The Doctrine of Unconscionability in Canadian Contract Law

Since this request for “the best materials on the doctrine of unconscionability in Canadian contract law” has been framed as coming from a senior partner “concerned about the quality of research done by one of her articling students,” I have focused my own research on finding material that would not only be current and authoritative, but would also address ongoing issues related to the doctrine of unconscionability in Canadian contract law.

Books

There are a number of regularly republished textbooks intended to serve as introductions and/or overviews of contract law in Canada. All of these would work for our purpose of meeting the needs of the senior partner’s articling student, but three new editions of volumes by Waddams, McCamus and Swan and Adamski stand out in meeting the above criteria for our senior partner.¹ Each of these large volumes on contract law includes a discussion of relevant and recent cases related to the development of the doctrine of unconscionability. They each discuss ongoing issues and provide possible points of development for the future. I began my search for these volumes with the guide for contract law on the Bora Laskin library website. I recorded the authors and titles of the volumes listed there and entered these into the online library catalogue in order to obtain the subjects for each volume so that I could conduct a subject search to get as many similar titles as possible. As I started skimming these volumes I conducted a broad search for journal articles, searching for “unconscionability and Canada” and other iterations. By skimming the books and a sampling of articles I determined the major issues related to unconscionability that came up most frequently. I made my final choices based on currency, frequency of citation and the thoroughness with which key issues were treated. Moving forward, I now have a large database of my own on the subject.

Each of these three volumes states that the doctrine of unconscionability is established in Canada and is therefore not questioned in court. However, each also demonstrates that the doctrine needs to be discussed in relation to the broader area of “protection of weaker parties” and more specifically to similar but distinct issues, namely “duress” and “undue influence.” The recognition that the doctrine of unconscionability is established in Canada, but is still developing, unstable and prone to being blurred with either duress or undue influence, is important given that unconscionability has developed differently in the common law of England (where it is less established) and in Australia (where there is no blurring between unconscionability and undue influence). The three volumes that I recommend are all richly cited and include lengthy discussions of the cases most frequently discussed in relation to the doctrine of unconscionability, such as Lloyd’s Bank v. Bundy (1975) and Harry v. Kreutziger (1978).

Articles
The three articles that I have chosen are all current and speak to the renewed interest and possible future development of the doctrine of unconscionability in Canadian contract law.

Stephen Waddams has written an important and concise article on unconscionability which gives an historical overview of the development of the doctrine in Canada from antecedents in England. According to Waddams, the main concern from the common law perspective has been to define unconscionability in such a way that it would be hemmed in by the necessity of proving “inequality of bargaining power, and undue advantage taken of it” so that the doctrine would not be abused. This historical preoccupation stems from the fact that the doctrine can be applied to all types of contracts, but that it should only be used in exceptional cases or else the courts will be swamped with cases. To

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2 Waddams, supra note 1 at § 542-44; McCamus, supra note 1 at 436-37 and 449-450; Swan & Adamski, supra note 1 at § 9.98.
3 Waddams, supra note 1 at § 509-522; McCamus, supra note 1 at 378; Swan & Adamski, supra note 1 at § 9.118 (Swan & Adamski deviate from other commentators to the extent that they separate duress from the discussion of unconscionability at § 2.155).
5 Waddams, supra note 1 at § 523 and 525; McCamus, supra note 1 at 379-80 and 428; Swan & Adamski, supra note 1 at § 9.106 and 9.111-16.
7 Ibid at 385.
emphasize this point, Waddams and others have highlighted the recent case of *Tercon Contractors* as relevant to discussion about the future direction of unconscionability and contract law in Canada.\(^8\)

Alexander J. Black's essay also provides an historical overview of the doctrine, tracing its development from the more settled doctrine of undue influence in England, and discusses the frequent difficulty with regard to distinguishing between the two doctrines.\(^9\) Black goes so far as to argue: “In Canada, the relationship between undue influence and unconscionability might benefit from judicial restatement. While the doctrine of undue influence appears settled, there is lack of precision in defining its relationship to the sporadic practice of using unconscionability as a basis for rescinding agreements.”\(^10\) The appeal of such a restatement, according to Black, would stem from the ability of lawyers and litigants to better predict, and hence avoid, the circumstances that occasionally lead to the rescinding of agreements due to unconscionability.

Black points to the importance of a recent case that is the subject of the third article we will look at, *Birch v. Union of Taxation Employees, Local 70030*. Both Black and Davis point to this case as an example of a missed opportunity to strengthen and clarify the doctrine of unconscionability.\(^11\) Davis does portray the ruling as a step-forward in further establishing the doctrine, since both the majority and the minority were in general agreement about the overall shape of unconscionability.\(^12\) Nevertheless, Davis argues, even greater strides could have been made to strengthen the doctrine of unconscionability, which would have been a benefit to contract law by supplanting penalty doctrine.\(^13\)

With regard to using Summon and law journal indexes for this project, it is clear that law journal indexes are far more powerful and more efficient search tools. While a search in Summon of “unconscionability – Canada” does yield a substantial number of sources (903), this is far less than the number of sources yielded by the same search using databases from HeinOnline, Quicklaw or Westlaw.

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\(^8\) *Ibid* at 392; see also Swan & Adamski, *supra* note 1 at § 9.99.

\(^9\) Black, *supra* note 4 at 67-68.

\(^10\) *Ibid* at 65.


\(^12\) Davis, *supra* note 11 at 156.

\(^13\) Davis, *supra* note 11 at 158
Canada. Furthermore, some of the databases, such as HeinOnline, list the number of times the article has been cited under the entry for each article on the results page. The options that a researcher has for sorting results are more numerous with Hein, Quicklaw and Westlaw than for Summon. Therefore, with the law journal indexes a researcher can sort by relevance, date (for currency) and most frequent citation (as a way to determine authority) and get a better idea of which journal articles fulfill these criteria, whereas with Summon it is more difficult to estimate if an article is both current and more frequently cited. With regard to efficiency of searching, for our purposes using Westlaw Canada’s Index to Canadian Legal Periodical Literature (ICLL) ensures that any search will be limited geographically to Canada; furthermore, ICLL provides the researcher with a clear and straightforward way to narrow a search, after completing a broad survey, with a few simple clicks limiting the search by document type and timeframe. I was impressed by the ability of these databases to switch between very broad and very narrow searches while allowing the user a great degree of freedom to tailor searches given the research needs of the moment.

**Encyclopedia**

The most relevant paragraph from *Halsbury’s Laws of Canada* is under the entry for “unconscionability” which is related to “duress” and “undue influence.” All three of these terms are collected together as “specific methods” under the title of “unconscionability and the protection of the vulnerable parties.” That Halsbury’s links these other two terms with unconscionability, as similar but distinct doctrines, fits with what we have seen in the books and articles generally above and is a helpful guide in teasing out the subtle differences between these concepts. Halsbury’s is well indexed, finding the term unconscionability was easy. The entry is well written and amply supported by citations.

The main problem with the Canadian Encyclopedic Digest (CED) with regard to the doctrine of unconscionability in contract law is that the index lists unconscionability under the main entry for “contracts” (p. 110) but does not list a separate entry for the term itself. The closest term in the index is...

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14 Halsbury’s Laws of Canada, “Contracts”, at § HCO-144.
15 Ibid at § HCO-143
“unconscionable transactions” which gives a see also reference to a number of other main entries, such as “fraud and misrepresentation” and “restitution” (p. 672) but not to contracts. The researcher would have to have prior knowledge that the doctrine of unconscionability was a part of contract law. However, the entry in the contracts volume of the CED for “unconscionability” is well written and lists more cases and statutes than Halsbury’s. Overall, I preferred reading Halsbury’s, but I found both titles adequate.

**Carswell’s Words and Phrases**

The clearest definition of “unconscionability” in Carswell’s *Words & Phrases* can be found under the entry for the term “unconscionability”: “Where a claim is made that a bargain is unconscionable, it must be shown . . . that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain.” This definition only addresses one aspect of the doctrine of unconscionability, but this is the cusp of what differentiates unconscionability from duress and undue influence.

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16 CED (Ont 4th), vol 13, title 35 at § 543