for Humanity Canada v Hearts and Hands for Homes Society*, 2016 BCCA 217 [*Habitat*] (turning on the preliminary issue of whether the clause was a remedy clause at all); *Rhebergen v Creston Veterinary Clinic Ltd*, 2014 BCCA 97 (upholding clause because not "extravagant and unconscionable in comparison with the greatest costs to the clinic that could be proved", para 51).

80 *Dundas v Schafer*, 2014 MBCA 92.

Makers.[81] *McKeen* includes the clearest appellate discussion of the doctrine in recent Canadian history, by Justice Robertson—but concludes that the doctrine has been replaced with a statutory all-things-considered reasonableness test.[82] It is of course a dangerous game to pronounce on the law of jurisdictions where there has been no recent appellate intervention, but I will note that the penalty doctrine along the lines of *Dunlop* has been recently applied in Saskatchewan,[83] Nova Scotia,[84] and Newfoundland and Labrador.[85]

The situation is most confused in Ontario. Only twenty years ago, there was the perfectly satisfactory case of *Infinite Maintenance*. Since then, two cases have substantially muddied the waters with obiter, *Peachtree II Associates-Dallas LP v 857486 Ontario Ltd* [86] and, to a lesser extent, *Birch v Union of Taxation Employees Local 70030*.[87] The case of *Infinite Maintenance* applied *Dunlop* to deny a remedy clause because it was not a genuine pre-estimate of damages. The full panel agreed on this point. *Peachtree* and *Birch* both include obiter, obiter clearly marked as obiter, to the effect that the penalty doctrine should perhaps be done away with some day, replaced with a test based either on bargaining unconscionability or relief from forfeitures. But *Infinite Maintenance* remains a governing authority in Ontario on the penalty doctrine, and this is not altered by the speculations of subsequent cases. The law in Ontario remains that of *Dunlop*, filtered through *HF Clarke*, *Elsley*, and cases like *Infinite Maintenance*.

Of course it could have been that *Peachtree*, while self-consciously leaving the law unchanged, triggered the beginnings of change at lower courts that might eventually percolate upward. It did not. Ontario courts

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81 *McKeen*, *supra* note 15.

82 *Ibid* (the case actually turned on a point of agency law, so that this too is all *obiter*. Justice Robertson notes this "irony" at para 54).

83 *Quadra Properties Ltd v Gamble*, 2021 SKQB 16 at para 30 (clause denied as unrelated to anticipated damages); *Thienes v Godenir*, 2011 SKQB 271 (clause denied with blend of *Dunlop*, *supra* note 2 and *Elsley*, *supra* note 8).

84 *Ferguson v Amiro*, 2011 NSSC 416 at para 54 (application of *Dunlop*, *supra* note 2 to deny a clause); *Canadian Elevator Industry Education Program v Gilby*, 2012 NSSC 274 paras 36, 38 (applying *Dunlop* to uphold clause as a genuine pre-estimate; for good measure, cites *Peachtree, supra* note 20, and says the clause wouldn't be unconscionable in any case); *Innotech Aviation v Skylink Express Inc*, 2018 NSSC 93 (more recent, less clear).

85 *Health Quest Inc v Arizona Heat Inc*, 2019 NLSC 52 at para 67 (clause denied as unrelated to "any cost actually incurred").

86 *Supra* note 20 (marking its discussion of the penalty doctrine as *obiter*: "I leave that question to another day" at para 36).

87 2008 ONCA 809 (*Birch*'s majority refers to *Peachtree*'s musings on the penalty doctrine as "*obiter*" at paras 32, 38 and respecting its own said that "the broader issue should be left to another day" at para 37).

have almost always continued to apply the penalty doctrine,[88] dutifully following precedent, and the main effect of *Peachtree* has been that once in a while they add something along the lines of "and this clause, which I have found ineffective due to the penalty doctrine, is unconscionable anyway, if it matters"[89] or "and this clause, which I have found does not run afoul of the penalty doctrine, is also not unconscionable, should anyone ask."[90] Some cases do suggest that *Peachtree* signalled a change in the law,[91] though cases considering *Peachtree* are not uniform on this point.[92] Most of what was said in *Peachtree* is unobjectionable, but its effect on subsequent cases has been turmoil. If there is an overall "trend"

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88 *Comonsents*, *supra* note 25 (enforced); *1259121 Ontario Inc v Canada Trust Company*, 30 BLR (4th) 193, 2007 CanLII 8628 (ON SC) (denied); *HL Staebler Company Limited v Allan*, 2007 CarswellOnt 5792, 2007 CanLII 37692 (ON SC) (enforced); *Hurley Corp v Canadian IPG Corp*, 2010 ONSC 681 (genuine issue for trial); *Roynat Inc v Transport Training Centres*, 2010 ONSC 4894 (enforced); *Loans Till Payday v Brereton*, 2010 ONSC 6610 (denied); *Hav-A-Kar Leasing v Vekselshtein*, 2011 ONSC 478 (enforced, aff'd in *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, which covers its bases with both *Dunlop*, *supra* note 2, and *Peachtree*, *supra* note 20, at paras 47–52); *Zander Sod Company Limited v Solmar Development Corp*, 2011 ONSC 7 (enforced); *Activ Financial Systems, Inc v Orbixa Management Services Inc*, 2011 ONSC 7286 (neither); *Action Auto Leasing v Boulding et al*, 2011 ONSC 7253 (enforced); *Mathkour v Abomadkoor*, 2012 ONSC 2997 (denied); *Western v Stach et al*, 2013 ONSC 4393 (denied); *Grand Ridge Estates Limited v Breadner Holdings Inc*, 2018 ONSC 655 (enforced); *Lamba v Gurung*, 2018 CanLII 64439 (ON SCSM) (denied); *1482241 Ontario Limited (Re)*, 2018 ONSC 5925 (denied); *Save Max*, *supra* note 17 (enforced); *7084421 Canada Ltd v Vinczer*, 2020 ONSC 217 (two at issue, one denied); *Multitech Contracting 2000 Inc v GJ Investments Inc*, 2021 ONSC 69 (denied).

89 *Mascia v Dixie X-Ray Associates Limited*, 55 BLR (4th) 163, 2008 CanLII 12708 (ON SC); *Konialian v Paletta*, 2020 ONSC 3976.

90 *Calloway Reit (Westgate) Inc v Michaels of Canada, ULC*, 2009 CanLII 7760, OJ No 761 (ON SC); *Signal Chemicals Ltd v Dew Man Marine Trade Inc*, 2011 ONSC 3951[*Signal Chemicals*]; *Nguyen v Tran*, 2012 ONSC 2418; *Haas v Viscardi*, 2018 ONSC 2883 [*Haas*].

91 *Graham* SCJ, *supra* note 70 at paras 135–136 (aff'd on this point *Graham* Div Crt, *supra* note 70 at para 38); *743513 Ontario Limited v Huang*, 2013 ONSC 7842; *Nikolai Chilikoff v West Capital Placer Inc*, 2016 ONSC 6354 (following *Peachtree*, *supra* note 20 and applying unconscionability only); *Heli-Transport v Kingsview Iron Ore*, 2012 ONSC 6649; *Peachtree* is also used for its statement of the forfeiture rules: *Kreadar Enterprises Limited v Xiao Jing Wang*, 2012 ONSC 4121; *Signal Chemicals*, *supra* note 90.

92 *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628 (mentioning that *Birch*, *supra* note 87, and *Peachtree*, *supra* note 20, were *obiter* on these points at para 59); *Haas*, *supra* note 90 ("the common law of penalty clauses remains in force in Ontario" para 13); *Birch v Union of Taxation Employees Local 70030*, 288 DLR (4th) 424, 2007 CanLII 43894 (ON SC) at para 25; *Jan Wong v The Globe and Mail Inc*, 2014 ONSC 6372 at paras 45–46 (unclear on this point). See also Fridman, *supra* note 63 at ~728 (who reads *Peachtree*, *supra* note 20, with the existing doctrine).

since *Peachtree*, my review of the cases shows it to be to apply the penalty doctrine as it existed beforehand.

Peachtree has often been cited in brief for its restatement of parts of the law, or simply ignored; but when it has been considered it has been systematically misinterpreted. The misinterpretation relates to a fundamental point I raised in the introduction to this article. While *Peachtree* advocates for the subsumption of penalty rules within forfeiture rules, and so within equity and notions of unconscionability, the "unconscionability" at play is broad. It is not the narrow, two-step test that requires inequality of bargaining power. In fact, *Peachtree* makes no mention of bargaining power.[93] Moreover, *Peachtree* is clear that its unconscionability-spiced forfeiture test looks to the time of breach,[94] whereas bargaining unconscionability looks to time of formation.[95] The notion of unconscionability at play is not bargaining unconscionability: it is rather that laid out in the recent appeal case of *Redstone Enterprises Ltd v Simple Technology Inc*,[96] rapidly becoming a leading case on forfeitures and unconscionability in Ontario:

> Can unconscionability be established purely on the basis of a disproportionality between the damages suffered and the amount forfeited? While in some circumstances a disproportionately large deposit, without more, could be found to be unconscionable, this is not such a case. … Where, as here, there is no gross disproportionality in the size of the deposit, the court must consider other indicia of unconscionability. … The list of the indicia of unconscionability is never closed, especially since they are context-specific[:] inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of bona fide negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties.[97]

If the penalty doctrine is to be conjoined with relief from forfeitures, that is the relevant notion of "unconscionability." It is very likely what was meant by unconscionability in *Peachtree*.[98] But those courts which have sought to "apply" the *obiter* in *Peachtree* typically read it as importing—not a more flexible test—but a more mechanical one, requiring an inequality of

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93 The lower court decision lists the related but distinct notion of sophistication of the parties in a list of factors going to enforceability: *869163*, *supra* note 27, at para 18.

94 *Peachtree*, *supra* note 20 at para 25.

95 *Uber*, *supra* note 13 at paras 74, 286.

96 2017 ONCA 282 (already cited by several dozen decisions).

97 *Ibid* at paras 26, 29, 30.

98 *Peachtree*, *supra* note 20, at para 32 citing Waddams, "Damages", *supra* note 29 (Waddams has long advocated a broad general principle of unconscionability).

bargaining power as a necessary element.[99] In this context it is no surprise that judges, who need flexibility to do equity, have continued to apply the penalty doctrine in its traditional form.

3. Analysis

Many explanations of the penalty doctrine have been put forward. It is understood to interfere with freedom of contract[100] and therefore needs justification. And, despite their modesty, scholars and judges have exceeded the task. I do not intend an in-depth review of the existing justifications, because such reviews have been done before.[101] Many of these explanations are convincing, especially in sum. The following list draws on that work.

- It is likely that parties are generally less good at evaluating remedy clauses than other clauses, because remedy clauses always trigger on a future contingency out of the control of one of the parties—viz, whether the other breaches. The future is hard to predict, and people tend to be over-optimistic about it. A remedy clause is harder to value than say an immediate payment of $100. So remedy clauses—like situational monopolies that give rise to unequal bargaining power[102]—are a place where parties are at greater than normal risk of making dramatically unequal deals. While none of this implies a bright line between remedy clauses and other kinds of clause (some of which trigger on contingencies in a similar way), it points in favour of treating remedy clauses with special care.

- The compensatory regime of contract law has many things going for it. Remedy clauses often exceed compensation—that is, compensation as contract law would otherwise define it. While again this is not an overpowering reason, since there are ways to make sense of remedy clauses within a compensatory framework (discussed below in 3B), it urges a second look at these clauses.

- There are reasons to believe that remedy clauses can lead to inefficient behaviour on the part of contracting parties—for

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99 *Supra* note 91.

100 *Elsley*, *supra* note 8. Some authors nevertheless attempt to interpret the doctrine as *manifesting* freedom of contract, see e.g. Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge: Harvard University Press, 2019) at 205–214.

101 Halson, *supra* note 6 at ch 4; Enman-Beech, *supra* note 3; Tiverios, *supra* note 6 at ch 4; Veel *supra* note 16 (on the economic arguments).

102 Michael Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26:4 UTLJ 359.

instance, they may miss out on what would otherwise be welfare-enhancing breaches to avoid paying the remedy amount, or they may wastefully attempt to induce their counterparty to breach in order to get the remedy amount.[103] Again this is not overwhelming, both because such economic arguments are always uncertain[104] and because whatever value there is in attempting to enhance welfare should be balanced against our attempt to respect parties' autonomy in settling remedy clauses. But this gives another reason to take a second look at remedy clauses.

- Since the purpose of a remedy clause is often to secure performance,[105] it would be a violation of good faith for a party to insist on its performance beyond that function, or perhaps to dishonestly set an amount that did not reflect that function.[106]

- Last, remedy clauses can punish parties. There is something wrong with a private person wielding the power of the court to punish their counterparty.[107] This might violate an ideal of civic equality or non-domination.

Again, all of these explanations have something going for them, and it seems that in sum they give good reason for the extra scrutiny applied to remedy clauses, a "multifactorial" approach.[108] Of course, none of them argue for a hard rule against all remedy clauses, and indeed remedy clauses are typically enforced under the penalty doctrine.

In this section then I will not dwell on the reasons already given for the penalty doctrine. Instead, I will comment on the grammar of the doctrine and of unconscionability that has been underappreciated. These formal points go a good way toward clarifying the appropriate application of the doctrine and its relation to bargaining unconscionability, regardless of the precise equity or policy that it effects.

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103 Veel, *supra* note 16.

104 See Halson, *supra* note 6 at 118.

105 Stephen Waddams, *Sanctity of Contracts in a Secular Age* (Cambridge, UK: Cambridge University Press, 2019) at 15.

106 Carter & Peden, *supra* note 39; Enman-Beech, *supra* note 3 at ch 2.

107 Seana Shiffrin, "Remedial Clauses: The Overprivatization of Private Law" (2016) 67:2 Hastings LJ 407; Enman-Beech, *supra* note 3 at ch 3.

108 So I share the conclusion that Halson attributes to courts, *supra* note 6 at 145. In contrast, Tiverios denies that several small reasons can add up to a big reason, though the basis for that counter-intuitive claim is not explained: *supra* note 6 at 86.

A) The Need for an Equitable Rule

Those in Canada who have expressed the most skepticism for the penalty doctrine have done so on the basis that it is not clear what it offers that unconscionability can't.[109] The penalty doctrine is at best redundant, and at worst an unprincipled imposition on contractual freedom. But this view implies that unconscionability itself is clearer or more principled than the penalty doctrine. In fact, the nature and scope of unconscionability remain confused, whereas the penalty doctrine has behind it centuries of precedent.

"Unconscionable" has been used in many contexts to express different things, having little in common with each other beyond the core lay meaning of the word: out of accord with conscience, that is, not right or reasonable.[110] It so often shows up in the blue streak precisely to suggest its generality—the judges know they mean something like extravagant, oppressive, unreasonable, or unconscionable, and mean to express nothing more precise than that. This has left interpreters of the law, both writers like me and subsequent judges deciding new cases consistently with old ones, to try to determine what exactly makes unconscionability so very unconscionable in any given case.

One fruit of this endeavour has been the rule on inequality of bargaining power. This rule was recently specified by the Supreme Court in the case of *Uber v Heller*.[111] There is no implication that this rule should be imported into every situation where the word "unconscionable" gets used. *Uber* represents, by a good margin, the fullest statement of the doctrine of bargaining unconscionability ever to come out of the Supreme Court of Canada.[112] Prior to *Uber*, many aspects of the doctrine were unclear,[113]

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109 Davis, *supra* note 37; Swan, *supra* note 3 at 1046.

110 John Simpson & Edmund Weiner, eds, "Oxford English Dictionary", *sub verbo* "unconscionability" (last modified September 2021) online <www.oed.com>.

112 There are few contenders. See e.g. *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449; *Hunter v Syncrude* [1989] 1 SCR 426, 57 DLR (4th) 321; *Tercon Contractors Ltd v British Columbia*, 2010 SCC 4 (did not go beyond referencing Chief Justice Dickson in *Hunter v Syncrude*); *Miglin v Miglin*, 2003 SCC 24 (gave a brief, clear statement of the doctrine, but did so in order to provide a "commercial" contrast to the family law subject that was at hand).

113 Chris DL Hunt, "Unconscionability Three Ways: Unfairness, Consent and Exploitation" (2020) 96 SCLR (2d) 37.

a longstanding situation.[114] After *Uber*, bargaining unconscionability has these features:

- It can render a single clause invalid, while upholding the rest of the contract.[115]
- The contract is to be evaluated at the time of formation.[116]
- The contract or clause will be invalid if there was, 1) an inequality of bargaining power; and, 2) a bad bargain resulting.[117]

There are many problems with this formulation of the doctrine,[118] but it is what we are working with for now. We can immediately see that this unconscionability is not redundant with the penalty doctrine. The penalty doctrine does not require an inequality of bargaining power. Nor does applying the penalty doctrine involve totting up the balance of the whole agreement. It focusses instead on comparing the specified amount to either a genuine pre-estimate of damages or to a legitimate contractual interest. Replacing the penalty doctrine with bargaining unconscionability would have the effect of enforcing once unenforceable contracts and denying contracts that would otherwise have been enforced. In the next subsection I will explain this fundamental problem with applying bargaining unconscionability to penalty cases, a formal or grammatical problem: the two doctrines simply do not compare the same things.

There is another sense of unconscionability in Canada, one with a long jurisprudential history and significant scholarly support. This is the notion that "unconscionability" describes a broad equitable jurisdiction to deny enforcement to contracts that would be "unfair, inequitable, unreasonable or oppressive."[119] The closest thing to a general test can be found in Justice Lambert's concurring judgment in *Harry v Kreutziger*: the single question is "whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded."[120] Obviously this is all incredibly vague and a by-

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114 Compare Hunt's conclusion, *ibid*, with that of Steven R Enman, "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law" (1987) 16 Anglo-Am L Rev 191, some thirty years earlier (no relation).

115 *Uber*, *supra* note 13, at para 96, n 8.

116 *Ibid* at para 74.

117 *Ibid* at paras 62–65.

118 *Ibid* at paras 147–175 (several issues raised by Justice Brown concurring).

119 Waddams, "Contracts", *supra* note 3 at 377.

120 *Harry v Kreutziger*, (1978) 95 DLR (3d) 231 at 241, 9 BCLR 166 (CA).

now rote set of pros and cons gets trotted out whenever this is discussed, pitting the virtue of flexibility against the vice of unpredictability.[121]

Acknowledging such a broad unconscionability would make it impossible for parties to know whether their deals will be enforced, it is alleged, and would send us down a short slippery slope to judicial determination of all market transactions,[122] the alien specter of "palm-tree justice."[123] The imagery here is mixed—judicial control of contracts inspires both a red scare of communist central planning and an orientalist, unchristian sage dispensing justice under a tree.[124] If we resist these visions, we might instead adopt a folksy faith in judicial restraint, and recall that commercial morality, by definition, is familiar to commercial actors. We might survey the results of the cases and conclude, as Steven Enman did many years ago, that "there are few instances where the courts have gone too far … [They have] given relief to many deserving parties without allowing contracts to be avoided on frivolous grounds."[125] In any case something like broad unconscionability seems to be here to stay, since the necessary discipline simply isn't in place to make judges send out the sheriff to enforce agreements they consider horribly unfair. We might think the judges soft, that they out to be more *bouche-de-la-lois*-like, but the point is that unconscionability and equity will abide, and the task falls to us to make sense of it.[126]

Against this background, the role of unconscionability in the penalty doctrine takes on new meaning. We want limiting frameworks that channel and control the exercise of equitable discretion.—And that is precisely what the penalty doctrine offers. Penalty cases represent a large and ancient body of reasoned decisions about when a remedy clause will

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121 John-Paul F Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997) 25:1 Man LJ 187.

122 Rick Bigwood, "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect" (2005) 25:1 Oxford J Leg Stud 65 ("the stability of the economic institutions of capitalism ultimately remains at stake" at 89).

123 *Uber*, *supra* note 13, paras 152, 237 by each of Justice Brown and Justice Côté. (The phrase arose in reference to an Islamic judge or *cadi* in the early 20th c: John Simpson & Edmund Weiner, eds, "Oxford English Dictionary", *sub verbo* "palm-tree justice" (last modified September 2021) online: <www.oed.com>. Attempts to link the phrase back to *Judges* 4:5, which describes Deborah under a palm, seem unhistorical and cannot explain the phrase's pejoration. That said, I am referencing not the origins but the current meanings of the phrase, which on its face associates arbitrary decision-making with a distant desert Other).

124 John Enman-Beech, "The Good Faith Challenge" (2019) 1 J Commonwealth L 35 (the attempt to put all of capitalism on the line in discussions of unconscionability closely mirrors similar attempts in discussions of good faith).

125 Enman, *supra* note 114 at 219, 209.

126 Waddams, "Unconscionability in Contracts", *supra* note 29 at 390–392.

be so unfair as to be denied and why.[127] It would be foolish to ignore these older decisions and collected experience on the basis of a new vocabulary about the rule. The dream of "rationalizing" this area of the law by tossing centuries of precedent in favour of a new rule lures the scholar, the treatise-writer, and sometimes even the appellate-level judge. But that is not the method of the common law, which is to develop reasoned bodies of decisions over time through precedent and analogy. And my review of the cases has shown just this sort of judicial restraint is still kicking it in the courts.

B) The Grammar of Evaluation

It is clear that bargaining unconscionability and the penalty doctrine do not compare the same things, but there have been valiant attempts to mix them up. Whether the penalty doctrine compares a remedy amount to a legitimate interest or to actual or expected loss, what it does not do is price the remedy clause, add that price to the prices of all the other terms of the contract, and see how good a deal was got overall. This is why the fact that the doctrine only applies to clauses that trigger on breach, or clauses that do so substantially,[128] is not a mere formal finick that gets in the way of equity.[129] It is a constitutive element of the penalty doctrine, because without it one of the two things that the doctrine seeks to compare does not exist.

There is some ambiguity about what makes a contract susceptible to the substantive prong of bargaining unconscionability. The majority judgement in *Uber v Heller* actually leaves this problem wide open, and has been criticized on this ground.[130] But the commentariat consensus is that the substantive prong ought to look at the contract as a whole and find a gross disproportion in the value given and received. This is a sensible position that accords with a distinctly contractual notion of fairness: equality of exchange.[131] But judges never do this in penalty cases,

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127 I thus disagree with Swan, *supra* note 3 at 9.293 ("[t]he … catalogue presented by Lord Dunedin [in *Dunlop*, *supra* note 2] was necessary only as long as the common law rejected the general power to police contracts for unconscionability.") It seems to me the opposite.

128 *Andrews*, *supra* note 5, *Doman Forest Products Ltd v GMAC Commercial Credit Corp-Canada*, 2007 BCCA 88; *Bidell Equipment*, *supra* note 33; *Habitat*, *supra* note 79.

129 Per Lord Justice Denning, *Bridge v Campbell Discount Co Ltd*, [1962] AC 600, 1 All ER 385, (UK HL) at 629 [cited to AC].

130 *Uber*, *supra* note 13 at paras 73–78 (concluding "[b]ecause improvidence can take so many forms, this exercise cannot be reduced to an exact science … Fairness, the foundational premise and goal of equity, is inherently contextual" at para 78).

131 James Gordley, "Equality in Exchange" (1981) 69:6 Cal L Rev 1587.

even when they talk about unconscionability,[132] and it is instructive to consider why.

What exactly would this process of evaluating the overall exchange rate involve? In a simple trade of $100 for a book, it is relatively straightforward. You get $100, the value of which in dollars is tautological. I get a book, and there are usually easy ways to figure out what that is worth. Suppose that you are to deliver the book with all due haste, and suppose that we add in the following remedy clause: "If book not delivered by Tuesday next, you will owe me $5 per day the book is delayed." If we are to evaluate the overall quid pro quo of this contract, we have moved from comparing $100 to the book, to comparing $100 to the book plus the remedy clause. What is the value of this clause? Is it worth it to me to pay $105, or $110 for this contract? The naïve answer (which is given too often) is that the clause is worth "$5 a day." But this is not quite right, because there is no certainty that the clause will be effective. If the book is delivered on time, the clause gets me no dollars at all.

This is a metaphysical problem with no naturalistic answer, because "value" is not a natural phenomenon. But mathematicians, economists, and actuaries have a method for putting a price on contingencies. One multiplies the value of the contingency against its likelihood, to get the expected value. This rule can give a good guide to action. If I offer you a chance to draw a ball from my bag, and the bag has 100 balls 99 of which are worth nothing and one of which is worth $100, how much should you pay for the chance? If you apply the expected value rule you will conclude that the chance is worth one dollar (1/100 chance of getting $100). If I'm selling the chance for 50¢ I'm a rube and you should buy it; if I'm selling the chance for $10 you should only buy it if I am running a fundraiser. There are useful senses in which applying the expected value rule is the rational thing to do.[133]

The ball-bag example is simple enough. We know the odds, know the values, and can do the multiplication. How would we calculate the value of our remedy clause for the late book delivery? For simplicity, I have given a strict value to the clause once it triggers—$5 a day. But this isn't what we get out of the clause, because it *replaces* something—damages normally assessed. What would the damages for late delivery be normally? Hard to say, the subject of treatises, courses, and judgments, and we have no reason to believe it should follow a strict formula like $5 a day. But suppose we know it, say $4 a day. The remedy clause is then worth $1 per day that it triggers (that is, this is the difference it makes when added to

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132 Davis, *supra* note 37.

133 As in the sense defined by the Von Neumann–Morgenstern utility theorem.

our contract). Now we need to know the chances of that happening.[134] We have no idea of this either.[135]

Moreover, the chance of late delivery changes with the remedy clause, for instance because a high remedy clause will induce you to ensure prompt delivery, or because a fixed remedy clause will allow you to deliver late knowing what the consequences will be, and perhaps will seem like an option that lets you preserve our deal while breaking it.[136] For this reason, even if we know the chance of one day's lateness, we cannot multiply by our $1 per day to get the expected value of the clause, because we will have to take into account three more things: 1) the chance of delay with remedy clause together with the remedy amount; 2) the chance of delay without the remedy clause together with the common law damages amount; and, 3) the differential chance of delay with or without the remedy clause together with the actual loss cause by that delay.

Summarizing, here is what a judge would have to do to determine the value of a remedy clause, for the purpose of deciding whether it had been suitably paid for by other elements of the contract.

1. Evaluate the other elements of the contract—often relatively easy, especially if they are immediate, relatively certain to occur, and have associated market prices, like $100 cash down.

2. Evaluate the damages that would result without the remedy clause—sometimes easy, often difficult, there are books about this.

3. Evaluate the value of the remedy clause if triggered—actually easy, because remedy clauses are usually stated as dollar amounts or formulas and have as one advantage precisely that they are easier to determine than common law contract damages.

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134 To be precise, we need to know the chance of it happening in a given way for every way it could possibly happen; in this case, what are the chances of (no delay, one day delay, two days delay, …, not delivered). There are many complications I have not bothered to include in the body.

135 We might evaluate the objective chances of this happening, for instance surveying the book delivery industry for the mean delay; but my point is that this is impracticable and judges don't do it, not that it is conceptually impossible.

136 Ben Depoorter, Sven Hoeppner & Lars Freund, "The Moral-Hazard Effect of Liquidated Damages: An Experiment on Contract Remedies" (2017) 173:1 J Institutional & Theoretical Economics 84 (with experimental results suggesting that just this will happen).

4. Evaluate the chances of breach with and without the remedy clause—impracticable.

5. Multiply the various chances by their values and sum it all up.

I have never seen a judge attempt this process. I will stress once more how different this process is from that required to evaluate the fairness of our original deal. Comparing $100 to a book is something judges explicitly do all the time, and the only actuarial theory or metaphysics involved is the widely understood concept of "market value."[137] Not only is evaluating a remedy clause in the above way not what judges do or can do, it reflects an implausible characterisation of actual contracting behaviour. Parties do not typically price out clauses in this way.

As I have just explained, it is true that over the last couple centuries or so we have developed the conceptual apparatus necessary to conceive of each contractual term as possessing a determinate expected value that incorporates all uncertainties and gives us a single commensurable number that can be priced out against the other terms.[138] And so it is possible to imagine a contract as reflecting the parties' valuations of all the terms under all possible contingencies in perfect balance. If we imagine this, it follows that refusing to enforce a remedy clause would be to disturb the balance of the bargain. But I am not that imaginative. It is unclear to me when, in the course of recent history, business people went from negotiating, bargaining, and curbing their risks like normal, decent human beings, and instanced instead the robotic practice of calculating the expected utility of every term in a contract and balancing it off. Nor is it clear why we should impose such a weird view of decision-making on contracting parties as "rational", just because it happens to be *au courant* in certain, though by no means most, attics of the ivory tower. This would be prolepsis perfected, collapsing every contingency into a single price term, weakening one of contract's weakest links. If we instead accept, as seems reasonable, that parties cannot price every contingency, or that there are things in any event that they are not allowed to trade, such as their civil rights to compensatory damages and to not be liable for more than others' civil rights are worth, the penalty doctrine has a place.

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[137] See e.g. Margaret Jane Radin, "Market-Inalienability" (1987) 100:8 Harv L Rev 1849 (market value is not without its own philosophical conundrums—some are discussed in Gordley, *supra* note 130—but the concept is clean enough that it gets used by even critics of market ordering such as Radin).

[138] For elements of this historical shift in perspective, see e.g. Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Standford, CA: Stanford University Press, 2007); Fritz Karl Mann, "The Socialization of Risks" (1945) 7:1 Rev Politics 43.

Thus it should come as no surprise that bargaining unconscionability and the penalty doctrine compare different things. The penalty doctrine only applies to a particular kind of clause—remedy clauses—where, by definition, the comparands of bargaining unconscionability do not exist or are inaccessible to reason. Many have observed these two bits of contract law and noted their similar concern for fairness, for equality, for "unconscionability" broadly defined, and gone on to conclude that we don't need both. But it makes no sense to subsume a penalty analysis within an evaluation of the overall quid pro quo of the agreement. And judges have never tried it. In attempting to avoid gross unfairness, uphold the compensatory regime, prevent punishment, and ensure good faith, they have simply compared actual losses to the stipulated amount. And there is no reason to assume that they are somehow upsetting the settled bargain of the parties in doing this, because parties and judges are equally incapable of the implicit calculation I have elaborated.

Parties *do* value remedy clauses in some way. They apply reason and judgement in selecting amounts. And judges evaluate these amounts. But these amounts exist in a different conceptual space from the amounts compared by bargaining unconscionability, a space of future contingency rather than immediate obligation, and the only way to bring them together is to engage in the complicated procedure I numbered above to get at expected value. Judges as a matter of fact never attempt this. What judges and parties do in evaluating remedy clauses is simply and reasonably to compare their amounts to expected or actual losses (or other contractual interests). This requires no complex calculations of unknowable chances, because both loss and the remedy clause amount exist within the same contingency of breach.

C) Heaps and Schemes

What judges do in applying the penalty doctrine is much simpler than the calculations that would be required to balance remedy clauses against other terms in a contract, but it is still not simple. There are two kinds of remedy clause that should be treated differently: heaps and schemes. I will discuss them in turn. Before I do, I should clarify the problem that my categories help solve. Sometimes remedy clauses straightforwardly connect the breach on which they trigger with the remedy amount by compensating for a clear loss. For instance, if you are contractually obliged to hold onto my book till next week, we might set a remedy clause stipulating that you will pay me $100 if you fail to return the book. This might be our agreed value for the book, which I have lost. Such a clause can serve several purposes, including forestalling later arguments about the value of the book, or securing the special sentimental value of the book

which, we agree, the law's focus on market value would miss. Here there is no problem comparing the loss and the remedy amount, seeing that the clause is reasonable, and enforcing the clause.

But remedy clauses usually cannot connect remedy and loss in a clear way. Consider *Dunlop*. Each time New Garage undersold they owed Dunlop five pounds. Dunlop will not lose five pounds if New Garage undersells once. So, what is the connexion between the five pounds and any actual loss to Dunlop? "Heaps" and "schemes" represent two distinct answers.

It might be that Dunlop will suffer loss should New Garage breach *enough*. One breach does nothing, but what of ten? Or a hundred, or a thousand? At some point, Dunlop's price maintenance scheme is undermined, they lose market share, and they have suffered a significant loss indeed. This is a heap. We know that each breach contributes to the loss in some way, and we can craft a remedy clause to compensate for this loss, but we cannot say how much each breach contributed.

I call this a heap in reference to the "paradox of the heap", also known by its Greek name from antiquity, the "*sorites* paradox."[139] You see a pile of sand and know that it is a heap. Remove a grain—still a heap. Remove another—still a heap. And yet there will be some point at which you have only one or two grains left, and no heap at all. The grains added up to a heap even though we couldn't say what contribution each grain made. This is not just a matter of labelling what we call a "heap", because the concern can be practical. Richard Tuck gives the example of a shepherd building a cairn that they will use to guide them along a misty mountain path. The shepherd must carry up a certain number of heavy stones, one or two at a time, to build the cairn. And there will in fact be some point at which the cairn is effective to purpose. The pricing scheme in *Dunlop* is the same way. There are definite damages, eventually, but it is impossible to know what contribution any one instance of underpricing could make. This is also often the nature of remedy clauses for delays, and for noncompetition. If you delay enough, I have no book at all, but one cannot say what contribution each day's delay made to that loss. If you set up a rival practice to mine, each patient you see makes an inscrutable dent in my market share, but eventually I am out of business. Despite this uncertainty, the goal of a heap-type remedy clause is to compensate for this loss.

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[139] See Richard Tuck, *Free Riding* (Cambridge, MA: Harvard University Press, 2008) ch 3 and conclusion to Part I (on which my discussion draws).

There is no way around the heap paradox. While the examples I have given imply a remedy clause that triggers "per breach", the problem is the same whether approached from grain standpoint or pile standpoint, e.g., a clause that says five pounds per little breach vs a clause that says $60,000 for one big breach. If we set a single large remedy amount, the question becomes one of determining the threshold on which it will trigger. The case I am about to discuss features this difficulty. Clauses thus often look odd at the margins. You will either have an amount that looks high per breach, or a threshold that seems arbitrary for a single large breach. But in coming to a remedy amount, parties are in fact doing what it says on the tin. They are using their judgement to determine a reasonable pre-estimate of loss in order to compensate for it, in the same way that the shepherd uses their judgement to decide how many stones to carry up the hill. Later, judges can evaluate how good a job parties did by comparing reasonable pre-estimates or, if they are known, actual losses with the remedy amount and seeing if the clause is reasonably compensatory.

A good example of this type of reasoning is in the case of *Rhebergen v Creston Veterinary Clinic Ltd.*[140] There, a new vet, R, was hired and trained, signing in the process an employment contract with a non-competition clause. If R "set up a practice" within the prescribed range, they would owe a stipulated amount depending on the timing: $150,000 if set up within one year of termination, $120,000 if set up within two years, and $90,000 if set up within three years. These amounts have the character of a heap. If R were to set up a practice immediately, treat one cow, then die, there is no way that this would occasion $150,000 of loss. So, the threshold of "set up a practice" seems arbitrary. How is a judge to evaluate this clause? The method whereby the remedy amounts were determined was described:

> The amount … was calculated by Dr. McLeod and Mr. Wallis based primarily on their experience in hiring a former associate. They calculated the investment to be made in employing Dr. Rhebergen with respect to mentoring, training, and equipment (with training said to be an investment in her outside the mentorship), apart from her salary, would not be recovered unless she remained with the clinic for three years—hence the three-year term. They concluded the unrecoverable cost to the clinic in this regard if the agreement were terminated before Dr. Rhebergen had been there three years could amount to $90,000 or more, although that would vary depending when the termination occurred.
>
> They then calculated what they considered the impact on the clinic's goodwill and the volume of its business could be if Dr. Rhebergen were to compete for its clientele. They believed that after being introduced to and working with the clinic's clientele, she could be expected to take as much as 25% of its business,

140 *Supra* note 79.

> which would amount to perhaps $60,000 in revenue. They recognized that would decline if one or two years passed before she began to compete. Thus, the payment Dr. Rhebergen would have to make if she left the clinic before the term of the agreement expired and set up a practice within the stipulated radius totalled $150,000 declining to $90,000.[141]

Justice Lowry went on to hold that this was thus not a penalty.[142] This reasoning is exemplary, and the resort to the actual method whereby the amount was calculated is unusual, but the emphasis on practical reason and sound judgement should be emulated. If parties have reasonably agreed that a heap's a heap, then that's that.

Heaps do not offend the compensatory norm of contract law, in contrast to schemes. "Scheme" is a different answer to the question I asked about *Dunlop*: what is the connexion between five pounds and loss?[143] If the remedy clause is a scheme, the answer is that there is no connexion. The remedy amount is designed to deter a certain behaviour, to scare parties into compliance and thus maintain the scheme, and has nothing to do with compensation.

ParkingEye supplies the archetype. The 85£ for over-staying is not an attempt to assess the loss occasioned by Beavis. Beavis's over-staying occasioned no loss. If Beavis had parked in the lot permanently, there would still be no loss to ParkingEye. Of course, if many people over-stayed consistently, eventually there might be a loss to ParkingEye (presumably, ParkingEye would lose its contract with the mall for failing to effectively manage parking). But this loss cannot be said to result from Beavis's actions except together with the actions of many other parkers, and even then the loss comes indirectly through the contract with the mall. Unlike in a heap, there is no way that Beavis's actions could add up to real loss, and so compensating for such loss is not the purpose of the 85£ charge. The purpose is, in the old sense, punitive and *in terrorem*. Beavis is just one small participant in the scheme managed by ParkingEye.

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141 *Ibid* at paras 4–5 (Justice Lowry went on to hold that the clause was an unenforceable restraint of trade because of an ambiguity in the definition of the threshold, "sets up a veterinary practice." The other two judges agreed with Lowry on the penalty argument, but upheld the clause as not ambiguous, at para 71).

142 *Ibid* at paras 50–51.

143 Schemes can also exhibit the heap paradox (as probably in *Dunlop*, *supra* note 2), but have the added difficulty I describe. In one version of the old terminology, all schemes would be called "true penalty clauses" and not enforced. I use a different term in order to separate the question of their enforceability from how, if they are to be enforced sometimes, they should be evaluated.

This does not resolve the issue of whether and when schemes like this should be enforceable. In the UK, they can be. The measure of the enforceability of the scheme is a proportion between the remedy amount and the interest of the relevant party in maintaining that scheme.[144] But this is a policy decision that could well go the other way. I have already stated the reasons to be skeptical of private punishment. Of course, people are free to agree to punish each other (as e.g., they might do with a penalty kick in a game of sports), but this does not mean that courts and the institutional apparatus of the law should lend its billy clubs in support.[145] The situation in *ParkingEye* is like that in *Emkay Canada Fleet Services Corp v Gemini Corporation*, where Justice Slatter wrote:

> The law will allow the recovery of damages from a defaulting party to a contract. The recoverable damages, however, are the damages resulting from the proven breach of that contract by that defaulting party. The contracting parties are allowed to estimate the reasonable "liquidated damages" arising from that discrete breach. … [T]he contracting party cannot combine together the potential losses it might incur from breaches of all of its contracts of a particular class, and stipulate that it can recover those losses after a breach of any one of those contracts.[146]

As I have said, whether to lend court assistance to such private disciplinary regimes is a policy question. The traditional answer has been no, and my review of the Canadian cases does not suggest a change. At the time *Dunlop* was decided, we did not have the mass consumer and employment markets we have today where businesses attempt to use court-enforced penalties to discipline their customers and workers into compliance with the business's private interests. Should such schemes be allowed, the *Cavendish Square* test goes some way to providing a reasonable limit on their scope. Here too, a specialised doctrine has a role for remedy clauses because these cases are not about when compensation goes too far, but about the extent to which private disciplinary schemes will be allowed: penal, not pactional.[147] As such, there is no particular reason for a doctrine

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144 Note that *Cavendish Square*, *supra* note 5, was able to give a single test for both heaps and schemes because in the case of heaps the "legitimate interest" protected by a remedy clause is the compensatory interest in normal damages. The *Cavendish Square* test collapses to the *Dunlop* test, or something like it, in the case of heaps.

145 See *Imperial Parking Canada v Toronto (City)*, 2006 CanLII 17326 (ON SC) (regarding the similar Canadian company Impark, a court noted that the municipal parking enforcement system used the very same collection service for fines as the private company, at para 10, and it was alleged that Impark's "tickets" were meant to look like city tickets, at para 13).

146 *Supra* note 21 at para 74.

147 Benson, *supra* note 100 (seems to capture this point in insisting that the doctrine manifests "the nonwaivable policy of the law that requires damages to be compensatory in character and nothing else" at 209).

limiting these schemes to track contractual notions such as compensation, the sufficiency of consent or consideration, or parity of bargaining power. The *Cavendish Square* test still checks against unfairness in a sense, but it is not really a contractual unfairness. We are already outside of the normal workings of contract and its compensatory regime. Here is an unrelated kind of fairness, more akin to proportional sentencing for a regulatory offence. While my sympathy lies with Justice Slatter's reasoning in *Emkay* just quoted, this is ultimately an issue for the courts to clarify.

4. Conclusion

Stephen Waddams writes that a remedy clause can

> give an assurance of performance, while limiting liability for consequential damages and thereby making the cost of breach predictable[, …] avoid the cost of securing compensation by litigation, and … avoid the risks of undercompensation that may be caused by the legal restrictions on damages, such as remoteness, certainty of proof, mitigation, and failure to recognize intangible losses.[148]

All this is true of heaps but not of schemes. In this article, I hope to have clarified the state of the law on the penalty doctrine in Canada, and clarified what remains to be clarified by the courts. There is a genuine policy issue of whether to sanction private penal schemes in court, and our courts have not made clear whether they will depart from the precedential answer of "no" in the light of a changed market society and decisions like *Cavendish Square*. If the courts are going to put their full body behind an equitable approach to remedy clauses, they cannot simply apply bargaining unconscionability because its comparands are incommensurable in the case of remedy clauses without impracticable probabilistic computation. If courts are to move toward an analysis like that in forfeiture cases, this puts them again at odds with bargaining unconscionability, which considers the time of agreement rather than the time of enforcement. The factors that should be considered in assessing a remedy clause are those laid out in *Redstone*, including the reasonableness of the remedy amount, the relative bargaining positions of the parties, the actual losses where these are greatly out of proportion with what might have been expected, and, if penal schemes are to be enforced, the legitimate interest of the party maintaining the scheme. But in the matter of equity, nothing definite can be said about the necessity of any one factor.

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148 Waddams, "Contracts", *supra* note 3 at para 468. See also Waddams, "Damages", *supra* note 3 at 8.330.