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Penalty Clauses Through the Lens of Unconscionability Doctrine:

Birch v. Union of Taxation Employees, Local 70030

Kevin E. Davis\*

#### 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 and improved 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. The majority's decision in the case suggests that change in the doctrine used to analyze the enforceability of stipulated remedies will not necessarily change the outcomes of decided cases. Changing outcomes may require a more fundamental shift in judges' understandings of stipulated remedies and their role in contractual relationships.

The background to the decision in *Birch* is a path-breaking line of cases in which Canadian appellate courts have signaled 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.' This is a positive development because

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<sup>&</sup>lt;sup>1</sup> (2008), [2009] 93 O.R. (3d) 1 (C.A.), leave to appeal to the Supreme Court of Canada denied May 7, 2009 [hereinafter *Birch*].

<sup>&</sup>lt;sup>2</sup> See in particular, *Coal Harbour Properties Partnership v. Liu* (2006), 273 D.L.R. (4th) 508 (B.C.C.A) at para. 24 (relief should only be granted against a penalty if to enforce the penalty would be unconscionable); *Peachtree Associates II – Dallas Associates v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362, 256 D.L.R. (4th) 490 (C.A.), at para. 32 ("I agree with Professor Waddams' observation in *The Law of Damages...*that

adherence to the traditional rule is difficult to justify. This is not to say that all penalty clauses ought to be enforced. But some of them should be enforced, and the reasons not to enforce the rest are more or less the same reasons not to enforce other contractual provisions. Consequently, doctrines such as unconscionability, mistake and contra proferentem ought to be capable of addressing the relevant concerns; there is no need for a rule that singles out penalty clauses for special treatment. Prominent commentators have long endorsed this position and Canadian courts<sup>3</sup> and legislatures<sup>4</sup> are cautiously beginning to take heed. The outstanding question though is whether analyzing stipulated remedies through the lens of unconscionability rather than the penalty doctrine will make any difference.

### 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

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."); J.G. Collins Insurance Agencies v. Elsley, [1978] 2 S.C.R. 916 at para. 47 ("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.") It is important to note that all but the first of these cases dealt with this issue in obiter dicta.

<sup>&</sup>lt;sup>3</sup> S.M. Waddams, *The Law of Contracts* (Toronto: Canada Law Book, 1977) at 274 and 281; Charles J. Goetz and 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.

<sup>&</sup>lt;sup>4</sup> New Brunswick has enacted legislation which was intended to reform the common law rule against enforcement of penalty clauses. See, Law Reform Act, SNB 1993, c. L.1.1, section 5 ("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.") and Timothy Rattenbury, "Reforming (or Should That be Reforming?) the Common Law: Some Notes on the Law Reform Act" (1994) 11 (1) Sol.J. 8. Curiously, however, in Mortgage Makers v. McKeen, (2008), 339 N.B.R. (2d) 215, 2008 NBOB 327 (CanLII) at paras, 31-32, the New Brunswick Court of Queen's Bench interpreted this provision as "a codification of the existing Common Law" subject only to the proviso that it shifts the onus of establishing reasonableness to the party seeking to enforce the clause. I am grateful to Edward Veitch for bringing this body of law to my attention.

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 provided 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."<sup>5</sup>

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 each of them an amount equivalent to each employee's gross salary for the three days they crossed the picket line. The applicants refused to pay the fine and the union sought to enforce its rights in the Small Claims Division of the 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. He went on to conclude that in the absence of legislation no such fine would be enforceable. In the Court of Appeal Armstrong J.A. wrote an opinion dismissing the union's appeal from the decision of the application judge, with Rouleau J.A. concurring. Juriansz J.A. dissented.

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<sup>&</sup>lt;sup>5</sup> Birch, para. 5.

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 though. The Court of Appeal premised its decision on the notion that the relationship between the applicants and their union was governed by ordinary principles of contract law (as established in Belley v. Pulley<sup>6</sup>) and that no special statutory provisions were applicable to the dispute at hand. Consequently, taken at face value, the decision in Birch also has significant ramifications for the development of contract law in Ontario, and perhaps elsewhere too.

In terms of its relationship to contract law, *Birch* is noteworthy because it represents an important step toward jettisoning the penalty doctrine. To begin with, both the majority and the minority explicitly endorsed the trend toward abolition of the strict rule against enforcing penalty clauses. The importance of this should not be overstated though because both judges limited the scope of their endorsement to cases involving union constitutions. More significant is the fact that when confronted with a possible penalty clause both the majority and the minority expressly endorsed an approach that had previously been adopted only in obiter dicta or in the secondary literature and declined to make a ruling on either the application of the penalty doctrine to the facts of

<sup>&</sup>lt;sup>6</sup> [2002] 2 S.C.R. 493.

Armstrong J.A. said, "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 agreements." *Birch*, para. 38. However, he prefaced those remarks by saying, "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." *Birch*, para. 37. Juriansz J.A. said, "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." *Birch*, para. 100.

the particular case or the broader issue of whether the rule against penalty clauses remains in force. Instead they devoted the bulk of their attention to whether the clause was unconscionable. 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 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 traditional approach.

Another encouraging feature of the decision is the fact that both the majority and the minority agreed on the basic contours of unconscionability doctrine. Armstrong J.A. approved of decisions holding that, "a determination of unconscionability requires a two-part analysis – a finding of inequality of bargaining power and a finding that the terms of the agreement have a high degree of unfairness." Juriansz J.A. agreed with Armstrong J.A.'s review and formulation of the test for unconscionability but emphasized that the unfairness must stem from the inequality of bargaining power. The majority and the minority also agreed – perhaps too hastily (more on this below) – that this particular contract was characterized by inequality of bargaining power, noting that when it was formed the applicants were unable "to negotiate or change its terms." 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

<sup>&</sup>lt;sup>8</sup> By contrast, on similar facts the Alberta Court of Appeal 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 that case, however, unlike in *Birch*, the Union's constitution left the amount of the fine to be determined by a "Trial Board" rather than specifying either the amount of the fine, or at least a formula for calculating it, in advance. See, *Telecommunications Workers Union, Local 202 v. MacMillan*, 97 Alta. L.R. (4th) 393, paras. 35-40 (2008), leave to appeal to the Supreme Court of Canada denied May 7, 2009.

<sup>&</sup>lt;sup>9</sup> Birch, para. 45.

<sup>&</sup>lt;sup>10</sup> *Birch*, para. 79.

<sup>&</sup>lt;sup>11</sup> Birch, paras. 50, 51 (per Armstrong J.A.) and 81 (per Juriansz J.A.)

adopted by equity in determining whether it would be unconscionable to deny relief from forfeiture – or the circumstances prevailing when the parties entered the contract. Nonetheless, the fact that the Court of Appeal was able to reach a consensus on the basic test for unconscionability should help to allay concerns that unconscionability offers too vague or indeterminate a standard to replace the relatively 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 Juriansz J.A. this meant that the liability the application judge found unconscionable stemmed from the applicants' decision not to resign from the union rather than from any lack of bargaining power. Meanwhile the majority believed that the presence of the option to resign was irrelevant to the analysis of whether the penalty clause was unconscionable – "[T]he penalty clause in the union constitution is either unconscionable or it is not." They rejected the view that a fine that

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<sup>13</sup> *Birch*, para. 86.

<sup>&</sup>lt;sup>12</sup> Peachtree II, supra, para 25; Dimension v. R., [1968] S.C.R. 93, 64 D.L.R. (2d) 632, para. 15. For an overview of the debate from an Anglo-Canadian perspective see S.M. Waddams, *The Law of Contracts* (5<sup>th</sup> ed.) (Toronto: Canada Law Book, 2005), para. 546. The lack of consensus in American law is reflected in Uniform Commercial Code § 2-718(1) and the Restatement (Second) of Contracts § 356(1) which state that damages must be reasonable in light of the "anticipated or actual" loss caused by the breach. Addressing this topic is beyond the scope of this Comment.

would otherwise be clearly unconscionable could be saved by giving union members the option to resign before crossing a picket line.<sup>14</sup>

A second point of disagreement stemmed from the fact that Juriansz J.A. 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 was willing to accept that the strike-breakers harmed the union by "diminishing its strength in its economic struggle with the employer." He also accepted that "[t]he amount by which the union's strength is diminished is equal to the quantity of labour provided to the employer" and that "the best measure of the labour provided to the employer is the amount that the employer paid for it." Consequently, he concluded that a fine equal to the strike-breaker's gross pay was "a reasonable, if not a particularly apt" pre-estimate of the union's damages from the breach. Armstrong J.A. 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. 17

## 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 to analyze the enforceability of stipulated remedies. The majority could have used its new lens to

Birch, para. 61.
Birch, para. 94.

<sup>&</sup>lt;sup>16</sup> *Birch*, para. 95.

<sup>&</sup>lt;sup>17</sup> *Birch*, para. 63.

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.

So, what features of the case were neglected? To begin with, a central problem with the penalty doctrine, at least in its traditional form, is the fact that it determines the enforceability of stipulated damages clauses without reference to other terms of the contract. So 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. By contrast a determination of unconscionability typically entails an examination of all the terms of the contract. The ability to undertake a more holistic analysis of the problem is a key advantage of using unconscionability doctrine instead of penalty doctrine to determine the enforceability of stipulated remedies.

In the present case, the idea that the enforceability of a stipulated remedy should be analyzed together with other terms of the contract suggests that the majority should not have determined the enforceability of the clause at issue here without considering its interaction with the provisions governing members' rights to resign. If the contract

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<sup>&</sup>lt;sup>18</sup> See, for example, *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71, paras. 37 and 38 (confirming that the penalty doctrine is applicable 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, paras 54, 71-76 (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 and George G. Triantis, "Embedded Options and the Case against Compensation in Contract Law," (2004), 104 *Colum. L. Rev.* 1428.

<sup>&</sup>lt;sup>19</sup> See, for example, *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 148 D.L.R. (4th) 496, (Ont. C.A.), paras. 28, 36 (relief from an exclusionary clause should only be granted if the clause is unconscionable "seen in light of the entire agreement"); *Harry v. Kreutziger* (1979), 95 D.L.R. (3d) 231, para. 26, per Lambert J.A. ("[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).

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 seems artificial to determine whether they were the victims of abuse without considering the nature of the election they were offered. This approach would not pre-determine the outcome of the analysis. As Armstrong J.A. noted in passing, being excluded from the benefits of union membership "is a significant penalty in itself." 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 Court of Appeal or the court below reached the wrong result 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 reflected 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. One of those reasons is that sometimes 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

<sup>&</sup>lt;sup>20</sup> *Birch*, para. 57.

damages. On this view, difficulty of proof of actual loss ought to be treated as a factor which weighs in favour of enforcing a stipulated remedy which otherwise appears to operate as a penalty.<sup>21</sup> In *H.F. Clarke Ltd. v. Thermidaire Corp.*, however, the Supreme Court of Canada adopted a strict version of the common law penalty doctrine and refused to treat the difficulty of proving actual losses as a factor pointing toward the conclusion that the stipulated damages clauses in question there was enforceable.<sup>22</sup> 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 leaves the impression that, on account of the potentially significant impact of the fine on strike-breaking members, the onus was upon the union to show that the fine was proportional to the union's actual damages, suggesting that the doctrine of unconscionability is no more open to arguments based on difficulty of proof of 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 on account of breach. Juriansz J.A. 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 strike-breaking will cause damage to the interests of 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 is able to secure through collective negotiations. However, Juriansz J.A.'s suggestion that the magnitude of the effect on relative bargaining power would be "equal to the quantity of labour provided to the employer"

<sup>&</sup>lt;sup>21</sup> Dimensional Investments Ltd. v. R., [1968] S.C.R. 93, 64 D.L.R. (2d) 632, at para. 13; Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd, [1915] A.C. 79. See also, Restatement (Second) Contracts § 356.

<sup>&</sup>lt;sup>22</sup> (1974), [1976] 1 S.C.R. 319 (S.C.C.), para. 28.

entails an indefensible leap of logic. By crossing the picket line strike-breakers benefit the employer to the extent that they are less costly or more skilled than replacement workers. This enhances the 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 will simultaneously reduce the employer's willingness to bargain and increase the union's willingness to bargain. It seems reasonable to presume that the magnitude of these effects will be significant, but at the same time there is no evident reason to presume that it 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 opportunity to explore whether in the presence of those factors a system of contract law freed of the strictures of penalty doctrine can justify enforcing stipulated remedies on the grounds that they are 'reasonable penalties' rather than genuine pre-estimates of compensatory damages. This would be consistent with the civil law's general approach to penalty clauses.<sup>23</sup> The union does not appear to have made an argument in exactly these terms. 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.<sup>24</sup> Only the most liberal articulations of the traditional penalty

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<sup>&</sup>lt;sup>23</sup> Art. 1623 C.c.Q. See generally, 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.* 38. <sup>24</sup> For a narrower but related argument see Gregory Klass, "Contracting for Cooperation in Recovery," (2007), 117 *Yale L.J.* 2.

doctrine go that far.<sup>25</sup> Again, 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 strike-breakers' net pay would be a sufficient deterrent (and in fact, the clause could easily be construed to refer to net rather than gross pay). There is also the question of whether the union could have been required to seek injunctive relief against strike-breakers. It is conceivable, however, that the union could have shown that injunctive relief was inappropriate or unavailable and defended the imposition of a fine equal to gross pay on the theory that it was necessary to deprive the strike-breakers 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 the process by which a contract containing a stipulated remedy has been formed as irrelevant. The traditional rule dictates that a penalty clause is per se unenforceable, regardless of the sophistication (or lack thereof) of the parties to the contract, the alternatives they faced, or how much time they spent negotiating the clause.<sup>26</sup> One of the attractions of employing unconscionability doctrine in this context is that it explicitly calls for analysis of the procedural as well as the substantive elements of the contract.<sup>27</sup>

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<sup>&</sup>lt;sup>25</sup> See, *Murray v. Leisureplay*, supra, 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 Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, supra. <sup>26</sup> See, for example, *H.F. Clarke v. Thermidaire*, supra, para. 15 (penalty doctrine applies even to contracts between business men or business corporations with relatively equal bargaining power); *Imperial Tobacco Co Ltd v Parslay* [1936] 2 All E.R. 515 (CA) (inequality of bargaining power irrelevant to analysis of whether clause was a penalty); John Carter and Elisabeth Peden, "A Good Faith Perspective on Liquidated Damages" (2007) 23 *J. Contract L.* 157, 162 (same).

<sup>&</sup>lt;sup>27</sup> Some commentators recommend that the focus be placed almost exclusively on the process by which the contract was formed. See, Goetz and Scott, *supra* and, with reference to the unconscionability doctrine in general, Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine," (2005), 84 *Can. Bar Rev.* 171.

Unfortunately the majority in *Birch* paid scant attention to the relationship between 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 Iacobucci J.'s unfortunate characterization of a member who was unable to bargain over the terms of his contract with the union as having "no bargaining power" in Berry v. Pulley.)<sup>28</sup> This conclusion is unfortunate because the mere 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.<sup>29</sup>

To begin with, the presence of viable alternatives to signing the contract can offset the effects of inability to negotiate. Those alternatives might involve contracting with a competitor – the price of dry-cleaning may not be negotiable but in a city where there is a drycleaner on every corner it seems wrong to conclude that customers suffer from inequality of bargaining power.<sup>30</sup> 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 Juriansz J.A., not contracting with any union at all may have been a viable alternative. This in turn raises the possibility of arguing that the need to attract members would automatically induce unions to offer reasonable terms of membership, even without any explicit negotiation. Juriansz J.A. raised but did not press

<sup>30</sup> *Id.* 

At para. 49.
M. J. Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords," (1976), 26 U. Tor. L. J. 359.

this argument.<sup>31</sup> Of course, this argument may ultimately have proven to be ill-founded. In other words, it may have been unreasonable to expect these particular employees to stay out of the union. But for the sake of clarifying the law the Court of Appeal should have indicated that it was worth examining the employees' opportunities to avoid signing the contract.

Other features of the contracting process besides the availability of opportunities either to negotiate or to avoid signing the contract at issue 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 being highlighted in bold font, marked with a big red arrow and accompanied by an oral warning – whether the parties were likely to be familiar with the terms in question by virtue of their past experience, are typically highly relevant in determinations of whether a contract is tainted by unconscionability.<sup>32</sup> Yet none of the opinions in *Birch* address these topics.

Should the court's reasoning be taken at face value?

So far I have taken the Court of Appeal at face value when it said that it would analyze the enforceability of the stipulated remedy provision through the lens of the

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<sup>&</sup>lt;sup>31</sup> *Birch*, para. 80. I say that Juriansz J.A. did not press the issue because in the next paragraph he conceded that it followed from prospective members' inability to negotiate that there was an inequality of bargaining power.

power. <sup>32</sup> See for example, *Calloway Reit (Westgate) Inc. v. Michaels of Canada, ULC*, Ontario Superior Court of Justice, February 24, 2009, Docket: CV-08-7862-00CL, CV-09-7946-00CL at para. 97 (no inequality of bargaining power where disadvantaged party was a sophisticated commercial developer familiar with penalty clauses and represented by a sophisticated leasing agent).

generally applicable doctrine of unconscionability. But this may be a misreading of the decision. 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 approach has some merit but that the kind of nuanced analysis applied in other unconscionability cases was inappropriate for a case involving stipulated remedies in a contract of adhesion. Or 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 lingering reluctance to have the relationship between unions and their members defined by courts as opposed to either the legislature or the parties' informal arrangements.

I am inclined to take the majority's opinion at face value. If I am wrong though and these sorts of unarticulated considerations did influence their ruling, then the majority in the Court of Appeal missed more opportunities to clarify the law than I suggest above.

#### 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 which 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

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<sup>&</sup>lt;sup>33</sup> I am grateful to two anonymous reviewers for encouraging me to address these alternative interpretations.

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 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.