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PENALTY CLAUSES THROUGH THE LENS OF UNCONSCIONABILITY DOCTRINE: *BIRCH V. UNION OF TAXATION EMPLOYEES, LOCAL 70030*

——CASE COMMENT——

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The author reviews the recent case of *Birch v. Union of Taxation Employees, Local 70030*, in which the Ontario Court of Appeal evaluated—in terms of the doctrine of unconscionability—the enforceability of a clause fining union members who cross picket lines during legal strikes. He applauds the decision as an important step toward jettisoning the traditional common law penalty doctrine, according to which stipulated remedy clauses designed to have an *in terrorem* effect upon a contracting party are per se unenforceable. The author criticizes the decision, however, for its failure to examine features of the case that would have been ignored under the penalty doctrine but that should have been prominent under the unconscionability doctrine. These features include: other provisions of the contract, the relative difficulty of arriving at "a genuine pre-estimate of the loss" as opposed to a "reasonable penalty", and the process by which the contract was formed. The author concludes that, in failing to examine these features, the court missed an opportunity to clarify the changing law on the enforceability of stipulated remedy clauses.

L'auteur analyse l'arrêt *Birch v. Union of Taxation Employees, Local 70030* dans lequel la Cour d'appel de l'Ontario a évalué sous l'angle de la théorie de l'iniquité la validité d'une clause imposant une amende aux membres d'un syndicat qui traversent la ligne de piquetage lors d'une grève légale. L'auteur approuve la décision de la cour, qu'il considère comme un pas significatif vers la possibilité de se défaire de la doctrine traditionnelle des clauses pénales de la *common law* selon laquelle les clauses destinées à avoir un effet *in terrorem* sur une des parties au contrat étaient réputées impossibles à exécuter. L'auteur critique néanmoins le jugement pour avoir ignoré certains aspects de la situation ; des éléments auxquels la doctrine traditionnelle des clauses pénales ne s'intéresse pas, mais qui, du point de vue de l'auteur, auraient dû être examinés sous l'angle de la théorie de l'iniquité. Parmi ces éléments, l'auteur soutient que la cour aurait dû se pencher sur les autres clauses du contrat, sur la difficulté d'évaluer les coûts anticipés de la réparation du préjudice et sur le processus de formation du contrat. L'auteur conclut que, parce que la cour n'a pas examiné ces éléments, elle a manqué une occasion de faire évoluer la *common law* dans le domaine de la mise en œuvre des clauses pénales.

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Introduction

Do advances in legal doctrine matter? Will it make a difference if courts begin to analyze a particular legal problem under the rubric of one doctrine rather than another? In theory, new doctrinal lenses should bring different features of the problem into focus, and this should in turn lead judges to form different impressions of how the problem ought to be resolved. The Ontario Court of Appeal's recent decision in *Birch v. Union of Taxation Employees, Local 70030* casts doubt on this hypothesis.[1] The majority's decision in the case suggests that changing the doctrine used to analyze the enforceability of stipulated remedies will not necessarily affect the outcomes of future cases. Changing outcomes may require a more fundamental shift in judges' understandings of stipulated remedies and their role in contractual relationships.

Birch was preceded by a path-breaking line of cases in which Canadian appellate courts signalled their willingness to depart from the strict common law rule against enforcing a stipulated remedy that amounts to a penalty rather than a genuine pre-estimate of damages.[2] Those cases marked a positive development in Canadian contract law, as adherence to the traditional rule against penalty clauses is difficult to justify. This is not to say that all penalty clauses ought to be enforced. But some of them should be enforced, while the reasons not to enforce the rest are more or less the same as the reasons not to enforce other contractual provisions. Consequently, doctrines such as unconscionability, mistake, and *contra proferentem* ought to be capable of addressing concerns relevant to the enforceability of stipulated remedies. There is no need for a rule that singles out penalty clauses for special treatment. Prominent commentators have

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1 2008 ONCA 809, 93 O.R. (3d) 1, 305 D.L.R. (4th) 64 [*Birch*], leave to appeal to S.C.C. refused, 32989 (7 May 2009).

2 See especially *Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385, 273 D.L.R. (4th) 508 at para. 24, 56 B.C.L.R. (4th) 230 [*Coal Harbour*] (the decision to grant relief against a penalty depends on whether to enforce the penalty would be unconscionable); *Peachtree II Associates—Dallas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362, (*sub nom. 869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership*) 256 D.L.R. (4th) 490 (C.A.) [*Peachtree II* cited to O.R.] ("I agree with Professor Waddams' observation in *The Law of Damages* that as there is often little to distinguish between [penalties and forfeitures] and that there is much to be said for assimilating both under unconscionability. The effect of assimilation would be 'to provide a more rational framework for the decisions of both forfeitures and penalties'" at para. 32 [reference omitted]), leave to appeal to S.C.C. refused, 31126 (19 January 2006); *Elsley Estate v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1 ("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" S.C.R. at 937). It is important to note that all but the first of these cases dealt with this issue in *obiter dicta*.

long endorsed this position,[3] and Canadian courts and legislatures are cautiously beginning to take heed.[4] This question remains: will analyzing stipulated remedies through the lens of unconscionability rather than the penalty doctrine make any difference in the outcome of decided cases?

I. The Decision in *Birch*

Most reported disputes concerning stipulated remedies arise in commercial settings. The dispute in *Birch* is an exception. According to the agreed facts, the applicants were employees of the Canada Revenue Agency and members of the Union of Taxation Employees (UTE), a component of the Public Service Alliance of Canada (PSAC). UTE brought disciplinary proceedings against the applicants for violating the PSAC constitution by crossing a picket line to work during a legal strike by PSAC. The PSAC constitution provides that the punishment for this sort of offense

> shall include the imposition of a fine that equals the amount of daily remuneration earned by the member, multiplied by the number of days that the member crossed the picket line, performed work for the employer or voluntarily performed struck work.[5]

Pursuant to this and other provisions of the constitution, the union suspended the applicants for three years (one year for each day that they crossed the picket line) and fined them each an amount equivalent to their gross salary for the three days they crossed the picket line. The ap-

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[3] See S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at 320-32. For a historical overview and explanation of the development of the penalty doctrine, and suggested alternative legal principles, see Charles J. Goetz & Robert E. Scott, "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach" (1977) 77 Colum. L. Rev. 554.

[4] New Brunswick has enacted legislation that was intended to reform the common law rule against enforcement of penalty clauses. See *Law Reform Act*, S.N.B. 1993, c. L-1.2 ("A party to a contract may enforce a penalty clause or a liquidated damages clause to the extent that it is reasonable in all of the circumstances that the clause should be enforced" at s. 5(1)); *Mortgage Makers v. McKeen*, 2009 NBCA 61, 312 D.L.R. (4th) 82 ("s. 5(1) of the *Act* effects a fundamental change in the common law regarding the enforceability of penalty and liquidated damages clauses" at para. 3), rev'g 2008 NBQB 327, 339 N.B.R. (2d) 215. See also Timothy Rattenbury, "Reforming (or Should That be Re-forming?) the Common Law: Some Notes on the Law Reform Act" (1994) 11:1 Solicitor's Journal (N.B.) 8. I am grateful to Edward Veitch for bringing this body of law to my attention.

[5] *Birch*, *supra* note 1 at paras. 38-39, 64-65, 75 (citing the PSAC Constitution, s. 25(3)). See also *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, 221 D.L.R. (4th) 651 [*Berry*] (holding that the relationship between a union and its members is contractual in nature).

plicants refused to pay the fine and the union sought to enforce its rights in the Small Claims Division of the Ontario Superior Court of Justice. The applicants applied for a declaration that the fines were unenforceable. The application judge declared that the clause was not only a penalty clause but also unconscionable, and thus unenforceable on both counts.[6] He went on to conclude that in the absence of legislation, no such fine could be enforced.[7] At the Ontario Court of Appeal, Justice Armstrong dismissed the union's appeal from the decision of the application judge, with Justice Rouleau concurring. Justice Juriansz dissented.

Birch may be regarded as a noteworthy case in the development of Ontario labour law on account of its impact on the balance of power between both unions and their members, and unions and employers. It may also be of more general importance. The Ontario Court of Appeal premised its decision on the notion that the relationship between the applicants and their union was governed by principles of contract law and that no special statutory provisions were applicable to the case at hand.[8] Consequently—if it is taken at face value—the decision in *Birch* has significant ramifications for the development of contract law in Ontario, and perhaps elsewhere too.

Birch is a noteworthy case in the law of contracts because it represents an important step toward jettisoning the penalty doctrine. At first glance, the significance of the decision may not be immediately obvious. The court declined to rule on either the application of the penalty doctrine to the particular facts of the case or whether the general rule against penalty clauses should be abolished. Both the majority and the minority explicitly endorsed the abolition of the strict rule against enforcing penalty clauses, but only in the context of union constitutions.[9] What is, however,

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6 See *Birch v. Union of Taxation Employees, Local 70030* (2007), 288 D.L.R. (4th) 424 at para. 60 (Ont. Sup. Ct. J.).

7 See *ibid.*

8 See *Birch*, *supra* note 1 at para. 14. See also *Berry*, *supra* note 5 at para. 48 (establishing ordinary principles of contract law).

9 See *Birch*, *supra* note 1. Armstrong J.A. held, "While I agree with the view that a union constitution represents a different kind of contract between a union and its members and that a penalty clause is not necessarily unenforceable in accordance with the common-law rule, I see no reason to suggest that the law of unconscionability does not apply to these kinds of agreements" (*ibid.* at para. 38). However, he prefaced those remarks by writing, "Whatever may be said of the facts of this case, it is not a typical commercial case and I would not wish to be taken as suggesting that what follows is intended to be general authority for sounding the death knell for the rule against penalty clauses" (*ibid.* at para. 37). Juriansz J.A. held, "While, like Armstrong J.A., I would decline to make a sweeping pronouncement that the rule against penalty clauses is no longer applicable to the law of contract generally, I would conclude the common-law rule against penalty clauses does not apply to a union constitution" (*ibid.* at para. 100).

more significant about *Birch* is that when confronted with a challenge to the enforceability of a stipulated remedy, all of the members of the court expressly endorsed the idea that the problem could be analyzed using the doctrine of unconscionability. In doing so they bolstered the respectability of an approach that had previously been adopted only in *obiter dicta* and secondary literature.[10] By making a serious effort to map out how the enforceability of stipulated remedies might be analyzed under the rubric of unconscionability, the members of the Ontario Court of Appeal probably did a great deal to make other judges comfortable with the new approach—the first step toward convincing them to abandon the penalty doctrine.

Another encouraging feature of the decision is the fact that both the majority and the minority agreed on the basic contours of the unconscionability doctrine. Justice Armstrong approved of the decision's holding that "a determination of unconscionability involves a two-part analysis—a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness."[11] Justice Juriansz agreed with Justice Armstrong's review and formulation of the test for unconscionability, but emphasized that the unfairness must stem from an inequality of bargaining power.[12] The majority and the minority also agreed—perhaps too hastily (more on this below)—that this particular contract was characterized by an inequality of bargaining power, noting that when it was formed the applicants were unable "to negotiate or change its terms."[13] Unfortunately, the court did not resolve the perennial question of whether unfairness is to be assessed by reference to circumstances at the time the stipulated remedy is invoked (the approach adopted in equity when determining whether it would be unconscionable to deny relief from forfeiture), or the circumstances prevailing when the parties entered the contract.[14] Nonetheless, the Ontario Court of Appeal's

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10 See *supra* note 3. Compare *Telecommunications Workers Union Local 2002 v. Macmillan*, 2008 ABQB 657, 458 A.R. 367 at paras. 35-40, 97 Alta. L.R. (4th) 393, leave to appeal to S.C.C. refused, 32940 (7 May 2009). Here, in contrast to *Birch*, the Alberta Court of Queen's Bench upheld a lower court's refusal to enforce a union's fine primarily on the grounds that it was a penalty rather than a genuine pre-estimate of compensatory damages. In this case, however, unlike in *Birch*, the union's constitution left the fine's quantum to be determined by the trial board rather than specifying either the amount of the fine, or a formula for its calculation (*ibid.* at para. 6).

11 *Birch*, *supra* note 1 at para. 45.

12 *Ibid.* at para. 79.

13 *Ibid.* at paras. 50, Armstrong J.A., 81, Juriansz J.A.

14 See *Peachtree II*, *supra* note 2 at para. 25; *Dimensional Investments Ltd. v. Canada* (1967), [1968] S.C.R. 93 at 100-101, 64 D.L.R. (2d) 632 [*Dimensional*]. For an overview of the debate from an Anglo-Canadian perspective, see Waddams, *supra* note 3 at 388.

consensus on the basic test for unconscionability should help allay concerns that unconscionability offers too vague or indeterminate a standard to replace the bright-line rule embodied in the penalty doctrine.

So where did the majority and the minority part ways? Essentially, they disagreed about the significance of two factors bearing on the unfairness of the penalty clause. First, they disagreed about the significance of the fact that the applicants could have avoided the fines by resigning from the union before crossing the picket line. If the applicants had resigned they would not have sacrificed any of the employment benefits enjoyed by other members of the bargaining unit, but they would have lost the ability to participate in union governance. For Justice Juriansz, this meant that the liability found unconscionable by the application judge stemmed from the applicants' decision not to resign from the union rather than from any lack of bargaining power.[15] Meanwhile, the majority believed that the presence of the option to resign was irrelevant to the analysis of whether the penalty clause was unconscionable: "The penalty clause in the union constitution is either unconscionable or it is not."[16] They rejected the view that a fine that would otherwise be clearly unconscionable could be saved by giving union members the option to resign before crossing a picket line.[17]

A second point of disagreement stemmed from the fact that Justice Juriansz was not convinced that a fine equal to the applicants' gross pay was necessarily disproportionate to the damage suffered by the union as a consequence of the breach. He acknowledged that the damage suffered by the union was difficult to estimate, but rejected the conclusion that the task was impossible. He accepted that the applicants harmed the union by "diminishing its strength in its economic struggle with the employer."[18] He also accepted that "[t]he amount by which the union's strength has been diminished is equal to the quantity of labour provided to the employer," and that "[t]he best measure of the labour provided to the employer is the amount that the employer paid for it."[19] Consequently, he concluded that a fine equal to the applicants' gross pay was "a reasonable,

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The lack of consensus in American law is reflected in the *Uniform Commercial Code* (U.C.C. § 2-718(1) (1995)) and the *Restatement (Second) of Contracts* (§ 356(1) (1981) [*Restatement*]), which state that damages must be reasonable in light of the "anticipated or actual" loss caused by the breach. This topic is beyond the scope of this comment.

15 *Birch*, *supra* note 1 at para. 86.

16 *Ibid.* at para. 61.

17 *Ibid.*

18 *Ibid.* at para. 94.

19 *Ibid.*

if not a particularly apt" pre-estimate of the union's damages from the breach.[20] Justice Armstrong dismissed this argument summarily on the grounds that no evidence had been adduced—"not a scintilla"—of any damage to the union or its members.[21]

II. Missed Opportunities

The majority's opinion fails to realize the potential benefits of using the doctrine of unconscionability rather than the penalty doctrine as the lens through which courts can analyze the enforceability of stipulated remedies. The majority could have used the new lens to examine features of the case that would have been overlooked in an analysis conducted exclusively through the penalty doctrine. Instead, it dismissed those features as irrelevant to its analysis. The dissent picked up on some but not all of the missing points.

Which features of the case were neglected? To begin with, a central problem with penalty doctrine, at least in its traditional form, is that it determines the enforceability of stipulated damages clauses without reference to other terms of the contract. For instance, it ignores the possibility that the prejudicial impact of a penalty clause on a breaching party has been offset by a benefit such as a price reduction conferred by another term of the contract.[22] By contrast, a determination of unconscionability typically entails an examination of all the terms of the contract.[23] The ability to undertake a holistic analysis of the problem is a key advantage

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[20] *Ibid.* at para. 95.

[21] *Ibid.* at para. 63.

[22] See e.g. *Ringrow Pty Ltd. v. BP Australia Pty Ltd.*, [2005] HCA 71, 224 C.L.R. 656 at paras. 37-38 (confirming that the penalty doctrine may be applicable even when a clause that would otherwise amount to a penalty has been offset by a reduction in the purchase price). For a much less traditional approach to the penalty doctrine, see *Murray v. Leisureplay Plc*, [2005] EWCA Civ 963, [2005] IRLR 946 at paras. 54, 71-76 [*Murray*] (permitting a stipulated remedy to be enforced even though it exceeded a genuine pre-estimate of the damages in part because other terms of the contract conferred benefits on the breaching party). For a discussion of why parties may agree to pay penalties in exchange for concessions on other terms of a contract, see Robert E. Scott & George G. Triantis, "Embedded Options and the Case Against Compensation in Contract Law" (2004) 104 Colum. L. Rev. 1428.

[23] See e.g. *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496 (relief from an exclusionary clause should be granted only if the clause is unconscionable seen "in light of the entire agreement" O.R. at 10); *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231, 9 B.C.L.R. 16 (C.A.) (Lambert J.A. holding: "[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" D.L.R. at 241).

of using the unconscionability doctrine instead of the penalty doctrine to determine the enforceability of stipulated remedies.

In the present case, a holistic analysis of the enforceability of the stipulated remedy issue would have involved considering its interaction with the provisions governing members' rights to resign. The contract essentially gave the applicants the right to elect between two potential sanctions for strike breaking: being excluded from the benefits of union membership, or paying the prescribed fine. It thus seems artificial to determine whether they were the victims of abuse without considering the substance of their options. Such an evaluation would not predetermine the outcome of the analysis. As Justice Armstrong noted in passing, being excluded from the benefits of union membership "is a significant penalty in itself."[24] If the court concluded that forced resignation from the union would have been an unconscionable penalty for breach, then the presence of an option to resign could not buttress the case for enforcing the provision calling for a fine. Therefore, my complaint here is not that the majority in the Ontario Court of Appeal or the court below reached the wrong conclusion on the facts of the case. Instead, my concern is about the reasons offered in support of that conclusion. By dismissing the option to resign as irrelevant to the unfairness branch of its unconscionability analysis, the majority perpetuated the unduly narrow analytical frame that is one of the most problematic features of the penalty doctrine.

The second point of disagreement between the majority and minority also reflects the majority's exceptionally narrow conception of the factors relevant to the enforceability of a stipulated remedy. A common complaint about the penalty doctrine is that, at least in its stricter forms, it ignores some of the benign reasons why parties adopt stipulated remedies that provide for damages higher than the losses that can be proved at trial.[25] For instance, in some cases, damages suffered as a result of breach of contract are virtually impossible to prove. This supports the conclusion that it is reasonable to enforce stipulated remedies adopted in circumstances where actual losses are likely to be difficult to prove, so long as they qualify as a genuine pre-estimate of damages.[26] On this view, difficulty of proving actual loss ought to be treated as a factor that weighs in favour of enforcing a stipulated remedy that otherwise appears to operate as a pen-

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[24] *Birch*, *supra* note 1 at para. 57.

[25] See generally Aaron S. Edlin & Alan Schwartz, "Optimal Penalties in Contracts" (2003) 78 Chicago-Kent L. Rev. 33.

[26] See *Coal Harbour*, *supra* note 2 at para. 10.

alty.[27] In *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, however, the Supreme Court of Canada adopted a strict version of the penalty doctrine and refused to treat the difficulty of proving actual losses as a factor pointing toward the conclusion that the stipulated damages clause in question was enforceable.[28] Operating under the rubric of the doctrine of unconscionability, the court in *Birch* had an opportunity to take a different view. Instead, the majority opinion left the impression that, on account of the potentially significant impact of the fine on the applicants, the onus was upon the union to show that the fine was proportional to the union's actual damages. The court thus construed the doctrine of unconscionability as no more open to arguments based on difficulty of proving loss than the strictest version of the rule against penalty clauses.

The minority unhelpfully tried to deny or at least downplay the difficulty of determining the union's losses resulting from the breach. Justice Juriansz seemed satisfied that the union had met the burden of showing that the fine was proportional to its actual losses, but the arguments he endorsed are weak. It is eminently plausible that breaking a strike would cause damage to the interests of a union and its members by altering the relative bargaining power of the union and the employer during a strike, and ultimately reducing the tangible benefits the union can secure through collective negotiations. However, Justice Juriansz's suggestion that the magnitude of the effect on relative bargaining power would be "equal to the quantity of labour provided to the employer" entails an indefensible leap of logic.[29] By crossing the picket line, strike breakers benefit the employer to the extent that they are less costly or more skilled than replacement workers. Strike breakers enhance employer's bargaining power by reducing the cost of the strike. In addition, to the extent that strike breaking reduces union solidarity, it may reduce the anticipated length of the strike, which simultaneously reduces the employer's willingness to bargain, and increases the union's willingness to do the same. It seems reasonable to presume that the magnitude of these effects will be significant. Yet there is no evident reason to presume that the damage will correspond even roughly to the quantity of labour supplied to the employer. The more defensible conclusion is that none of these potential losses are amenable to calculation or proof at trial.

By ignoring or denying the difficulty of calculating and proving compensatory damages, both the majority and the minority missed an oppor-

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[27] See *Dimensional*, *supra* note 14 at 100; *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1915] A.C. 79 at 87-88, [1914-1915] All E.R. Rep. 739 (H.L.) [*Dunlop*]. See also *Restatement*, *supra* note 14.

[28] (1974), [1976] 1 S.C.R. 319 at 338-39, 3 N.R. 133 [*H.F. Clarke*].

[29] *Birch*, *supra* note 1 at para. 94.

tunity to explore whether, in the presence of these factors, a system of contract law freed of the strictures of the penalty doctrine can justify enforcing stipulated remedies on the ground that they are reasonable penalties rather than genuine pre-estimates of compensatory damages. Such an approach would be consistent with the civil law's treatment of penalty clauses under article 1623 of the *Civil Code of Quebec*.[30] The union does not appear to have adopted this argument. But it could well have argued that when breach is likely to cause significant but incalculable losses, a party should be permitted to stipulate damages expressly designed to deter rather than compensate for breach.[31] Only the most liberal articulations of the traditional penalty doctrine go that far.[32]

I do not mean to suggest that this would necessarily have been a winning argument for the union. One would think that a fine equal to the applicants' net pay would be a sufficient deterrent (and in fact, the clause could easily be construed to refer to net rather than gross pay). The question of whether the union could have been required to seek injunctive relief against the applicants also remains open. It is conceivable, however, that the union could have shown that injunctive relief was inappropriate or unavailable. The imposition of a fine equal to gross pay might then have been defended on the theory that it was necessary to deprive the applicants of the time value of money, or that the difference between net pay and gross pay for each employee would have been too difficult to calculate.

Another criticism of the penalty doctrine is that it treats as irrelevant the process by which a contract that contains a stipulated remedy has been formed. The traditional rule dictates that a penalty clause is unenforceable per se, regardless of the sophistication of the parties to the contract (or lack thereof), the alternatives they faced, or how much time they spent negotiating the clause.[33] One of the attractions of employing the un-

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[30] See also Aristides N. Hatzis, "Having the Cake and Eating It Too: Efficient Penalty Clauses in Common and Civil Contract Law" (2002) 22 Int'l Rev. L. & Econ. 381.

[31] For a narrower formulation of this argument, see Gregory Klass, "Contracting for Cooperation in Recovery" (2007) 117 Yale L.J. 2.

[32] See *Murray*, *supra* note 22 at paras. 54, 69-76 (permitting a stipulated remedy to be enforced even if it provides for an amount that exceeds a genuine pre-estimate of the damages if the discrepancy is justified for some other reason). *Cf. Dunlop*, *supra* note 27.

[33] See e.g. *H.F. Clarke*, *supra* note 28 at 330 (penalty doctrine applies even to contracts between businessmen or business corporations with relatively equal bargaining power). See also *Imperial Tobacco Co. Ltd. v. Parsley*, [1936] 2 All E.R. 515 (C.A.) (inequality of bargaining power is irrelevant to the analysis of whether the clause was a penalty clause); John Carter & Elisabeth Peden, "A Good Faith Perspective on Liquidated Damages" (2007) 23 J. Cont. L. 157 at 162.

conscionability doctrine in this context is that it explicitly calls for analysis of the procedural as well as the substantive elements of the contract.[34]

Unfortunately, the majority in *Birch* paid scant attention to the process by which the contract between the union and the applicants was formed. In concluding that the process involved inequality of bargaining power, it focused exclusively on the fact that the terms were not negotiable before the applicants joined the union. They appear to have been led in this direction by a recent Supreme Court of Canada decision in which Justice Iacobucci characterized a member who was unable to bargain over the terms of his contract with the union as having "no bargaining power".[35]

The fact that the process by which a contract was formed did not involve an opportunity to negotiate its terms—in other words, that it is a contract of adhesion—is neither sufficient nor necessary to justify special scrutiny of the contract's substance.[36] In principle, unconscionability doctrine should enable an evaluation of the contract's terms that incorporates factors relevant to its formation.

The majority failed to realize this principle in several respects. To begin with, the presence of viable alternatives to the signing of a contract can offset the effects of an inability to negotiate. Those alternatives might involve contracting with a competitor (e.g., the price of dry cleaning may not be negotiable, but in a city where there is a dry cleaner on every corner it seems wrong to conclude that customers suffer from inequality of bargaining power).[37] When it comes to contracts between unions and prospective members, contracting with a competing union is not a viable alternative for the workers. But, at least according to Justice Juriansz, not contracting with any union at all may have been a viable alternative. This in turn raises the argument that the need to attract members would automatically induce unions to offer reasonable terms of membership, even without any explicit negotiation. Justice Juriansz raised but did not press this position.[38] Of course, this argument may ultimately have

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[34] Some commentators recommend that the focus be placed almost exclusively on the process by which the contract was formed. See Goetz & Scott, *supra* note 3. For details regarding the unconscionability doctrine, see generally Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171.

[35] *Berry*, *supra* note 5 at para. 49.

[36] See M.J. Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 U.T.L.J. 359.

[37] *Ibid.*

[38] See *Birch*, *supra* note 1 at paras. 80-81. I argue that Juriansz J.A. did not press the issue because he conceded that it followed from prospective members' inability to negotiate that there was an inequality of bargaining power (*ibid.*).

proven to be ill-founded; it may have been unreasonable to expect the applicants to stay out of the union. But for the sake of clarifying the law, the Ontario Court of Appeal should have indicated that it was worth examining the applicants' opportunities to avoid signing the contract.

Other features of the contracting process also warrant attention in determining procedural unconscionability. In particular, in deciding whether to enforce an onerous contractual provision, it seems important to consider whether and to what extent the disadvantaged party was informed of its existence and significance. Whether onerous terms were buried in the fine print of a lengthy agreement (as opposed to highlighted in bold font, marked with a big red arrow, and accompanied by an oral warning), and whether the parties were likely to be familiar with the terms in question by virtue of their past experience, are typically highly relevant in determining whether a contract is tainted by unconscionability.[39] Yet none of the opinions in *Birch* address these topics.

III. Should the Court's Reasoning Be Taken at Face Value?

So far I have taken the Ontario Court of Appeal at face value when it stated that it would analyze the enforceability of the stipulated remedy provision through the lens of the generally applicable doctrine of unconscionability. But this may be a misreading of their decision.[40] Perhaps the members of the majority felt obliged to pay lip service to the new approach to stipulated remedies but remained sympathetic to the traditional penalty doctrine and its bright-line clarity. Or perhaps they concluded that the unconscionability doctrine has some merit but that the nuanced analysis applied in other unconscionability cases was inappropriate for a case involving stipulated remedies in a contract of adhesion. Finally, perhaps the court was moved by considerations specific to the labour law context. These might include unstated factual assumptions about the circumstances of unions and their members, or a lingering reluctance to have the relationship between unions and their members defined by courts as opposed to either the legislature or the parties' arrangements. I am inclined to take the majority's opinion at face value. However, if I am wrong and these sorts of unarticulated considerations did influence their ruling, then the majority in the Ontario Court of Appeal missed more opportunities to clarify the law than I suggest above.

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39 See e.g. *Calloway Reit (Westgate) v. Michaels of Canada*, 2009 CanLII 7760 at para. 97 (Ont. Sup. Ct. J.) (no inequality of bargaining power where disadvantaged party was a sophisticated commercial developer familiar with penalty clauses and represented by a sophisticated leasing agent), aff'd on other grounds 2009 ONCA 713.

40 I am grateful to two anonymous reviewers for encouraging me to address these alternative interpretations.

Conclusion

By this point, my central concern about the majority opinion in *Birch* should be clear: the opinion misses several opportunities to examine features of the case that would have been ignored under the penalty doctrine but ought to have been prominent once the issue in the case was framed in terms of unconscionability. Those features include: other provisions of the contract; the relative difficulty of arriving at a genuine pre-estimate of the loss as opposed to a reasonable penalty; and the process by which the contract was formed. By failing either to examine those features of the case or to explain why they could be safely ignored, the court missed an opportunity to clarify the law.

Employing the unconscionability doctrine instead of the traditional penalty doctrine was a bold and valuable step. But the potential benefits of that innovation will not be realized so long as courts' vision continues to be occluded by the remnants of the penalty doctrine.