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Developments in Contract Law: The 2021-2022 Term — The Enduring Allure of Freedom of Contract

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Developments in Contract Law: The 2021-2022 Term — The Enduring Allure of Freedom of Contract

Marcus Moore[*]

Dedication

This article on Developments in Contract Law is dedicated to the memory of the late Stephen A. Smith. It is with utmost sadness that the Canadian legal academy and that Private Law colleagues internationally received the news of his passing. All who knew him are well aware that as great a scholar as he was, he was an even better person. He will be greatly missed. With regard to the present article, I would like to express my appreciation to Steve for his support of the unconventional approach I have taken this year in focusing on broad themes, and for his generosity in offering me research advice on the preparation of it only a short time before the end of his long illness.

I. INTRODUCTION

A review of recent developments in Contract Law reveals that Freedom of Contract continues to thrive in the jurisprudence a half-century after its supposed fall. As the analysis here shows, it is a theme that animates not only general thinking about contracts, but also court resolution of specific cases and issues. High-level considerations drive the reasoning, colouring the application of more detailed rules where these exist. And among these high-level considerations, Freedom of Contract enjoys privileged status as the default law, against which opposing considerations in practice must justify themselves as exceptions. Other considerations vary in their power to constrain Freedom of Contract. Notably, among the significant constraints are where the Freedom is complicated by an asymmetric distribution or opposing concerns about loss of wider or future freedom. Freedom is not the only value to be reckoned with. However, its abiding influence over resolution of legal problems in the area of contracts is remarkable. Arguably, the continued centrality of Freedom of Contract in modern society is surprising in light of the prevalence of circum- stances such as standard form contracting and relational contracting which are not well-modelled by Freedom of Contract. This suggests that Freedom of Contract remains essential to us not as a fact, but as an idea — as a way that we like to think about contracts and issues arising in the domain of what we call Contract Law.

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II. BACKGROUND

1. Rules and Principles

Textbooks and casebooks on Contract Law tend to focus on an elaborate array of doctrines which are supposed to govern any issue that may arise in the field. Faced with a particular dispute, the judge's task would be to find the right rule within this exhaustive rulebook, and apply it to the case at hand. Of course, long ago the Legal Realists shattered the myth that this is a complete and accurate account of how decisions are actually made. Other factors ranging from policy concerns to unconscious cognitive biases can and do frequently influence decisions.[1] Ronald Dworkin later theorized that in hard cases, judges do not adhere to rules but weigh principles that embody higher-value considerations relevant to the dispute.[2] But what counts as a hard case? Perhaps this question is — for most cases — only answerable in retrospect based on whether the court was persuaded to approach it by considering high-level considerations rather than by selecting and applying a rule from the rulebook.

The Supreme Court of Canada seems to have very often taken this sort of approach to contractual disputes in its recent decisions. In fact, that tendency may not be limited to Contract Law, and may not be limited to the 2021-2022 term analyzed in this article. But at the least, it seems to characterize the Court's handling of issues in the field of Contract Law during this period. Various rules are referenced, but do not seem to be doing the work; the reasoning seems to flow from weighing high-level considerations. Put differently, the flexibility that a court can find either in the rules or in their application to the facts tends to fall in line with its sense of the relative weight of relevant high-level considerations. The rules channel the higher-level principles, and the principles drive the decisions.

Recognizing this is essential to understanding the significance of recent developments in Contract Law. Their significance does not lie in doctrinal innovations or analysis. Nor is their significance to be found in express concerns of social policy. Rather, the real significance of recent developments in Contract Law is in examining

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[1] See, *e.g.*, O.W. Holmes, *The Common Law* (Boston: Little Brown, 1963) at 5; Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum. L. Rev. 809; Jerome Frank, "Are Judges Human?" (1931) 80 U. Pa. L. Rev. 17.

[2] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 1977). In a recent reflection, Steve Smith submitted somewhat similarly that judges decide cases based on what he called "intermediate principles" in that they reside at a higher level than rules but a lower level than foundational principles of comprehensive moral theories: Stephen Smith, "Intermediate and Comprehensive Justifications for Legal Rules" in Simone Degeling, Michael Crawford & Nicholas Tiverios, eds., *Justifying Private Rights* (Oxford: Hart Publishing, 2020). My argument and some of the principles I discuss here overlap somewhat with his. However, his focus is on their status and law-justifying capacities as moral principles, whereas mine is on their role and relative influence on the reasoning judges rely on to resolve legal issues/disputes.

how the high-level considerations influence the reasoning and, in particular, how the Court handles potential conflicts between different principles in the particular contexts that are the subject of the decisions.

It goes without saying that analyzing recent developments in the law is important not only to appreciating what has just happened, but also to anticipating what could soon happen. Hence, analyzing the Court's recourse to high-level considerations will provide important insights into how future legal controversies in the area of Contract Law may be approached.

2. Freedom of Contract

(a) Privileged Status

Among the high-level considerations at play in the decisions examined in this article, none looms larger than Freedom of Contract. A century and a half since its conventionally perceived peak, and half a century since its supposed fall,[3] the tremendous influence of the idea of Freedom of Contract is unmistakable. As I will detail below, in most cases it is the Court's starting point in thinking about how issues of Contract Law should be regulated. As per a speech once made in the House of Lords, in general, "the policy of the law is to uphold freedom [of] contract."[4] It is seen as the default position, both factually in terms of whether Freedom of Contract is possible in a given context, and normatively in terms of what principle should govern a particular contractual concern.

This, in turn, creates a tension between Freedom of Contract and other high-level considerations: the room to be given the others must be carved out of the dominion of Freedom of Contract. Very often, there is seen to be a need to expressly justify why some "exception" is warranted to Freedom of Contract as the default position. Further, there seems to be a sense that the law is obliged to keep the scope of any exception as limited as possible. These patterns are evident in the reasoning of the cases, as will be seen throughout the article. Freedom of Contract continues to be treated as a "paramount value in the law of obligations".[5] Hence, Freedom of Contract is clearly not just a relic of the Classical Age of Contract; its enduring influence not only on the development of Contract Law writ large but on the way courts approach particular cases and issues that come before them for resolution is impressive. I will not try to assess the principle's current standing relative to its historical high and low points, as other well-known studies have done.[6] What

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[3] Patrick Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

[4] *Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd.*, [1967] 1 All E.R. 699 at 712 (H.L.).

[5] Patrick Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) at 356.

[6] See, *e.g.*, P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979); F.H. Buckley, ed., *The Fall and Rise of Freedom of Contract*

matters to Contracts scholars, to barristers arguing in court and to solicitors drafting at the risk of potential future litigation or legislation is that Freedom of Contract maintains a firm hold over the politico-legal mind.

While in that mind's eye the idea of Freedom of Contract may appear obvious, if not inevitable, history reveals that it was not always privileged in Western society. In ancient and medieval periods, only certain types of agreements were enforceable based on consent.[7] Patrick Atiyah describes Freedom of Contract's emergence as part of the broader liberal philosophical revolution of the last few centuries.[8]

Freedom of Contract may be seen to rest on four major normative pillars. One is the nature of humans: as autonomous beings, their choices should be respected. Two more are property and market ordering, which together leave the fulfillment of a great deal of human needs and interests to private exchange. The fourth is Adam Smith's invisible hand, by which the welfare of society is advanced by individuals making self-interested choices in these transactions.[9] This is because, as Michael Trebilcock explains, "if two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it."[10]

(b) Meaning

While the idea of Freedom of Contract is well known, and rests on even more prominent political norms, what exactly the principle includes may be hazier. One reason for this, as Richard Craswell explains, is that:

> the topic carries a heavy ideological charge. Depending on one's point of view, freedom of contract can be seen as a choice between individual liberty and heavy-handed government control, or between communitarian consensus and the worst excesses of laissez-faire capitalism. In other words, freedom of contract is a sort of lightning rod, which always attracts strongly-held political beliefs.[11]

In particular, wider political and economic perspectives over which views tend to extremes often include views on whether Freedom of Contract should enjoy greater or lesser scope*;* these value judgments can impede first obtaining an accurate

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(Durham, N.C.: Duke University Press, 1999).

[7] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991); Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden: Martinus Nijhoff, 2013).

[8] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

[9] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, MetaLibri 2007) at 349.

[10] Michael Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA.: Harvard University Press, 1993) at 7.

[11] Richard Craswell, "Freedom of Contract" in Eric Posner, ed., *Chicago Lectures in Law and Economics* (St. Paul, MN: West Academic, 2000).

understanding of the principle's actual meaning. As well, there is a risk of the phrase being assumed to include more than it does because of the sweeping import of the words it invokes, or (as discussed below) due to it being conflated with the whole Classical Law of Contract. Therefore, it serves to specify here what this article takes Freedom of Contract to entail.

The above comments on the importance attached to Freedom of Contract, as well as important clues as to its attributes, are captured by the oft-quoted classical statement by Sir George Jessel M.R. that:

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.[12]

By a common contemporary view, Freedom of Contract includes three components: (1) the parties should have freedom over whom to contract with, including the freedom not to contract with another party, and the freedom to shop contracting partners ("Party Freedom"); (2) the parties should have freedom to decide the terms of a contract, rather than have them externally imposed ("Term Freedom"); and (3) the law should enforce what parties freely agreed, and not exercise a controlling function ("Sanctity of Contract").[13] The second and third components are those primarily at stake in the controversies discussed in this article. And they are intertwined, in that parties' initial freedom to decide the terms would be hollow if courts did not then respect the terms they agreed. And conversely, for the law to enforce what the parties freely agreed assumes that they did freely agree the terms to be enforced. Thus, in the discussion that follows, I will simply refer to the overall notion of Freedom of Contract, and not belabour matters by attempting to continually distinguish between its different aspects.

(c) Other Values

It is important, however, to keep separate Freedom of Contract and other values, including some that it collaborates with in the larger set of ideas consisting of the Classical Law of Contract. These include, notably: parties' intentions; contractual certainty; consideration and privity; emphasis on self-interest and conflict; and compensation for non-performance. I must leave it to other works to detail the meaning of these other values, and map out their association with Freedom of Contract within the Classical scheme of Contract Law or more broadly. What

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[12] *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462 (Ch.).

[13] See, *e.g.*, Roger Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2d ed. (Oxford: Oxford University Press, 2006) at 50; Peter Cserne, "Freedom of Contract and Economic Analysis" in Jurgen Backhaus, ed., *Encyclopedia of Law and Economics* (Springer, 2015).

matters here is that Freedom of Contract is an idea with a particular meaning, content and normative basis, and it is these which are the subject of discussion here. The term should not be conflated with the whole set of values encompassed by the Classical Law of Contract, and I do not use the phrase here as a proxy for the Classical Law, despite Freedom of Contact's important place in it.

The discussion below includes sections named for certain other high-level considerations. These represent the considerations which come into tension with Freedom of Contract in the cases covered in this article. They do not comprise a complete list of other values that may conflict with Freedom of Contract in the field of Contract Law. And certainly there are other principles which are very influential in Contract Law, ranging from Private Ordering to Reciprocity to Good Faith, that are simply left aside here, given the focus on Freedom of Contract and the considerations it came into tension with in the cases covered here.

(d) Fact versus Idea

A final distinction I want to make before diving into the analysis of Freedom of Contract's influence over the reasoning and resolution of the cases and issues that recently came before the Court is the distinction between fact and idea. Eighty years ago, confronting the imposition in standard form adhesion contracts, Friedrich Kessler noted how rarely do contracting parties both meaningfully enjoy Freedom of Contract. Nonetheless, as he explained, the *idea* of Freedom of Contract "has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture". It is appreciated for its role in the social levelling of status-based systems, associated with the free enterprise system's opportunities, and conceived of as the most regular experience of democracy and limited government as parties make laws for themselves by contract. This underlay what Kessler called "courts' emotional desire to preserve freedom of contract".[14] Putting aside the psychoanalytic validity of Kessler's assessment, his point was that the enduring value of Freedom of Contract is not that it accurately describes the fact-context in which most contracts are made in modern society, but that the idea of it is essential to the value we see in the institution of Contract Law.

Then, 50 years ago, Ian MacNeil brought to the fore the phenomenon of relational contracts,[15] in which parties seek a legal framework for their relationship, but need their agreement open-ended and flexible to allow for later specification of details, or ongoing adjustment and revision. Freedom of Contract offers a poor description of relational contracts, where the parties' obligations are sparsely defined by the terms, and they want room to manage a relationship on the fly rather than to be held to highly specific obligations comprehensively anticipated and carved in stone. MacNeil argued that relational contracting was not peripheral, but prevalent: in

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[14] Friedrich Kessler, "Contracts of Adhesion — Some Thoughts about Freedom of Contract" (1943) 43:5 Colum. L. Rev. 629.

[15] Ian MacNeil, "The Many Futures of Contract" (1974) 47 S. Cal. L. Rev. 691.

addition to obvious examples like employment or franchising, a great deal of commercial arrangements took the form of relational contracting.[16] Some have gone further: Angela Swan, in fact, sees almost all contracts as relational.[17] Whether or not this is so, they are another major area in which Freedom of Contract is of little use in describing the factual context.[18] Yet, as discussed above, the law often continues to treat Freedom of Contract as the "normal" scenario, and situations in which it is not present or not a useful description of the process or result as "exceptions".

As adhesion and relational contracts exemplify, there is ample reason to question how commonly Freedom of Contract factually describes the conditions of contracting. The enduring depictions of it as the norm and the default must therefore be based on the allure of the *idea* of Freedom of Contract. What it describes accurately is how we want to think about contracts.

Its enduring appeal is clear from the cases, which I now turn to analysis of.

III. THE JURISPRUDENCE

This Part of the article is divided into two major sections. Section 1 looks at how Freedom of Contract is treated as a general principle; a default position factually and normatively. The discussion here emerges from the Court's judgment in *6362222 Canada inc. v. Prelco inc*.[19] Section 2 looks at tensions between Freedom of Contract and other high-level considerations. The various subsections there draw on *Prelco*, and the Court's decisions in *Corner Brook (City) v. Bailey*,[20] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada* [21] *and Canada (Attorney General) v. Collins Family Trust*.[22] Overall, it will be shown how the Court's reasoning proceeds by considering how to resolve tensions between high-level considerations, rather than by selecting and applying a rule from

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[16] Ian MacNeil, "The Many Futures of Contract" (1974) 47 S. Cal. L. Rev. 691 at 694-695.

[17] Angela Swan, "A Solicitor Looks at the Law of Contracts" in Marcus Moore & Samuel Beswick, eds., *The Power and Limits of Private Law* (2023) 109 S.C.L.R. (2d) 3.

[18] Standard form contracts and relational contracts are noted by Brownsword as some major incursions into Freedom of Contract in modern society: Roger Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2d ed. (Oxford: Oxford University Press, 2006) at 69.

[19] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 (S.C.C.) [hereinafter "*Prelco*"].

[20] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 (S.C.C.) [hereinafter "*Corner Brook*"].

[21] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 (S.C.C.) [hereinafter "*Trial Lawyers*"].

[22] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 (S.C.C.) [hereinafter "*Collins Family Trust*"].

"rulebooks" of Contract Law. Further, I demonstrate the extent to which Freedom of Contract benefits from an assumption of primacy or of default application. And I investigate the extent to which the other considerations covered here are able to establish room for themselves where they come into conflict with Freedom of Contract.

1. Freedom of Contract as a General Principle of Law

The major influence that the idea of Freedom of Contract continues to exert in determining how the law should deal with contractual disputes is very evident in the *Prelco* case. The central issue in *Prelco* was whether a limitation of liability clause in a commercial contract was invalid because it prevented the benefiting party from being held responsible for breach of a fundamental obligation under the contract. However, the Court found the clause to be valid. The Court's unanimous judgment rejecting the claim of the clause's invalidity is animated by the value of Freedom of Contract.

The contract at issue was a commercial contract between a manufacturer and a specialist consulting firm. The contract called for the consultant to propose a method for implementing an integrated management system capable of satisfying the manufacturer's operating needs. The consulting firm was found to have breached this, which was its fundamental obligation under the contract.[23]

Consistent with this article's argument that the idea of Freedom of Contract often plays a prime role in how judges resolve concrete disputes in Contract Law, Wagner C.J.C. and Kasirer J. writing for the Court in *Prelco* recognize Freedom of Contract as a "clear . . . general principle . . . of the general law of obligations".[24] While acknowledging that it "is not expressed as such in the Civil Code" of Quebec, the justices view it as implicit in the Code's preliminary provision.[25] The preliminary provision, in turn, describes the Code as governing private law "in harmony" with, *inter alia*, "general principles of law", which they see as including Freedom of Contract. Further, the preliminary provision explains that the *jus commune* includes not just the "letter" of provisions of the Code, but also their "spirit or object", thus suggesting that Freedom of Contract is implicit in provisions or indeed larger portions of the Code.

Parallel accounts of Freedom of Contract as a general principle of direct

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[23] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at paras. 2, 7 (S.C.C.).

[24] *6362222 Canada inc. v. Prelco inc*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 39 (S.C.C.).

[25] *6362222 Canada inc. v. Prelco inc*., [2021] S.C.J. No. 39, 2021 SCC 39 (S.C.C.), citing Jean Pineau, Danielle Burman & Serge Gaudet, *Théorie des obligations*, 4th ed. (Montreal: Les Éditions Thémis, 2001) and Jean Pineau, "La philosophie générale du Code civil" in *Le nouveau Code civil: interprétation et application — Les journées Maximilien-Caron* (Montreal: Les Éditions Thémis, 1993).

application in the Law of Contract can be found in the common law. For example, in *Photo Production Ltd. v. Securicor*, Lord Diplock explained that: "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept."[26] Another prominent example was *Suisse Atlantique*, where the House of Lords depicted Freedom of Contract as a general principle that conflicting rules of law would have to justify themselves as exceptions to.[27] The Supreme Court of Canada has echoed similar sentiments. For instance, in *Bhasin v. Hrynew*, where a unanimous SCC recognized an organizing principle of good faith in Canadian common law, Cromwell J. referenced "the basic principle of freedom of contract" and submitted that the newly recognized principle of good faith was compatible with it.[28] Likewise, in *Fraser River v. Can-Dive*, Iacobucci J. also for a unanimous Court invoked the principle of freedom of contract, describing the risk that the principled exception to privity might restrict Freedom of Contract as a "significant concern".[29]

This conception of Freedom of Contract as a principle operative *within* Contract Law, alongside other principles such as good faith, protecting legitimate interests of third parties, and so on, seems to me different from another conception that sees Freedom of Contract as *pre-legal*; that sees Contract Law as establishing legal rules on what people are otherwise *naturally and politically* free to do with contracts.[30] If it is viewed as external, it follows that "most of what we know as contract law has very little to do with freedom of contract"; and "arguments about 'freedom of contract' are largely irrelevant" to the Law of Contract.[31] But this view does not seem to fit with what we see in the cases discussed in this article, in which Freedom of Contract factors greatly into judicial resolution of contractual disputes and articulation of fine details of Contract Law. In these cases, Freedom of Contract is interacting with other legal principles and rules, seeking a balance, a mutual accommodation, or some other form of harmony as the case may be.[32] However, another view sees "today's contract law regimes . . . as long lists of exceptions to

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[26] *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 at 848 (H.L.).

[27] *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen Centrale NV*, [1967] 1 A.C. 361 (H.L.) (see, *e.g.*, Dilhorne V.C. at 392).

[28] *Bhasin v. Hrynew*, [2014] S.C.J. No. 1, [2014] 3 S.C.R. 494 at para. 79 (S.C.C.) [hereinafter "*Bhasin*"].

[29] Specifically, the concern was of restricting Freedom of Contract in regard to how the parties might modify their obligations: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] S.C.J. No. 48, [1999] 3 S.C.R. 108 at paras. 35-36 (S.C.C.).

[30] The latter view is referenced by Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017) at 11.

[31] Richard Craswell, "Freedom of Contract" in Eric Posner, ed., *Chicago Lectures in Law and Economics* (St. Paul, MN: West Academic, 2000) at 1.

[32] On the different ways that judges might determine that multiple legal principles should

the principle of contractual freedom".[33] Potentially, this would bring closer together the "internal" view of Freedom of Contact as part of and operative within the parameters of Contract Law and the "external" view of it as apart from and preceding Contract Law, by depicting the law as separate from but existing and evolving expressly relative to Freedom of Contract.

Prelco situates itself close to this view, although perhaps just on the other side of the line: it treats Freedom of Contract as a principle directly applicable *within* the Law of Contract, while constructing it as a sweeping rule to which any other legal rule that might conflict with it would have to find expression as an exception to it.[34] Quoting from the Court's earlier decision in *Churchill Falls v. Hydro-Québec*, the judges cast "restrictions on consensualism [as] generally tak[ing] the form of exceptions and specific rules".[35] Apart from where these exceptions apply, contracting parties in Canadian civil law operate in a "'free zone' in which freedom of contract is not limited by [considerations like] public order".[36]

Again, an analogous view is visible in common law jurisprudence. Indeed, while as mentioned earlier I do not wish here to get into attempting to locate the present position of Freedom of Contract in the range spanned by its historical high points and low points, one cannot but notice the consistency with which the principle has been expressly invoked and affirmed in Supreme Court of Canada cases of the last few years. This includes both cases where Freedom of Contract prevailed over other principles with which it conflicted, and cases where Freedom of Contract was restricted for the sake of other principles.[37] But even in the latter, we witness

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coexist in the context of any given legal problem; see Marcus Moore, "Justice as Harmony" (2018) 87 S.C.L.R. (2d) 3.

[33] Peter Cserne, "Freedom of Contract and Economic Analysis" in Jurgen Backhaus, ed., *Encyclopedia of Law and Economics* (Springer, 2015).

[34] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at paras. 41-53 (S.C.C.). For contrary views on whether Freedom of Contract is the rule or the exception, see, *e.g.*, G.H.L. Fridman, "Freedom of Contract" (1967) 2 Ottawa L. Rev. 1; Wolfgang Friedmann, *Law in a Changing Society*, 2d ed. (Harmondsworth, Eng.: Penguin Books, 1972); Hugh Collins, *The Law of Contract*, 4th ed. (Cambridge: Cambridge University Press, 2003) c. 2; Hanoch Dagan & Michael Heller, "Freedom of Contracts" (2013) Columbia Law & Economics Working Paper 458 at 2.

[35] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 53 (S.C.C.); *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, [2018] S.C.J. No. 6 at para. 102, 2018 SCC 46, [2018] 3 S.C.R. 101 (S.C.C.).

[36] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 53 (S.C.C.); Jean Pineau, "La philosophie générale du Code civil" in *Le nouveau Code civil: interprétation et application — Les journées Maximilien-Caron* (Montreal: Les Éditions Thémis, 1993) at 439.

[37] See, *e.g.*, *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, [2020] S.C.J. No. 25, 2020 SCC 25 (S.C.C.); *Peace River Hydro Partners v. Petrowest Corp.*, [2022] S.C.J. No.

"veneration" having to be paid to Freedom of Contract to justify a departure from it.[38] This is so even (or perhaps, especially) in the cases which most substantially restrict Freedom of Contract. For instance, in *Uber Technologies Inc. v. Heller*, which greatly expanded the scope of circumstances in which relief from contractual enforcement may be available for unconscionability, the majority insisted that "Freedom of contract remains the general rule. It is precisely because the law's ordinary assumptions about the bargaining process do not apply that relief against an improvident bargain is justified."[39] Likewise, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, the majority took the time to argue that "recognizing this general duty [to exercise discretionary powers in good faith] interferes very little with freedom of contract . . .".[40] In that case, a separate opinion supported by three justices was issued largely to argue for the paramountcy of Freedom of Contract in how the law should assess the purpose of a discretionary power in judging whether it was exercised in good faith, and further, that with clear language the parties could provide for a discretion which is nearly absolute.[41] The theoretical climate in which considerable and express justification is necessary for any restriction of Freedom of Contract is perhaps evident from the following statement of Brown J., concurring, in the aforementioned *Uber* case:

> My colleague Justice Côté [dissenting] stresses freedom of contract, for which I readily share her enthusiasm. Freedom of contract is of central importance to the Canadian commercial and legal system and . . . often trumps other societal values. Indeed, a hallmark of a free society is the freedom of individuals to arrange their affairs without fear of overreaching interference by the state, including the courts.[42]

Arguably, this statement by Brown J. goes beyond Freedom of Contract, speaking

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41, 2022 SCC 41 (S.C.C.) (Côté J.); *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 (S.C.C.) [hereinafter "*Wastech*"]; *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16 (S.C.C.) [hereinafter "*Uber*"]; *Krayzel Corp. v. Equitable Trust Co.*, [2015] S.C.J. No. 18, [2016] 1 S.C.R. 273 (S.C.C.) (indeed in this case, Côté J., dissenting, describes Freedom of Contract as "the foundational principle").

[38] The word "veneration" comes from Stephen Weatherill, "Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract'" (2014) 10:1 ERCL. For support of religious language's aptness to describe juristical reverence of Freedom of Contract, see, *e.g.*, Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (Cambridge: Cambridge University Press, 2019).

[39] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16 at para. 86 (S.C.C.).

[40] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 at paras. 92-94.

[41] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 at paras. 115*ff*.

[42] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16 at para. 107 (S.C.C.) (citations omitted).

also of the value of private ordering, which is of much greater scope in that it does not necessarily require as conditions term freedom or sanctity of contract, as Freedom of Contract does.[43] But this is missing the point: courts treating Freedom of Contract as the prime value in this area of law may involve an aspect of conflation with additional values. If so, this raises the possibility that in some cases Freedom of Contract will be overvalued.

All in all, in both the common law and civil law traditions, the Court not only has direct recourse to the principle of Freedom of Contract in resolving areas of uncertainty in Contract Law that emerge in disputes, but also envisions Freedom of Contract as the rule and conflicting considerations as potential exceptions.

2. Tensions Between Freedom of Contract and Other Considerations

(a) Public Policy

The prime role accorded to Freedom of Contract by the Supreme Court does not mean it is without limits.

In *Prelco*, Wagner C.J.C. and Kasirer J. invoke a "modern" view of Freedom of Contract as circumscribed by rules of public order.[44] The concept of public order in Canadian civil law is very broad; in my view, it is better seen as a label that conveys the primacy of specific rules that are labelled as being of public order than as encapsulating with any specificity a particular substantive value. For example, with respect to limitation/exclusion clauses which were the subject of *Prelco*, public order encompasses concerns of human dignity, of deterrence policy, of protecting the vulnerable in a contractual setting, and of contextualized perceptions of contractual fairness. Each of these will be discussed below.

I begin with two morality-based restrictions on Freedom of Contract that, because they are not instances of a wider precept accepted by the law as justifying a more general "exception" to Freedom of Contract, we can regard merely as Public Policy exceptions.

The first bars excluding/limiting liability for bodily or moral injury (art. 1474 para. 2 of the *Civil Code of Quebec*[45]). This restriction is seen as existing to protect the human person, by taking such injury out of the sphere of what should be transactable on the market.[46]

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[43] Or party freedom, for that matter.

[44] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 39 (S.C.C.), citing Jean Pineau, Danielle Burman & Serge Gaudet, *Théorie des obligations*, 4th ed. (Montreal: Les Éditions Thémis, 2001); and Jean Pineau, "La philosophie générale du Code civil" in *Le nouveau Code civil: interprétation et application — Les journées Maximilien-Caron* (Montreal: Les Éditions Thémis, 1993).

[45] CQLR, c. CCQ-1991 [hereinafter "CCQ"].

[46] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 46 (S.C.C.); Didier Lluelles & Benoît Moore, *Droit des Obligations*, 3d ed. (Montréal: Les

The other prohibits excluding/limiting liability for material injury caused by gross or intentional fault (art. 1474 CCQ). This is intended to deter wrongdoing in the form of recklessness and intentional wrongs, or perhaps more modestly and realistically, at least to express the law's disapproval of such misconduct by withholding legal enforcement of clauses sheltering such acts from liability.[47]

These provide discrete and narrow restrictions on Freedom of Contract with regard to the use of limitation/exclusion clauses. Thus far, the law fits with the picture painted by the Court of Freedom of Contract as the rule and of conflicting considerations as exceptions. However, the next basis for restricting Freedom of Contract is much wider, as will be discussed.

(b) Unfreedom — Asymmetric Freedom of Contract

Various other rules of public order which operate to constrain freedom to use limitation/exclusion clauses are described as animated by a need to protect presumptively weaker parties. Together, these constitute a much more extensive circumscription of the scope of Freedom of Contract.

For example, the rules in this category constrain the use of limitation/exclusion clauses in both contracts of adhesion (art. 1379 CCQ) and in consumer contracts (art. 1384 CCQ). Standard form "adhesion" contracts alone are said to comprise over 99 per cent of contracts made.[48] Consumer contracts is also a major category of contracts in the modern "consumer economy".[49] However, despite the scope of

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Éditions Thémis, 2018) no 2971; Étienne Cossette-Lefebvre, "Chronique — Plaidoyer en faveur du rejet de la 'théorie de l'obligation essentielle' en droit civil québécois: critique de l'arrêt 6362222 Canada inc. c. Prelco inc., 2019 QCCA 1457, à la lueur du droit comparé" (2020) Repère (available on La référence) no 14; Nathalie Vézina, "Préjudice matériel, corporel et moral : variations sur la classification tripartite du préjudice dans le nouveau droit de la responsabilité" (1993) 24:1 R.D.U.S. 161 at 171; Jean Pineau, "La philosophie générale du Code civil" in *Le nouveau Code civil: interprétation et application — Les journées Maximilien-Caron* (Montreal: Les Éditions Thémis, 1993) at 284.

[47] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 45 (S.C.C.); Didier Lluelles & Benoît Moore, *Droit des Obligations*, 3d ed. (Montréal: Les Éditions Thémis, 2018) nos 2975–2976; Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 7th ed., by Pierre-Gabriel Jobin & Nathalie Vézina (Cowansville, Québec: Éditions Yvon Blais, 2013) no 870; *Djamad v. Banque Royale du Canada*, [2021] J.Q. no 1796, [2021] QCCA 371 at paras. 46-49 (Que. C.A.); *Audet v. Transamerica Life Canada*, [2012] J.Q. no 245, [2012] QCCA 1746 at paras. 90-91 (Que. C.A.).

[48] W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84(3) Harv. L. Rev. 529; Robert Hillman & Jeffrey Rachlinski, "Standard-Form Contracting in the Electronic Age" (2001) 77 NYU L. Rev. 429.

[49] Although the category of contracts of adhesion largely subsumes that of consumer contracts. See, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 at 346-347 (2011) (*per* Scalia J.) ("the times in which consumer contracts were anything other than adhesive are long past").

contracts that these rules cover, they do not eviscerate Freedom of Contract, as they do not prohibit the use of limitation/exclusion clauses; they merely constrain them within the bounds of "decency", as will be detailed shortly.[50]

But first, I want to briefly comment on how the principle animating these rules (and others like them) is conceived. As mentioned, this animating principle is often described as about protecting weaker parties.[51] Closely related to this, another common phrase used to characterize the animating principle in this area is inequality of bargaining power.[52] However, in my view, these phrases misstate the essential concern in these and related circumstances.[53]

For starters, in those forms of contract, neither side, regardless of its bargaining power, has any intent to bargain anything but the core terms (*e.g.*, subject-matter, price).[54] It makes no sense for them to do so, given the modern economy's reliance on mass markets and frequent limited-stakes transactions, which together create an inherent need to minimize transaction costs.[55] As they are not bargaining, their relative bargaining strength is irrelevant.[56] Furthermore, beyond contracting by adhesion, if we look at other situations that are often seen as falling under the purported animating theme of inequality of bargaining power or of protecting weaker parties, some of the most prominent such situations again do not fit this conception.[57] Consider duress, for instance. Suppose two parties of unequal

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[50] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little Brown, 1960) at 370.

[51] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 51 (S.C.C.).

[52] See, *e.g.*, *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326; *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16 (S.C.C.); Spencer Nathan Thal, "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness" (1988) 8:1 Oxford J. Leg. Stud. 17; John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991).

[53] Marcus Moore, "The Future of Unfair Terms Regulation in Commercial Contracts" in Mads Andenas & Maren Heidemann, eds., *Issues in Commercial Contract: From Unfair Terms to Dispute Settlement Agreements*, LCF Studies in Commercial and Financial Law Series (Springer, 2023); Marcus Moore, "The Doctrine of Contractual Absolution" (2022) 59:4 Alta. L. Rev. 871; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[54] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (London: Bloomsbury, forthcoming 2023).

[55] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (London: Bloomsbury, forthcoming 2023).

[56] Marcus Moore, "Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?" (2022) 55:2 U.B.C. L. Rev. 547 at 576.

[57] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The

bargaining power are negotiating, and the weaker puts a gun to the head of the stronger and threatens to shoot if the stronger party makes use of its superior bargaining power: their bargaining power is, as a result of the threat, precisely equal. But the contract is void for duress. Likewise, in the common law, consider cases of "actual" undue influence — those where it is said that the parties were *not* in a relationship of power-and-vulnerability, but *in the circumstances*, the evidence reveals that one party was unduly influenced by the other.[58] Here again, the problem was not that the party had a deficit of bargaining power, but that its thought process was interfered with.[59] Thus, bargaining power as a concept fails to encompass several of the major sets of circumstances in the area that the principle is said to animate.[60]

A more accurate statement of what is going in these cases is that the *freedom*, rather than the bargaining power, of one party is attenuated.[61] As Steve Smith observed, one of the most frequent and difficult questions in "[d]iscussions of freedom and contract law [is] when is an agreement freely entered into"?[62] Quite simply, in the contexts referred to above, Freedom of Contract is distributed Asymmetrically (markedly so). In contracts of adhesion and consumer contracts, one party has little or no Freedom of Contract, while the other has too much, as it is unchecked by the counterparts' Unfreedom or by anything else.[63] Likewise, in duress and undue influence-type cases, the Unfreedom of the party that was coerced

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Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[58] *Williams v. Bayley*, [1866] L.R. 1 H.L. 200; *CIBC Mortgages plc. v. Pitt*, [1994] 1 A.C. 200, [1993] 4 All E.R. 433 (H.L.).

[59] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[60] For more extended argument/discussion of this point, see Marcus Moore, "The Future of Unfair Terms Regulation in Commercial Contracts" in Mads Andenas & Maren Heidemann, eds., *Issues in Commercial Contract: From Unfair Terms to Dispute Settlement Agreements*, LCF Studies in Commercial and Financial Law Series (Springer, 2023); Marcus Moore, "The Doctrine of Contractual Absolution" (2022) 59:4 Alta. L. Rev. 871; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[61] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[62] Stephen Smith, "Future Freedom and Freedom of Contract" (1996) 59:2 Mod. L. Rev. 167 at 186.

[63] Such as competition, legal liability, *etc.*: Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (London: Bloomsbury, forthcoming 2023).

or influenced is the concern.[64] Thus, these rules reflect the law's assessment that the value attributed to Freedom of Contract depends on it being distributed relatively symmetrically. And that in circumstances where Freedom of Contract is on the contrary distributed with a marked Asymmetry, its value collapses, so that it is susceptible to being overridden by concerns of substantive fairness.

This is evident looking at how, in this context, the Civil Code deals with limitation/exclusion clauses in contracts of adhesion or consumer contracts: with Freedom of Contract mostly on one side in such forms of transaction, clauses in them excluding or limiting liability are void (null) if they are unfair (abusive), per art. 1437 of the Civil Code.[65]

One way such a clause might be unfair — of particular relevance in *Prelco*, given the argument about the significance of seeking to excuse the breach of a fundamental obligation — is if the "clause . . . so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract".[66] The rules normally governing the contract refers to special regulation of nominate contract-types. For a number of such contract-types, in fact there exist specific rules constraining the use of limitation/exclusion clauses.[67] This includes residential leases,[68] contracts of sale,[69] employment contracts[70] and

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[64] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257.

[65] Article 1437 is not limited to limitation/exclusion clauses, but includes them, and they are a regular target of attack.

[66] *Civil Code of Québec*, CQLR, c. CCQ-1991 art. 1437 para. 2; See also, *e.g.*, Vincent Karim, *Les obligations*, 5th ed. (Montréal: Wilson & Lafleur, 2020) nos 2315–19, 2288 and 3909; Claude Masse, "Civil Liability" in *Reform of the Civil Code*, vol. 2-B, Obligations III, V, VI (Montréal: Barreau du Québec, 1993) no 96; Stephanie Ghozlan, "La notion d'obligation essentielle dans le cadre du contrôle des clauses abusives : Étude des systèmes juridiques français et québécois" (2015) 49 R.J.T.U.M. 399 at 413-416 and 434-440; Étienne Cossette-Lefebvre, "Chronique — Plaidoyer en faveur du rejet de la 'théorie de l'obligation essentielle' en droit civil québécois : critique de l'arrêt 6362222 Canada inc. c. Prelco inc., 2019 QCCA 1457, à la lueur du droit comparé" (2020) Repère (available on La référence) no 39; *Ferme Franky 2004 inc. v. Gestions Pierre Saint-Cyr inc. (Centrale de contrôle d'alarmes du Québec)*, [2014] J.Q. no 3825, [2014] QCCA 848 at para. 3 (Que. C.A.).

[67] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 50 (S.C.C.); Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 7th ed., by Pierre-Gabriel Jobin & Nathalie Vézina (Cowansville, Québec: Éditions Yvon Blais, 2013) no 868; Didier Lluelles & Benoît Moore, *Droit des Obligations*, 3d ed. (Montréal: Les Éditions Thémis, 2018) no 2970; Frédéric Levesque, *Précis de droit québécois des obligations : contrat, responsabilité, exécution et extinction* (Cowansville, Québec: Éditions Yvon Blais, 2014) no 488; Pierre-Gabriel Jobin & Michelle Cumyn, *La vente*, 4th ed. (Montréal: Éditions Yvon Blais, 2017) no 201.

[68] CCQ, arts. 1863, 1893 and 1900 para. 1; *Karrum Realties Inc. v. Ama Investments Inc.*,

consumer contracts.[71] The special restrictions for nominate contract-types are again commonly seen as based on the idea of protecting the presumed weaker party in those types of contracts.[72] However, as I have argued, they are better understood as situations in which the value of Freedom of Contract is seen to be attenuated because the Freedom is Asymmetrically distributed.

Circumscription of Freedom of Contract where it is distributed Asymmetrically is considerably more extensive than the narrow exceptions to Freedom of Contract discussed in the preceding section. However, it could be argued that this apparently significant restriction does not diminish the potency of the principle of Freedom of Contract in determining how the law should deal with contractual disputes, but rather adds to it. The argument would be that where we see significant restrictions of the scope of the principle (*i.e.*, to protect weaker parties) these in fact result from the principle's own abnegation in circumstances where such Freedom does not meaningfully exist on both sides of a transaction, as the value attached to the principle assumes.[73] The greater difficulty for views of Freedom of Contract as the defining principle of Contract Law is just how seldom the freedom is in fact meaningfully present on both sides of transactions.[74]

(c) Substantive Fairness

Above I mentioned that where the value of Freedom of Contract is seen as attenuated because it is asymmetrically distributed between the parties, it may be overridden by concerns of Substantive Fairness.

In the Classical view of Contract, the mere suggestion that Substantive Fairness is a consideration that the law should take account of is controversial. As Hugh Collins explains, this view reflects a

> deeper faith in the justice of an order of wealth and power established through exchange relations. This faith stems from the belief that the market order establishes both equality in place of social hierarchy and reciprocity instead of

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[2007] J.Q. no 6400, [2007] QCCA 880 at para. 35 (Que. C.A.); *9092-3335 Québec inc. v. 4364856 Canada inc.*, [2019] J.Q. no 7511, [2019] QCCS 3666 at para. 35 (Que. S.C.).

[69] CCQ, arts. 1732 and 1733; *Assoc. pour la protection des automobilistes inc. v. Toyota Canada inc.*, [2008] J.Q. no 3248, 2008 QCCA 761 at para. 34 (Que. C.A.).

[70] CCQ, art. 2092; *Quebec (Commission des normes du travail) v. Asphalte Desjardins inc.*, [2014] S.C.J. No. 51, 2014 SCC 51 at para. 53 (S.C.C.).

[71] *Consumer Protection Act,* CQLR, c. P-40.1, s. 10; Nicole L'Heureux & Marc Lacoursière, *Droit de la consommation*, 6th ed. (Cowansville, Québec: Éditions Yvon Blais, 2011) nos 60 and 71.

[72] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 51 (S.C.C.).

[73] The Court does make a passing allusion to thoughts somewhat along these lines in *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 49 (S.C.C.).

[74] See section II.2(d), "Fact versus Idea".

> exploitation. [And] above all . . . intervention was unnecessary because . . . a freely chosen exchange ensured that the bargain was fair.[75]

The latter proposition rests on an assumption that "[m]ost people look after their own interests better than anyone else would do for them."[76]

The Modern Law of Contract is far more skeptical that social justice is produced by Freedom of Contract, and because of the risk that *laissez-faire* can compound socio-economic inequality if Freedom of Contract is distributed asymmetrically, it approves of more direct scrutiny of whether a bargain is Fair.

This is evident in *how* Contract Law deals with limitation/exclusion clauses in contracts of adhesion and consumer contracts. As alluded to in the previous section, these are forms of contract in which the adherent or consumer has little or no freedom over the terms, while the other party's freedom is virtually absolute as it is unchecked. In these scenarios, does the law then prohibit outright the use of such clauses? No, the law turns its attention to the Substantive Fairness of the clause in question.[77] By virtue of art 1437 of the Civil Code, if the clause is substantively fair, it is accepted as valid and enforced; conversely, if it is unfair (abusive), it will be declared void (null) or else the obligation may be reduced that the clause imposes on the party that was unfree.[78] The general test for Substantive Unfairness is whether the term is "excessively and unreasonably detrimental to the consumer or the adhering party".[79]

A similar position is apparent in Canadian common law. Initially, the circumstances in which courts should scrutinize the Substantive Fairness of the limitation/exclusion clause were cast (somewhat misleadingly, as explained above) as where there is "unequal bargaining power".[80] However, the Supreme Court later clarified

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[75] Hugh Collins, *The Law of Contract*, 4th ed. (Cambridge: Cambridge University Press, 2003) at 24.

[76] Robert Cooter & Thomas Ulen, *Law & Economics*, 6th ed. (Boston: Pearson/Addison Wesley, 2012) at 342.

[77] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 61 (S.C.C.); Sebastien Grammond, "La règle sur les clauses abusives sous l'éclairage du droit comparé" (2010) 51 C. de D. 83 at 98. See also Didier Lluelles & Benoît Moore, *Droit des Obligations*, 3d ed. (Montréal: Les Éditions Thémis, 2018) no 1064.5; Étienne Cossette-Lefebvre, "Chronique — Plaidoyer en faveur du rejet de la 'théorie de l'obligation essentielle' en droit civil québécois: critique de l'arrêt 6362222 Canada inc. c. Prelco inc., 2019 QCCA 1457, à la lueur du droit comparé" (2020) Repère (available on La référence) no 41.

[78] As mentioned, this not only applies to limitation/exclusion clauses, as were at issue in *Prelco*, but any clause.

[79] CCQ, art. 1437.

[80] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 at 462 (S.C.C.) [hereinafter "*Hunter*"]; *Tercon Contractors Ltd. v. British*

that this scrutiny is "generally applied in the context of a consumer contract or contract of adhesion"[81] — similarly to Canadian civil law. The common law test of Substantive Fairness is whether the clause is "harsh or unconscionable".[82] This is meant to be a straightforward evaluation, like the civil law test of whether the clause is substantively one-sided. In developing an unconscionable clauses doctrine to provide for this scrutiny in the common law,[83] the Supreme Court explained that it wanted to deal "directly" and "explicitly" with a term's fairness, rather than playing "artificial . . . games of characterization" or "subterfuge" (such as straining the interpretations of a clause to make it fair, or distinguishing and disallowing limitation/exclusion of a breach that is "fundamental") as these methods were "sometimes at odds with concerns of fairness", being "the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties".[84] Thus, in Canadian common law also, where Freedom of Contract is meaningfully present on only one side of a transaction, and unfreedom on the other, the law turns its attention to the Substantive Fairness of a disputed clause.

In the civil law, a clause that breaches art. 1437 CCQ is considered to be "contrary to the requirements of good faith". We can understand why this is so by reference, again, to Freedom of Contract: *viz.*, because one party has unchecked freedom over the clause, and the other party is at the mercy of that party, it is a breach of good faith for the party which has the freedom to determine the clause to take advantage of this and not have regard to the legitimate interests of its contracting partner.

Again, we see the SCC evince a similar view in Canadian common law. In *Bhasin*, Cromwell J. wrote of the common law version of good faith that "[c]onsiderations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other."[85]

Columbia (Transportation and Highways), [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at para. 122 (S.C.C.) [hereinafter "*Tercon*"].

[81] *ABB Inc. v. Domtar Inc.*, [2007] S.C.J. No. 50, [2007] 3 S.C.R. 461 at para. 82 (S.C.C.).

[82] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 at 462 (S.C.C.).

[83] Marcus Moore, "The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts" (2022) 45:2 Dal. L.J. 551, s. V.3. As in the civil law, this scrutiny should not be seen as applicable only to limitation/exclusion clauses, but could apply to any clause in these forms of contract: Moore, *id.*, s. V.3, at 462.

[84] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 (S.C.C.).

[85] *Bhasin v. Hrynew*, [2014] S.C.J. No. 1, [2014] 3 S.C.R. 494 at para. 43 (S.C.C.);

The law turning to address Substantive Fairness concerns where there is Freedom of Contract on one side and unfreedom on the other is not limited to contracts of adhesion and consumer contracts. In the civil law, the Court in *Prelco* noted that the doctrine of lesion may apply where the party who suffers detriment from a limitation/exclusion clause is incapable.[86] In the common law, two additional examples would be unconscionable bargains (where one party is under a disability falling short of incapacity),[87] and cases of "presumed" undue influence (where one party is generally seen to be under the influence of the other).[88] Both result in the avoidance of a bargain only if it is Substantively Unfair.

Some may argue that all of the above circumstances can be seen as examples of *procedural* unfairness.[89] The argument would be that in each case, the free party took advantage of the unfreedom of the other.[90] On this view, it could be argued that there is no evidence that the Law of Contract is concerned with Substantive Fairness. Even where Contract Law turns to look at the substantive fairness of a clause, for instance under art. 1437 of the Civil Code and in common law cases of unconscionable bargains or of presumed undue influence, the significance of the substantive unfairness would merely be evidentiary, in proving that the risk of exploitation that existed due to the asymmetric distribution of Freedom of Contract in each of these circumstances did in fact materialize — that exploitation did

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G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 329-330; Elisabeth Peden, "When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005) 21 J.C.L. 226; Edward P. Belobaba, "Good Faith in Canadian Contract Law" in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (Don Mills, Ont.: De Boo, 1985) at 86; Stephen Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 J.C.L. 55.

[86] CCQ, art. 1405 provides that lesion vitiates consent only with respect to minors and protected persons of full age; (see Pierre-Gabriel Jobin, "L'étonnante destinée de la lésion et de l'imprévision dans la réforme du code civil au Québec" [2004] R.T.D. civ. 693).

[87] Marcus Moore, "The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts" (2022) 45:2 Dal. L.J. 551, s. V.2.

[88] *Royal Bank of Scotland v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 (H.L.); *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.); *CIBC Mortgage Corp. v. Rowatt*, [2002] O.J. No. 4109, 61 O.R. (3d) 737 (Ont. C.A.); Matthew Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 514.

[89] See, *e.g.*, Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2004); John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012) at 415, 432, 444.

[90] See, *e.g.*, Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2004); John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012) at 415, 432, 444.

occur.[91] This section of the article would then just be redundant of the prior section on Unfreedom.

However, ultimately this view is not persuasive. In the first place, there are a number of other situations in which Contract Law is manifestly concerned with Substantive Fairness.[92] And secondly, in the scenarios above, we observe that even without positive proof of exploitation of the unfree party by the free party, the law will presume this in the event of Substantive Unfairness. Given an asymmetric distribution of Freedom of Contract, as is present in the scenarios in this section, it is notable that the law puts the onus *on the free party* to show that the Substantive Unfairness was *not* the result of exploitation[93] (where it is possible to show this — in the case of standard form contracts and consumer contracts, it may not even be possible, as in a contracting process consisting of preformulation by one party and adhesion by the other, nothing relevant transpires between the parties[94]). In other words, cognizant of a risk of exploitation, the law deals with the unknown of whether it actually occurred through "default rules" that make Substantively Unfair terms or contracts unenforceable, rather than enforceable.

As explained in *Prelco*, all of this reflects the thinking that it is "the principle of freedom of contract" itself, which through the ability to negotiate, "ensures, for the general law of contracts, contractual fairness absent express exceptions".[95] Hence, where Freedom of Contract is symmetrically distributed, the law counts on it to assure Substantive Fairness through parties' ability to bargain or shop, and not agree unless and until they find terms that are fair. *However*, where Freedom of Contract is asymmetric, the law shifts its concern to Substantive Fairness: the concern is sometimes framed as about free parties' exploitation of counterparts' unfreedom, but the default rules show an underlying concern for Substantive Fairness.

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[91] Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257 at 278.

[92] See, *e.g.*, Stephen Waddams, *The Law of Contracts* (Toronto: Canada Law Book, 2017) c. 14; Hugh Collins, *The Law of Contract*, 4th ed. (Cambridge: Cambridge University Press, 2003) at 272; see c. 13 generally; Stephen Smith, "In Defence of Substantive Fairness" (1996) 112 L.Q.R. 138.

[93] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (London: Bloomsbury, forthcoming 2023).

[94] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] S.C.J. No. 37, [2016] 2 S.C.R. 23 at para. 28 (S.C.C.) ("While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because 'the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition'").

[95] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 53 (S.C.C.).

(d) The Nature of Spheres of Law (Including Regulated Contract-Types)

As the Court notes in *Prelco*, a limitation/exclusion clause may also be null (or the obligation reduced) by virtue of art. 1437 CCQ if the clause "so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract".[96] The Nature of the Contract refers to the contract-type. The Civil Code contains rules for various contract-types (sale, lease, insurance, *etc.*) under Book V, Title II (nominate contracts). Some of these rules are default rules in the sense that they apply in the absence of the parties exercising their Freedom of Contract to provide otherwise. Thus, the aspect of art. 1437 CCQ presently being discussed suggests that certain obligations are fundamental to a contract-type, and that departing from them too radically changes the very Nature of the Contract. In such cases, the clauses will not be enforced in contracts covered by that article.[97] This represents another possible constraint on Freedom of Contract — where it is seen as being taken to the point of altering the Nature of a Contract.

This concern is particularly relevant to limitation/exclusion clauses, the type of term at issue in *Prelco*. Indeed, in common law also, special regulation of limitation/exclusion clauses through regimes such as the U.K.'s *Unfair Contract Terms Act 1977*[98] was motivated by similar worry about distorting the Nature of some Sphere of Law.[99] The spheres of law addressed by art. 1437 CCQ comprise special regulation of given contract-types, while under the UCTA some of the spheres of law are more general: these include, for example, the law of negligence, as well as Contract Law's basic expectation that parties should substantially perform their contractual obligations, and if they do not they should be liable for the breach.[100] In North America, Margaret Radin has drawn prominent attention to the concern about the Nature of Spheres of Law (including Civil Procedure and Remedies, especially in the area of Access to Justice), or, as she argues, possibly even the liberal politico-legal system itself, being circumvented by the abuse of Freedom of Contract in a context of asymmetric freedom.[101]

However, *Prelco* was not perceived to involve a context of asymmetric freedom. And in it we see the SCC disinclined to impose stiff boundaries for Freedom of Contract purely out of concern about upsetting the Nature of Spheres of Law.

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[96] Again, the scope of art. 1437 is not limited to limitation/exclusion clauses, but does cover them as a type of clause frequently targeted under it.

[97] Article 1437 CCQ covers contracts of adhesion and consumer contracts.

[98] U.K., 1977, c. 50 [hereinafter "UCTA"].

[99] Law Commission, *Exemption Clauses: Second Report* (Law Com No. 69, 1975), s. 11.

[100] Some more specialized spheres are also included, such as terms implied by statute.

[101] Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, N.J.: Princeton University Press, 2014). The circumstance of asymmetric Freedom of Contract that she is concerned with is contracts of adhesion, or boilerplate, as another moniker of renewed popularity over the past two decades.

Despite whatever concerns exist, as discussed, about limitation/exclusion clauses distorting the Nature of Spheres of Law, the SCC casts the law's default position as that limitation/exclusion clauses (among other clauses) are valid, being an exercise of Freedom of Contract.[102] The various restrictions on parties' freedom to use limitation/exclusion clauses, recognized by *Prelco* and surveyed in the prior sections of this paper, are portrayed by the Court as exceptions to the rule of Freedom of Contract.[103] Hence, with respect to limitation/exclusion clauses, this means that

> if an impugned clause has been freely negotiated, is compatible with the constraints provided for in arts. 1474 and 1475 C.C.Q. and is not specifically regulated, it cannot be [refused enforcement] on the basis of legislative public order.[104]

Legislative public order refers, in this case, to the various statutory constraints on parties' Freedom of Contract in relation to limitation/exclusion clauses. That said, Wagner C.J.C. and Kasirer J. note that "it is not for the legislature alone to articulate rules of public order that limit freedom of contract".[105] They reiterate that "The Civil Code [of Quebec] does not contain the whole of civil law"[106] and that "innovations by judges and authors are not unknown in the civil law".[107] In fact, they note that under the preceding Civil Code of Lower Canada, most of the law on limitation/exclusion clauses was developed by courts and scholars.[108] It was therefore open for the justices to conclude as a matter of *judicial* public order that Freedom of Contract must be constrained to prevent the limitation or exclusion of liability for breaching a fundamental obligation.

However, addressing the question of whether judicial public order calls for such restriction of the use of limitation/exclusion clauses, the judges reach the same conclusion, for the same reason — Freedom of Contract: there is no need for courts

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[102] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 39 (S.C.C.).

[103] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at paras. 41-53 (S.C.C.).

[104] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 51 (S.C.C.).

[105] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 57 (S.C.C.).

[106] *Cie Immobilière Viger v. Lauréat Giguère Inc.*, [1976] S.C.J. No. 75, [1977] 2 S.C.R. 67 at 76 (S.C.C.). See, *e.g.*, *Bank of Montreal v. Kuet Leong Ng*, [1989] S.C.J. No. 98, [1989] 2 S.C.R. 429 at 442 (S.C.C.); *Ostiguy v. Allie*, [2017] S.C.J. No. 22, 2017 SCC 22 at para. 73 (S.C.C.); Pierre-Gabriel Jobin, "La Cour suprême et la réforme du Code civil" (2000) 79:2 Can. Bar Rev. 27 at 36.

[107] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 58 (S.C.C.).

[108] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 58 (S.C.C.); Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile, vol. 1, Principes généraux*, 7th ed. (Cowansville, Québec: Éditions Yvon Blais, 2007) nos 1–1375.

to intervene in "freely negotiated contracts . . . between sophisticated legal persons".[109] Chief Justice Wagner and Kasirer J. endorse the view of Didier Lluelles and Benoît Moore that "freedom of contract should continue to apply, absent a gross or intentional fault, to any contract that is neither a contract of adhesion nor a consumer contract".[110]

This includes limitation/exclusion clauses. In transactions with a symmetric distribution of Freedom of Contract, the Court does not see the fact that such clauses alter default rules as a problem; rather, the Court presumes that the alteration reflects productive economic and/or logistical planning — the clauses embody rational strategies of risk management, including potential compensation elsewhere in a contract for taking on the risk of a counterpart exercising the limitation/exclusion clause.[111]

Not surprisingly, in approving of their strong presumption in favour of Freedom of Contract, the judges note this as having also been the legislative intent at the time of the reform of the Civil Code: "the legislature deliberately indicated its preference for freedom of contract . . . throughout the Code" in contracts freely negotiated among sophisticated parties.[112] The justices' interpretation is that, "the legislature, far from being silent on the subject, has permitted the use of [limitation/exclusion] clauses in the name of freedom of contract"[113] *but for* in exceptional circumstances:

> The limits and prohibitions that are expressly provided for in the Code apply to situations of inequality between contracting parties or are based on other rules of public order deemed to be pertinent by the legislature. Aside from these situations, and of course subject to other mandatory rules that are of no consequence here, the general law of obligations leaves the contracting parties free to apportion the risk of nonperformance between them.[114]

Applying this thinking to the parties' dispute, the Court considered the clause in *Prelco* as freely agreed in a contract between sophisticated parties, and thus there

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[109] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 59 (S.C.C.).

[110] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 61 (S.C.C.); Didier Lluelles & Benoît Moore, *Droit des Obligations*, 3d ed. (Montréal: Les Éditions Thémis, 2018) no 2981.

[111] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at paras. 64, 70 (S.C.C.).

[112] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 63 (S.C.C.); see Pierre-Gabriel Jobin, "La révision du contrat par le juge dans le Code civil" in Ernest Caparros, ed., *Mélanges Germain Brière* (Montréal: Wilson & Lafleur, 1993) 400 at 410-411.

[113] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 64 (S.C.C.).

[114] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 67 (S.C.C.).

was no reason for the law to interfere with it, as a product of Freedom of Contract:[115] "The will of the parties had to be respected."[116]

Further, the Court was skeptical that the position should be different for fundamental obligations. Without more — an issue of Public Policy (bodily or moral injury, reckless or intentional fault), an Asymmetric distribution of Freedom of Contract, *etc.*, as discussed — nothing inherently objectionable is seen in radically departing from a fundamental obligation. Indeed, if the legitimacy of limitation/exclusion clauses in regard to ancillary obligations is accepted, the Court sees little sense in the risk-management rationale that it perceives to underlie this rationale being prevented from applying to the greatest risks of contractual non-performance, which typically arise from the fundamental obligations of a contract.[117] Accordingly, for a contract "freely negotiated on equal terms", the judges reject the suggestion that the party who stands to benefit from the limitation/exclusion of a fundamental obligation is acting in bad faith by seeking to apply it.[118]

Thus, the Court did not merely passively apply the position to be found in the legislation in force. True, the justices' opinion, as mentioned, ties itself to the Civil Code, and to the historical contingencies involved in its articulation, notably the pro-Freedom of Contract views alluded to at the time of the reform. However, equally clear is the judges' *approval* of the legislative position. And the justices choose a sympathetic position in envisaging what is called for by judicial public order. Further still, they acknowledge that the SCC's "permissive approach" to Freedom of Contract, as described above, "is to some extent echoed in this Court's decisions in cases . . . in the common law provinces".[119] As *Prelco* dealt with a limitation clause regarding a fundamental obligation, the justices point as common law examples to *Hunter*[120] and *Tercon*,[121] the cases in which the doctrine of

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[115] Chief Justice Wagner and Kasirer J. additionally considered and rejected, on the facts of the case, an argument for the clause's invalidity if it were considered to deprive the counterpart's reciprocal contractual obligations of their objective cause under art. 1371 CCQ.

[116] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 103 (S.C.C.).

[117] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 66 (S.C.C.).

[118] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 65 (S.C.C.).

[119] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 54 (S.C.C.).

[120] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 (S.C.C.).

[121] *Tercon Contractors v. British Columbia (Transportation and Highways)* [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at para. 122 (S.C.C.).

"fundamental breach"[122] was retired in Canadian common law.[123] In *Hunter* and *Tercon*, which like *Prelco* were cases of contracts between sophisticated parties, the exclusion clauses at issue were held to be valid.[124] Moreover, as discussed above, the principles laid down in the line of cases that included *Hunter*, *Tercon* and *Domtar* were that the boundaries of the freedom lay in concerns about Substantive Unfairness in circumstances where Freedom is distributed Asymmetrically. Gener- ally, the Court did not see in common law either an independent constriction based purely on limitation/exclusion clauses distorting Spheres of Law (although they left open the possibility of more narrow restriction if a specific limitation/exclusion raised a Public Policy concern).[125]

The Court's recent thinking about such situations can perhaps be further illuminated by looking at its handling of other situations bearing some similarities but also some differences. One prominent such example was *Uber*,[126] in which an arbitration clause was not enforced. An arbitration clause can be seen as an exclusion clause (in that it excludes access to court, which would otherwise be available as a recourse at law), besides providing for arbitration to resolve disputes. Indeed, the clause in *Uber* was at least doubly an exclusion clause in that the affected action was a class proceeding, which arbitration would exclude. The *Uber* majority framed the issue as a matter of unconscionability — that is, of Substantive Fairness in circumstances of Asymmetric Freedom of Contract. Justice Brown, concurring, framed the exclusion as pertaining to fundamental rights, and thus a concern of Public Policy. But both opinions were animated by an overriding concern about how the clause affected Civil Procedure and Remedies in the area of Access to Justice. Further, *Uber* suggested that similar concerns would be raised by choice of law and forum selection clauses used in similar circumstances with similar effects. Those too can be seen as exclusion clauses — excluding the law or forum that would otherwise apply by default. Thus, the Court flagged multiple types of clauses that involve an exclusionary/limiting effect in relation to default rules in this Sphere of Law as warranting scrutiny. This again, was a Sphere in which Radin argued that contractual distortion of background law was especially pernicious.[127] However, it also appears from the discussion in *Uber* that the distortion on its own would not be enough for courts to constrain Freedom of Contract: whether framed

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[122] *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.).

[123] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 55 (S.C.C.).

[124] Tercon prevailed in the result, but on the basis that the exclusion clause was interpreted as inapplicable to the breach that occurred.

[125] *Tercon Contractors v. British Columbia (Transportation and Highways)* [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 at para. 123 (S.C.C.).

[126] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16 (S.C.C.).

[127] Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, N.J.: Princeton University Press, 2014).

broadly as an issue of unconscionability, or narrowly as an issue of Public Policy, there had to also be an Asymmetric distribution of Freedom and a clause with a harsh Substantive effect for the party that was unfree in order to arouse sufficient concern to contemplate non-enforcement.

Another partly similar but partly different situation emerges from the Court's discussion in *Prelco* of the question of whether an exclusion clause can go so far as to deprive an obligation of the objective cause it requires under art. 1371 CCQ. The justices expressed some doubt about this, distinguishing a limitation/exclusion clause, which excludes liability while still conceivably allowing other remedies, from a clause that lets a party disavow the underlying obligation altogether — more problematic for the objective cause.[128] While in *Prelco* the impugned clause merely limited liability, the Court noted that some scholars saw greater difficulties arising as the exclusionary scope of a clause more closely approaches in effect a clause negativing the obligation itself.[129] The objective cause issue is not addressed in this article, but the Court's distinction between mere liability versus the obligation itself is interesting. Consider a scenario where a limitation/exclusion clause concerns a *mandatory* term, such as a minimum wage or rent control. On the objective cause issue, would the Court validate the same formalist distinction between excluding liability and excluding the underlying obligation, and thus potentially give effect to a clause sheltering from liability an employer who pays less or a landlord who charges more?

It seems to me that the distinction made by the Court is less important than the distinction to be made between *mandatory* rules and *default* rules of law, including rules as to contract terms.[130] The typical way legislatures or courts immunize a rule from being overridden by contractual exclusions/limitations is by making the rules mandatory. From the complete freedom that is the start point of social contract theories, Freedom of Contract is *enormously* constrained by rules that are mandatory in order to ensure that Spheres of Law fulfil their intended functions, and do not unravel into the rule of the jungle. However, as Duncan Kennedy underlined, these constraints are also what secure the freedoms we do enjoy under our legal system.[131] In any case, regardless of the extent to which one views the legal order as detracting from or contributing to freedom that we could realistically exercise, much of the

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[128] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at para. 78 (S.C.C.).

[129] *6362222 Canada inc. v. Prelco inc.*, [2021] S.C.J. No. 39, 2021 SCC 39 at paras. 82-83 (S.C.C.).

[130] Marcus Moore, "The Future of Unfair Terms Regulation in Commercial Contracts" in Mads Andenas & Maren Heidemann, eds., *Issues in Commercial Contract: From Unfair Terms to Dispute Settlement Agreements*, LCF Studies in Commercial and Financial Law Series (Springer, 2023), s. 5.2.2.

[131] Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 211 at 213.

work of protecting the Integrity of Spheres of Law is done by making certain rules mandatory.

It follows that where rules have the status of defaults rather than being mandatory, we should not be surprised that courts are reluctant to prevent parties from excluding/limiting these.[132] But this does not mean that protecting the Nature of Spheres of Law is a weak basis for constraining parties' Freedom of Contract in relation to limitation/exclusion clauses.

From this perspective, one way of looking at the argument about the permissibility of limiting/excluding fundamental obligations would be to see it as an argument that the obligation in question is mandatory in that contract-type, although the legislature (or another court previously) never expressly said so. Looking at it this way suggests that in contracts with a Symmetric distribution of Freedom of Contract, the party arguing for invalidity should emphasize any perverse Effect of the clause in wider Background Law, rather than Unfairness it might create as between the parties.

To this point, the recent *Prelco* case has been most useful as the starting point for investigating the tensions between Freedom of Contract and the other high-level considerations discussed in this and the preceding sections. The remaining considerations to be examined that admit of potential tensions with Freedom of Contract emerge from the other cases covered in this analysis of developments in Contract Law.

(e) Technical Rules of Law

Besides emerging from different cases, the tensions between Freedom of Contract and the remaining considerations to be discussed here emanate out of contexts other than use of limitation/exclusion clauses. In *Corner Brook (City) v. Bailey*,[133] the clause at issue was of a somewhat related type — a contractual release. The issue in this case was the proper approach to interpreting the scope of contractual releases.

The context was litigation over a car accident. The person who was struck sued the driver, while the driver sued the municipality. The latter suit was settled, releasing the municipality from further liability relating to the accident. Later, the driver sued the municipality for contribution or indemnity in the suit against the driver by the person who was struck. The dispute was whether this was covered by the release.[134]

Corner Brook was a unanimous judgment of the Court. The Court's opinion was authored by Justice Rowe, who explained that the Blackmore rule[135] for interpreting

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[132] Without something more, such as Asymmetric Freedom, an issue of Public Policy, or Bad Faith.

[133] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 (S.C.C.).

[134] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 2 (S.C.C.).

[135] *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610 (H.L.).

releases is now superseded by the revised general principles of contractual interpretation laid down by the SCC in *Sattva Capital Corp. v. Creston Moly Corp.*[136] One of the evident reasons the Court wanted to distance itself from the Blackmore rule was that the latter could be read as inappropriately limiting Freedom of Contract. The statement in question came from the speech of Lord Westbury:

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.[137]

It is settled that the Blackmore rule's reference to what was "in the contemplation of the parties at the time the release was given" does not refer to their subjective intention,[138] but rather — as is usually the case in Contract Law — to the "objective intention" of the parties, in the sense of what a reasonable person would infer their intention to have been, considering the contractual text and context known to both parties.[139]

Whether the objective test of intention counts as a restriction of Freedom of Contract is perhaps a matter of semantics: there are many cases in which the

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[136] *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, [2014] 2 S.C.R. 633 (S.C.C.) [hereinafter "*Sattva*"].

[137] *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at 623-624 (H.L.).

[138] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 25 (S.C.C.); *White, Fluhman and Eddy v. Central Trust Co.*, [1984] N.B.J. No. 147, 54 N.B.R. (2d) 293 at para. 33 (N.B.C.A.) (*per* La Forest J.A.); *Hill v. Nova Scotia (Attorney General)*, [1997] S.C.J. No. 7, [1997] 1 S.C.R. 69 at paras. 18-22 (S.C.C.); *Strata Plan BCS 327 v. IPEX Inc.*, [2014] B.C.J. No. 1873, 2014 BCCA 237 at paras. 22-23 (B.C.C.A.); *Biancaniello v. DMCT LLP*, [2017] O.J. No. 2468, 2017 ONCA 386 at para. 28 (Ont. C.A.); Geoff Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016) at 291-292.

[139] Geoff Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016), s. 2.5.1; *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164, 2000 BCCA 70 at para. 17 (B.C.C.A.); *Golden Capital Securities Ltd. v. Investment Industry Regulatory Organization of Canada*, [2010] B.C.J. No. 1458 at para. 44, 2010 BCCA 359 (B.C.C.A.); *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1999] O.J. No. 3290, 45 O.R. (3d) 417 at para. 9 (Ont. C.A.). There are numerous judicial pronouncements to a similar effect. See, for example, *Alberta Treasury Branches v. MacLeod Dixon*, [2001] A.J. No. 114, 2001 ABQB 73 at para. 32 (Alta. Q.B.); *Barque Investments Ltd. v. DKT Computer Learning Centre Inc.*, [2001] A.J. No. 1190, 2001 ABQB 768 at para. 12 (Alta. Q.B.); *Greenhills Golf and Country Club 617654 Saskatchewan Ltd. v. Morhart*, [2002] S.J. No. 6, 2002 SKQB 10 at para. 8 (Sask. Q.B.); *CISH Care Institute of Safety & Health Inc. v. West Fraser Home Centres Inc.*, [2004] B.C.J. No. 1318, 2004 BCSC 847 at para. 98 (B.C.S.C.).

objective test protects reasonable reliance at the expense of the actual wishes of the party in question. However, this limitation of party autonomy may be discounted on the basis that it is simply part of what we understand to be entailed in something being a contract, as a legal term that involves criteria of validity and content-determinants beyond the parties' intentions.[140] It might further be argued that this is a necessary concession for the workability of an institution that tries to give effect to the idea of voluntary obligations, in that it is simply not possible to read parties' minds.[141] As Steve Smith explains, a contract is a relation, a relation requires communication, and communication's meaning is determined by a complex set of factors beyond the will of the subject of the communication.[142]

Some theorists might go further, and argue that the objective test can be reconciled with the principle of Freedom of Contract in that the parties were free to record their wishes more accurately than would result in a gap between their wishes and a reasonable interpretation thereof, but chose not to spend the additional effort to do so. But the latter argument is not fully convincing, as communication is so complex that it is probably impossible to record wishes so perfectly as to preclude reasonable miscommunication of any aspect that might only become evident in some unforeseen event or context. The argument is more convincing in relation to contracts that it is obvious were hastily drawn.[143] At any rate, the objective test is more of an issue for party Intention than for Freedom of Contract, and the Blackmore rule reconsidered in *Corner Brook* is but one of innumerable instances of the objective test's applicability in Contract Law.

Of more definite and specific relevance to Freedom of Contract is the fact, as Geoff Hall explains, that the Blackmore rule was "often used to hold that a claim that arose after execution of the release was not in the contemplation of the parties at the time and is therefore not within the scope of the release".[144] Thus, the

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[140] Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 272*ff*.

[141] Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004).

[142] Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004).

[143] See, *e.g.*, the statement in *Wood v. Capita Insurance Services Ltd.*, [2017] UKSC 24 at para. 13 (S.C.), in the context of interpretation:

> Textualism and contextualism are not . . . in a battle for exclusive occupation of the field of contractual interpretation . . . The extent to which each tool will assist the court in its task will vary . . . Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.

[144] Geoff Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016), s. 8.10.2; *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, [1997] B.C.J. No. 935, 36 B.C.L.R. (3d) 155 (B.C.C.A.); *Hill v. Nova Scotia (Attorney General)*,

Blackmore rule is a Technical Rule that, if applied as just mentioned, directly limits contracting parties' Freedom to provide for the release of future claims: uncontemplated future claims could not be released. In the U.K., this restriction of Freedom of Contract had been rolled back in 2001 in the judgment in *Bank of Credit and Commerce International SA (in liq.) v. Ali*,[145] with Lord Nicholls explaining that commonly it is the case that

> the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made.[146]

More recently, in *Biancaniello v. DMCT*,[147] the Ontario Court of Appeal followed the House of Lords' decision in *Ali*. In *Corner Brook*, the Supreme Court of Canada signalled its agreement with this move to alleviate the Blackmore rule's restriction of Freedom of Contract in this context. Justice Rowe articulated the parties' rationales for exercising their freedom in this way:

> The releasor takes on the risk of relinquishing the value of the claims he or she might have had, and the releasee pays for the guarantee that no such claims will be brought. The uncertainty or risk that is allocated to the releasor is precisely what the releasee pays for.[148]

As can be seen from this passage, the Court perceives — much like the limitation/exclusion clauses in *Prelco* — sound economic and/or administrative reasons comprising a mutually beneficial reallocation of risks as motivating the exercise of Freedom of Contract to release legal claims, and is thus reluctant to restrict this based on categorical reasoning.

But whereas in *Prelco*, the categorical reasoning argument was that only ancillary obligations, and not fundamental ones, could be limited/excluded, in *Corner Brook* its argument is for allowing for the release of present claims but not future ones, or allowing release of foreseen but not unforeseen claims.

[1997] S.C.J. No. 7, [1997] 1 S.C.R. 69 (S.C.C.).

[145] *Bank of Credit and Commerce International SA (in liq.) v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 (H.L.) [hereinafter "*Ali*"].

[146] *Bank of Credit and Commerce International SA (in liq.) v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 at para. 27 (H.L.).

[147] *Biancaniello v. DMCT LLP*, [2017] O.J. No. 2468, [2017] ONCA 386 (Ont. C.A.).

[148] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 27 (S.C.C.).

While, as Rowe J. suggests, the restriction of Freedom of Contract produced by the Blackmore rule's strict construction of releases had been seen as animated by Substantive Fairness concerns, this was less salient than the *approach* that the Blackmore rule took to that task. And the Blackmore rule's approach — embodying a Technical Rule of Law — was problematic. Thus, Rowe J. agreed with Lord Nicholls' opinion from *Ali* that "there is no room today for the application of any special 'rules' of interpretation in the case of general releases",[149] and agreed also with the broader claim by Justice Rothstein in *Sattva* that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction".[150]

There are multiple apparent reasons that the Court is disinclined to constrain Freedom of Contract by a Technical Rule of Law in this context. As the quotes above allude to, one reason is that too many Technical Rules of Law detract from the accessibility of the law: it is more realistic for parties to appreciate the *general* rule of interpretation from *Sattva* than a *ménagerie* of *special* rules that might challenge the working knowledge of even a solicitor with a fair degree of expertise in contract drafting. On the other hand, it might be argued that the accessibility of the rule from *Sattva* is only *apparent*, as it obscures how that broad principle will be applied in particular contexts. From that perspective, while it may avoid forcing one to learn several Technical Rules, one must nonetheless research the jurispru- dence to discern the pattern of how the courts will apply the broad rule in the context of releases of future claims.

A second reason the Court disfavours the Technical Rule approach is its rigidity: the rule only crudely embodies Substantive Fairness concerns, because there will be cases where a broad release *does* reflect a fair reallocation of risks, but the inflexibility of the rule would stand in the way of that. In cases where there is a Symmetric distribution of Freedom of Contract, the rule then unduly constrains Freedom of Contract, imposing on the parties on the basis of a broad generalization of what is Fair, rather than letting the parties determine in their specific context and particular circumstances what they perceive to be Fair.

This is closely related to a third and more basic reason, simply being that the Technical Rule unnecessarily restricts the scope of Freedom of Contract by impeding parties from releasing unknown/future claims. This is unnecessary for a substantially similar reason as discussed in the last section: the Court does not think that it should be mandatory that releases do not apply to future claims. In some

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[149] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 33 (S.C.C.); *Bank of Credit and Commerce International SA (in liq.) v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 at para. 26 (H.L.).

[150] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 34 (S.C.C.); *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, [2014] 2 S.C.R. 633 at para. 47 (S.C.C.).

contexts, it may be rational or indeed appropriate that a release include such claims in order to "wipe the slate clean".[151]

In short, by moving away from the approach of Technical Rules of construction, the Court widens the scope of Freedom of Contract, eliminating the boundaries that these rules place on what parties could otherwise provide for in a contract. In *Corner Brook*, the Technical Rule impedes the freedom to release unknown/future claims, which is sometimes an important aspect of parties' more general interest in release agreements. But based on the Court's reasoning in *Corner Brook*, we might further expect that Technical Rules that crudely curtail Freedom of Contract in other contexts of Symmetric Freedom may encounter similar judicial skepticism in future cases.

(f) Other Freedom

Despite disfavouring (as just discussed) an approach based on Technical Rules of Law, *Corner Brook* effectively affirmed the judicial tendency to construe contractual releases strictly.[152] In other words, on my reading, while it retired use of the Blackmore rule in Canada, *Corner Brook* did *not* decide that courts should interpret releases more liberally. Rather, the judgment aimed to replace Technical Rules of Law as the basis for their tendency to do so. The Court could have re-explained the pattern as animated by Substantive Fairness concerns. However, instead it framed the strict construction of releases too as a matter of Freedom: the inquiry is simply the usual interpretive question of ascertaining the parties' true intentions, and the pattern of strict interpretation just reflects the fact that in spite of common use of catchall language, it is rare that parties would intend to exclude unforeseen/future claims. The concern, then, is of Freedom from an overbroad reading of the obligations contracted. But what does this mean in terms of Freedom of Contract specifically? The Court's explanation suggests that strict interpretation of releases actually *gives effect* to Freedom of Contract. As I read the judgment, there are two reasons for this.

The first is simply the claim that the strict interpretation is what the parties actually provided for. If we accept the Court's empirical claim that releases are often drafted in words of "all-embracing scope" even though it will normally be the case that parties intend their release to cover something less than that, then the parties' Freedom of Contract is actually respected by the seeming paradox of departing from the words they used.[153] It would negate the parties' Freedom of Contract if courts defer to words which they know to be misleading, and thereby effectively impose

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[151] *Bank of Credit and Commerce International SA (in liq.) v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 at para. 23 (H.L.).

[152] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 35 (S.C.C.).

[153] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at paras. 3, 35-43 (S.C.C.).

obligations broader than what the parties chose. On its face, the argument is plausible, because the text is not the only indicator of the parties' intentions; what the parties actually provided for always requires taking into account other contextual factors.

What is problematic about this argument is to make it a general statement about interpretation of releases. It then amounts to saying, perhaps, that parties normally intend that courts not interpret the wording of releases according to the provisions' ordinary grammatical meaning. This would conflict with the general approach to contractual interpretation from *Sattva* that *Corner Brook* presented its position as relying on, wherein the text of any clause is to be given that meaning in interpreting it.[154] Alternatively, the argument as a general statement about releases might amount to saying that the text should be given less weight in the case of releases. Either way, it is hard to accept this argument without ending up back with essentially a Technical Rule of Law — the remaining distinction being that is not actually a rule, but an empirically-based presumption.

As discussed in the last section, my sense is that the Court *does* want to move away from Technical Rules of Law that constrain Freedom of Contract in circumstances where Freedom is Symmetrically distributed. Thus, I do not find this first argument for why narrow interpretation of releases gives effect to Freedom of Contract very convincing.

The second argument for why strict interpretation of releases gives effect to Freedom of Contract is that it effectively counsels parties to accurately capture the true intended scope of the release through more careful language. After all, the parties *can* control the drafting. And if they do manage to capture their intended meaning in the words, then courts should give effect to it. *Corner Brook* even provides parties with drafting guidelines to assist in this. For instance, Rowe J. recommends that releases mention their intended timeframes and subject-matters, or make clear if they are not to be restricted on these bases; further, he suggests that if releases are to cover unknown or future claims, that the release specify this, to openly confront judicial skepticism.[155] In these ways, the judgment seems keen to communicate to contracting parties (or the lawyers who draft contracts for them) that Freedom of Contract encompasses the freedom to override the judicial tendency to interpret releases strictly, through drafting which is clear as to a release's intended scope.[156] In short, the parties' Freedom of Contract is given effect through this

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[154] *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, [2014] 2 S.C.R. 633 at para. 47 (S.C.C.).

[155] *Corner Brook (City) v. Bailey*, [2021] S.C.J. No. 29, 2021 SCC 29 at para. 41 (S.C.C.).

[156] Given the Court's strong view that releases tend to be drafted broadly even when the context suggests that the parties' actual intent is more measured, a possible suggestion for drafters in cases where the parties' intent really is to provide for such a broad release would

enhanced opportunity to record their intentions accurately so that courts will enforce these.

But this too seems questionable. In some respects, it is a bit like arguing that one has a better chance of a fair hearing by a court that is partial, because it will incentivize making one's argument extra-persuasive. Moreover, I doubt that courts will consistently adhere to the drafting guidelines provided in *Corner Brook* when called to interpret releases. For one thing, the holistic approach to contractual interpretation endorsed in *Sattva* and affirmed in *Corner Brook* as governing the interpretation of releases in negotiated contracts encourages judges to look beyond the text.[157] The context includes a variety of factors that are more difficult for parties to control the interpretation of than the text. After all, as Lord Hoffmann famously said in *Investors Compensation Scheme v. West Bromwich*, the context "includes *absolutely anything* which would have affected the way in which the language of the document would have been understood by a reasonable [person]".[158] Second, as Lord Hoffmann alluded to in *Ali*, there is a risk that drafting guidelines like those given in *Corner Brook* invite "grosser excesses of verbiage",[159] reflecting more so the accretion of lawyerly precedent than the true intention of the parties. If so, this

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be to better document the other half of the equation — the context — including in the contract itself, through recitals, definitions, etc.

That said, I suspect that releases are among the types of clauses over which disputes commonly arise because often there probably was no actual common intention as to the scope: the party in whose favour the release exists banks on the broad language of the clause as determinative, while the other party counts on the context to cut the clause down to a narrower effective scope than the contractual verbiage pretends. Sometimes, the parties may suspect that they are operating on conflicting bases, but do not wish to scuttle the deal by surfacing disagreement and forcing predetermination of a future potential dispute the possibility of which they may hope is low. As with the uncertain legal status of letters of intent, the unpredictability of how a court will interpret a release likely facilitates reaching the deal that includes the release. While that uncertainty may be the basis of a future dispute, the same uncertainty may deter litigation over it. And in the meantime, the release itself resolves a prior dispute. Thus, it is perhaps a case of a bird in the hand being worth two in the bush.

Where parties suspect that their counterpart has a conflicting understanding of the scope of a release being negotiated, do not anticipate being able to reach agreement over the scope if they were to openly negotiate it, *and* are unwilling to accept the uncertain interpretation of it by courts as the price of a deal, the game will become one of negotiating in one's favour (by any/all means) the preponderance of indicia of the scope of the release that a court might draw on in interpreting it in the event of future litigation.

[157] *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, [2014] 2 S.C.R. 633 at paras. 46-48 (S.C.C.).

[158] *Investors Compensation Scheme v. West Bromwich*, [1997] UKHL 28 [emphasis added].

[159] *Bank of Credit and Commerce International SA (in liq.) v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 at para. 38 (H.L.).

might occlude rather than illuminate their true intention. Thus, *Corner Brook*'s guidance on how to draft releases is far from a formula for how to draft releases in a way that would allow parties to unmistakably communicate their intention to courts. In practice, Freedom of Contract remains limited by the inevitable subjec- tivity of the court itself in contractual interpretation — a subjectivity which is enhanced by the slant inherent in strict interpretation.

I suggest that the strict interpretation of releases is best seen not as enhancing Freedom of Contract, but as constraining it for the sake of Other Freedom. A desire to preserve Wider human Freedom and/or Future Freedom has been treated by courts as among the most compelling reasons for restricting Freedom of Contract.[160] One way to describe the effect of the strict interpretation would be as Freedom *from* Contract — preserving the parties' Freedom *outside the contract* by limiting the scope of the contractual *obligations* (in this case releases).[161] The parties' Freedom in relation to innumerable matters outside the contract (including the Freedom to undertake additional obligations via other contracts) is expanded by strict construction of the obligations in the contract at bar. Meanwhile, concern for Future Freedom is evident in many rules of Contract Law, including those that offer relief from "autonomy-endangering agreements" such as self-enslavement contracts, unreasonable restraints of trade and restrictive covenants, and penalty clauses.[162] The release of unknown/future claims fits into both of these categories — it preserves the releasing party's Wider and Future Freedom to pursue claims not released, or to contract separately (for additional consideration) for the release of claims other than those included in a strict construction of the release given.

It has been argued that the circumstances in which Contract Law circumscribes Freedom of Contract to preserve Wider/Future freedom are based on a view that more liberal enforcement of the contract would result in a collateral loss of Freedom that is unnecessary or disproportionate.[163] Again, the scenario in *Corner Brook* fits this more general judicial pattern: construing the releases liberally (or literally in the normal case where the language is said to be overbroad) so as to include claims not foreseen would result in "unnecessary" loss of Other Freedom to the releasing party (as compared to the strict construction) or disproportionate loss of Other Freedom in the sense that likely little consideration was paid for the release of claims that were not contemplated.

Here is one scenario, then, where Freedom of Contract can be seen as constrained

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[160] See, *e.g.*, Stephen Smith, "Future Freedom and Freedom of Contract" (1996) 59:2 Mod. L. Rev. 167; Samuel Williston, "Freedom of Contract" (1920) 6 Cornell L.Q. 365.

[161] Todd Rakoff, "Is Freedom from Contract Necessarily a Libertarian Freedom?" (2004) Wis. L. Rev. 477.

[162] Stephen Smith, "Future Freedom and Freedom of Contract" (1996) 59:2 Mod. L. Rev. 167.

[163] Stephen Smith, "Future Freedom and Freedom of Contract" (1996) 59:2 Mod. L. Rev. 167 at 179.

by the Court's opinion. However, this is only to give effect to Freedom more broadly, including the Freedom to enter other contracts or future contracts. Moreover, *Corner Brook* did not curtail the scope of Freedom of Contract in allowing for that; it just affirmed existing judicial practice to construe releases strictly. And the Court's justification for this affirmation was couched — even if unconvincingly — as giving greater effect to Freedom of Contract.

(g) Induced Reliance

The next consideration whose tension with Freedom of Contract animated recent decisions of the Supreme Court of Canada was the concern to protect Reliance which has been Induced by another party. This tension is most evident in the case *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*,[164] in the issue of whether or not the doctrine of promissory estoppel should apply.[165]

More specifically, the issue in *Trial Lawyers* was whether the doctrine of promissory estoppel prevented the insurer from denying coverage after earlier having defended a claim for a period of time. All members of the Court (split among two concurring opinions) found that the insurer was not estopped from denying coverage. Further, all members of the Court came to the conclusion that the claim of promissory estoppel failed because the insurer lacked the requisite intention.[166] They were reluctant, thus, to hold the insurer responsible for the claimant's detrimental reliance on the insurer covering the claim, even after it had done so for three years, including more than a year of litigation.[167] The insurer was still able to go back to the contract and deny coverage based on a condition of coverage it had included through Freedom of Contract.[168] As such, the judgment zealously preserves the freedom of parties to invoke their "strict" contractual rights procured through Freedom of Contract: it does so generally by setting a high bar for what is required for these to be constrained by estoppel; and it does so more particularly by

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[164] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 (S.C.C.).

[165] Besides Freedom of Contract, another high-level contractual principle which very evidently influenced the majority judgment in *Trial Lawyers* was Reciprocity: Brown and Moldaver JJ. were clearly disinclined to recognize any duties to the claimant as a third party beneficiary, beyond what they accepted as already established by law/fact.

[166] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at paras. 3, 18 (Moldaver and Brown JJ.), 77-79 (Karakatsanis J.) (S.C.C.).

[167] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 1 (S.C.C.).

[168] Coverage would not apply if the driver's blood alcohol level was above the legal limit. Under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, the limit for the applicable class of motorcyclists was zero: *Bradfield v. Royal and Sun Alliance Insurance Co. of Canada*, [2018] O.J. No. 4072, 2018 ONSC 4477 at para. 10 (Ont. S.C.J.) [hereinafter "*Bradfield*"].

making the hard part of the test for estoppel the intention to concede a permitted exercise of the strict rights acquired through Freedom of Contract. I will elaborate on these points further below.

The dispute in *Trial Lawyers* concerned a motorcycle accident. The insured had a modest quantity of alcohol in his system at the time of the accident.[169] Under the insurance policy, any consumption of alcohol was a violation for the relevant class of driver.[170] The violation allowed the insurer to take an off-coverage position, and only be responsible for a statutory minimum amount.[171] However, the insurer did not do so. Although a coroner's inquiry was conducted and found the presence of alcohol, the insurer's investigation failed to discover this fact until three years later, during which time the insurer had covered the claim in legal proceedings.[172] Only then did the insurer take an off-coverage position, ceasing to defend the claim, and reducing its liability to the statutory minimum amount.[173] A fellow motorcyclist, who was also party to the proceedings, subsequently sought a declaration that the insurer was estopped at that point from denying coverage of the claim.[174]

The Court delivered two opinions, both concluding that the strict rights the insurer had by virtue of Freedom of Contract to deny coverage if a policy condition was violated were unaffected by the insurer subsequently providing coverage or by the insurer failing to discover the violation until three years later. The two opinions further agreed on the primary reason for this being that the insurer had not shown an unequivocal intention to concede its ability to assert the strict rights it had by virtue of Freedom of Contract.[175] In the opinion of Karakatsanis J., despite the coroner finding alcohol and the insurer conducting an investigation before covering the claim, it was not reasonable to assume that the insurer knew of the alcohol issue

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[169] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 8 (S.C.C.).

[170] Coverage would not apply if the driver's blood alcohol level was above the legal limit. Under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, the limit for the applicable class of motorcyclists was zero: *Bradfield v. Royal and Sun Alliance Insurance Co. of Canada*, [2018] O.J. No. 4072, 2018 ONSC 4477 at para. 10 (Ont. S.C.J.).

[171] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 1 (S.C.C.).

[172] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at paras. 1-8 (S.C.C.).

[173] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 9 (S.C.C.).

[174] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 12 (S.C.C.). The other rider was both injured in the accident and partly responsible for it: at paras. 1, 11.

[175] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47, at paras. 3, 18, 77-79 (S.C.C.).

when it provided coverage.[176] Nor was it reasonable to assume by the passage of three years that if the insurer intended to deny coverage based on a policy violation, it would have done so by then.[177] As it were, by a confluence of mistakes, misleading silence and fluke occurrences, it was only after this that the insurer in fact learned of the alcohol consumption.[178] It is cliché to say that courts must guard against a course of conduct appearing reasonable in hindsight although it was unreasonable at the time, and vice versa. One might think this would be the case here — that it is because we know in hindsight that the insurer only learned of the alcohol consumption after all this, and we think it is bad policy to let insurance shield motorists from liability for drinking and driving — that it might appear to us unreasonable that the insurer could previously have intended to provide coverage, and not to deny it. Hence, for Karakatsanis J. to conclude otherwise tells us that a reasonable person sets a very high bar of what would persuade that person that a party intended to make a concession in regard to what rights it could exercise by virtue of Freedom of Contract. One might even view the law as effectively presuming that a party would not abridge what powers it held through Freedom of Contract, unless the strongest of evidence rebuts that presumption. However one may wish to put the point, what is evident is a tremendous reluctance to treat parties as having conceded through subsequent words or conduct what they were entitled to by Freedom of Contract.

In many respects, the position of the other justices can be seen as even more strongly protective of Freedom of Contract from effective encroachment as a result of subsequent words or conduct Inducing detrimental Reliance by another party. This is apparent in the majority opinion of Moldaver and Brown JJ. (Wagner C.J.C., Côté, Rowe and Kasirer JJ. concurring). A remarkable feature of the majority's opinion — and the subject of their disagreement with Karakatsanis J. — was their view that a party cannot be taken to have intended a promise it would not have made but for its ignorance of relevant facts. This shows a concern that the interest in Freedom of Contract would be hollowed out if parties are counted as having given up the ability to exercise a right procured through Freedom of Contract without knowing that the relevant fact(s) are present that would cause them to exercise the right at issue. If it was said that the case was one of mistake, the courts' reluctance to find that there has been a mistake would limit how far this concern could otherwise be taken.[179] But the majority made no mention of mistake. Does a party

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[176] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 77 (S.C.C.).

[177] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 78 (S.C.C.).

[178] *Bradfield v. Royal and Sun Alliance Insurance Co. of Canada*, [2018] O.J. No. 4072, 2018 ONSC 4477 at paras. 52*ff.* (Ont. S.C.J.) [hereinafter "*Bradfield*"].

[179] Bruce MacDougall, *Mistake in Contracting* (Toronto: LexisNexis Canada, 2018) §1-013.

bear no responsibility then for its ignorance of facts decisive as to whether it would wish to exercise the rights it acquired through Freedom of Contract? The majority rejected that the insurer had a duty to investigate thoroughly and diligently.[180] It felt that this would conflict with the duty it had endorsed earlier in *Fidler*[181] that insurers are bound to investigate claims fairly in a balanced and reasonable manner.[182] This is important. But what about a duty to investigate promptly? The length of time that had passed was central to the trial judge's conclusion that the insurer could no longer deny coverage.[183] While the trial judge's conclusion was based erroneously on the doctrine of waiver by conduct, it could be considered to speak as well to whether the intention to provide coverage was conditional or unequivocal. There must be a point at which a continuing intention to provide coverage becomes settled. The majority fails to address this temporal issue, and why the point in time was not before the insurer took its off-coverage position that the intention should be treated as settled and that other parties affected by it should be entitled to Rely on that. For her part, Karakatsanis J. acknowledges the temporal issue, but treats it as a discrete issue — addressing the insufficiency of the passage of time *alone* to establish estoppel.[184] It is not the passage of time on its own, but the combination of it with the fact that the position taken by the insurer in the meantime would Induce Detrimental Reliance by others. In any event, with constructive knowledge by the insurer of the policy violation held to be insufficient, and actual knowledge not present, in practice the majority's position is that estoppel requires that the promisor have *subjectively* intended not to exercise its strict contractual rights.

That the majority's position made the test one of subjective intent was a point made and excepted to by Karakatsanis J., who properly noted that: "Subjective intent is unknowable to anyone other than the promisor and is not the appropriate lens for this equitable doctrine."[185] Unlike in Criminal Law, which is directly concerned in many instances with whether the state of mind of an accused was blameworthy, civil justice's concern is more practical: enabling people to plan their affairs based on what it is reasonable to interpret as the meaning of the actions of others and of the state. Contract Law almost always treats intention "objectively" as

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[180] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at paras. 32-34 (S.C.C.).

[181] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30, [2006] 2 S.C.R. 3 (S.C.C.).

[182] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at paras. 33-34 (S.C.C.).

[183] *Bradfield v. Royal and Sun Alliance Insurance Co. of Canada*, [2018] O.J. No. 4072, 2018 ONSC 4477 at paras. 63-70 (Ont. S.C.J.).

[184] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 78 (S.C.C.).

[185] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 56 (S.C.C.).

a matter of its outward manifestation and the reasonable interpretation thereof by other parties, who have only that to rely on, since a person's state of mind (and knowledge) are indeed typically "unknowable" to others. Further, the very role of promissory estoppel as an equitable adjunct to Contract Law in cases of promises meant to affect legal rights but not made for consideration, is to protect the reasonable Reliance of the promisee thereon. A test of subjective intent, as was endorsed by the majority in *Trial Lawyers*, in most cases will make it virtually impossible to prove that a party intended not to exercise the strict rights it obtained through Freedom of Contract.

For example, in the case at bar, even if the insurer knew of the alcohol consumption from the beginning, it could argue that the information was lost, or forgotten, or that the employee who discovered this failed to inform the claims manager who communicated the intent in question, or that there was a misunderstanding of some critical factual aspect. To the reader, it may seem like these would be strained arguments. But that is the point: arguably, these are less strained than arguments the majority accepted in sheltering the insurer from how a reasonable person would interpret the insurer's conduct, putting aside its ignorance of alcohol consumption and its failure to cure itself of that ignorance for three years following a coroner's report that found the presence of alcohol. Among the strained arguments alluded to were the fact that the adjuster hired by the insurer did a poor investigation; that the adjuster and the insurer were confused as to who should obtain the coroner's report, and so no one did; that the police never mentioned alcohol; that the insured was not available to be questioned as he died in the accident; that parties with adverse interests refused to submit to interviews, *etc.*[186]

Other cases of alleged promissory estoppel might not be as simple as *Trial Lawyers*, where the sole fact that the insured consumed alcohol was acknowledged by all as decisive of the insurer's subjective intent. In a more complex case, there could be many factors that would bear on a promisor's intent. These could have many relevant facts. If the promisor did not know any one of them, it could argue in retrospect in the event it wished to reassert strict rights it held through Freedom of Contract but previously seemed to promise not to assert, that that appearance belied its subjective intent. And that its subjective intent was that the promise was conditional on the nonexistence of this fact that it did not know, as if it knew, it would not so promise.

Because subjective intent is unknowable, as a test it would amount in many cases to licensing a party to decide its intent retroactively — enabling it to liberate itself from responsibility for choices it made at the time they mattered in a modern world that is intensely interdependent, including in allocating risks among parties and/or Inducing Detrimental Reliance by others. A test of subjective intent establishes a regime of "contractual fundamentalism" in which what was provided for by

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[186] *Trial Lawyers Assn. of British Columbia v. Royal & Sun Alliance Insurance Co. of Canada*, [2021] S.C.J. No. 47, 2021 SCC 47 at para. 6 (S.C.C.).

Freedom of Contract is sacrosanct, and contrary words or conduct thereafter — even where they reasonably Induce Reliance by others in relation to the parties' legal relationship — can say little to the contrary. Widening the scope of Freedom of Contract in this way correspondingly winnows the field of promissory estoppel to a striking degree.

While no grand statements were made about the status of promissory estoppel, it could well be that the majority sees that doctrine itself as an imposition on party intention and Freedom of Contract. Certainly, the decision gives great sway to Freedom of Contract in its tension, discussed in this section, with reasonably Induced not-strictly-contractual Reliance.

In my view, and as Karakatsanis J. alluded to, the majority's approach does not allow for maintaining a suitable balance between the value of Freedom of Contract and the conflicting interest in the estoppel context of protecting reasonable Reliance Induced by the promise of another party.[187] Further, the concern is not limited to estoppel. The reasoning in *Trial Lawyers* gives reason to worry, for instance, whether contracting parties who continually need to and do modify contracts "on the fly", without going back to the drafting table to record the change each time,[188] will have Canadian courts tell them that their contract was not modified despite potentially a great deal of Detrimental Reliance on the assumption that it was. And we know that this happens very frequently, even in a business context.[189]

In short, one must hope that the weighing of Freedom of Contract versus Detrimental Reliance which was so one-sided in *Trial Lawyers* is rebalanced in future cases to give more considerable effect to the latter as an important value in the area of contracts in an age of intensely interdependent private ordering.

(h) Contractual Purpose

From the Supreme Court term covered in this article, a further important tension

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[187] I do not mean to suggest that I disagree with the outcome of the case. In my view, the proper reason why the estoppel claim is not made out in *Trial Lawyers* is that in these circumstances it would not be inequitable for the insurer to go back on its promise in respect of Bradfield, as the latter consumed alcohol with the insured prior to the accident, and arguably concealed this from the insurer. The leading case on promissory estoppel in Canada, *Maracle v. Travellers Indemnity Co. of Canada*, [1991] S.C.J. No. 43, [1991] 2 S.C.R. 50 (S.C.C.) does not list as a requirement of the doctrine that it be inequitable for the promisor to go back on the promise. But in my view, it cannot be right that this requirement, which is part of the law of England, is not also part of the law of Canada. As an equitable doctrine, in my view this element is fundamental, and as cases like *Trial Lawyers* show, the equities to be weighed are not limited to the detrimental reliance of the promisee.

[188] Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Rev. 55.

[189] Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Rev. 55.

is evident between Freedom of Contract and an additional consideration: Contractual Purpose. In fact, this is by extrapolation, as the case in question, *Canada (Attorney General) v. Collins Family Trust*,[190] is not a Contracts case. The set of transactions (or series of transactions, in Tax Law parlance)[191] that it centred on were as follows:

> [A] holding company was incorporated to purchase shares in an operating company, a family trust was created with the holding company as a beneficiary, and funds were loaned to the trust to purchase shares in the operating company. The operating companies paid dividends to the trusts, which were attributed to the holding companies [for tax purposes].[192]

One of two major purposes for the set of transactions (the other being to protect assets from corporate creditors) was to reduce tax liability.[193] That said, the trial judge found that the tax-reducing purpose was not such as to make the transaction set an avoidance transaction under the *Income Tax Act*.[194]

The transactions were based in part on an interpretation of attribution rules in the ITA which interpretation was commonly accepted by tax professionals and the Canada Revenue Agency ("CRA").[195] However, the Tax Court of Canada later issued a decision in another matter in which it interpreted the rules differently.[196] The CRA then reassessed the trusts and retroactively imposed additional tax

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[190] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 (S.C.C.).

[191] While "series of transactions" is the term used in Tax Law, I will use "set of transactions" for purposes of this article's discussion of Contract Law, because in the contractual domain, issues relating to Contractual Purpose and its tension with Freedom of Contract could arise as well from multiple transactions executed simultaneously as sequen- tially.

[192] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 2 (S.C.C.).

[193] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 84-85 (S.C.C.).

[194] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [hereinafter "ITA"]; *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 84-85 (S.C.C.). Although the Supreme Court of Canada did not qualify the trial judge's finding as an error, my implicit sense from the judgment is that the majority may have felt that these were in fact avoidance transactions, a view that my colleague in Tax Law, Prof. David Duff, expects might be shared by some tax scholars. This observation is also relevant to my comments below regarding rescission, the precedents relied on by the majority, and the majority's seeming discomfort with the finding of the transactional purpose being neither primary nor ancillary, but intermediate.

[195] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 76 (S.C.C.). Specifically at issue were the attribution rules in s. 75(2).

[196] *Sommerer v. Canada*, [2011] T.C.J. No. 160, 2011 TCC 212 (T.C.C.).

liability.[197] The claimants sought rescission of the transactions, based on precedents from the U.K. Supreme Court and the B.C. Court of Appeal.[198] However, the SCC refused to rescind the transactions. The reasoning of the majority relied extensively on a position that the parties could not expect anything but what ensued from what they *did*, as opposed to what they were *trying to do*. Extrapolating this reasoning to a contractual context, the majority's strongly espoused view translates into the proposition that Freedom of Contract prevails, and in this instance means specifically that the parties are to be left to suffer the consequences of a reasonable mistake, even where this frustrates the Contractual Purpose. I will explain this further below.

To start, it will help to unpack the reasoning of the majority in the case. The judgment, authored by Brown J., began with rescission, noting that rescission is an equitable remedy. Justice Brown opined that "a limiting principle of equity — indeed, the most fundamental premise of that domain, found in its origins . . . is that transactions that do not call for relief as a matter of conscience or fairness are properly outside equity's domain".[199] He then stated that "there is nothing unconscionable or unfair in the ordinary operation of tax statutes to transactions freely agreed upon".[200] But really, these statements settle nothing; they just beg the question: why was it not unfair for the parties to be retroactively taxed as a result of the CRA changing its interpretation of the attribution rules from what its interpretation was at the time the parties relied on it in their tax planning in making this set of transactions?

The majority made some allusions to concerns about courts obstructing the government's ability to change tax policy.[201] However, this was not the focus of the reasons. Moreover, this concern could be alleviated by restricting to only exceptional circumstances the availability of relief from retroactive effects of policy changes. This position was argued by Côté J., dissenting. She submitted that the test developed by the UKSC in *Pitt v. Holt* and applied by the BCCA in *Re Pallen Trust* could do this, was "compatible with Canadian law and should be endorsed".[202] This

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[197] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 78 (S.C.C.).

[198] *Pitt v. Holt*, [2013] UKSC 26 (S.C.); *Re Pallen Trust*, [2015] B.C.J. No. 1007, 2015 BCCA 222 (B.C.C.A.).

[199] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 9-10 (S.C.C.).

[200] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 11 (S.C.C.).

[201] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 12, 25-26 (S.C.C.).

[202] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 45 (S.C.C.).

test would permit rescission only in the event of mistakes of certain types and of sufficient gravity.[203]

Further, the change at issue in *Collins Family Trust* did not derive from a change in government policy, but from a(nother) court decision.[204] On one hand, this should have further alleviated the concern about interfering with government policy changes. But given the typical retroactive effect of court decisions, it may on the other hand have simultaneously fuelled a floodgates-type concern by the majority about allowing rescission of transactions whenever courts change the law.[205]

As it was, the majority's decision placed a great deal of weight on the fact that the parties freely entered into the transactions, and that the thing to do then is to enforce what the transactions provided for — hence the case's relevance to the subject of this article, Freedom of Contract.[206]

The majority invoked the Duke of Westminster principle that parties are free to arrange their affairs to minimize tax.[207] As well, they quoted from the Ontario Court of Appeal decision in *Canada Life Insurance Co. of Canada v. Canada (Attorney General)* that "[t]here is nothing inequitable about [a party] being taxed on 'what it did' rather than on what it intended to achieve".[208] However, arguably, this was misleading, as in *Canada Life*, the mistake resulted from incorrect tax advice, whereas in *Collins Family Trust*, it resulted from tax advice that was correct, based on the information available at the time that the set of transactions was entered into.[209] Nonetheless, the majority's reasoning continued that as the transactions were freely entered into, parties must accept the gains or losses that ensue from

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[203] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 46-47 (S.C.C.).

[204] *Sommerer v. Canada*, [2011] T.C.J. No. 160, 2011 TCC 212 (T.C.C.).

[205] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 25-26 (S.C.C.).

[206] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 11-16, 21-22, 27 (S.C.C.).

[207] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 12 (S.C.C.); *Canada Trustco Mortgage Co. v. Canada*,]2005] S.C.J. No. 56, 2005 SCC 54 at para. 11 (S.C.C.); *Commissioners of Inland Revenue v. Duke of Westminster*, [1935] UKHL 4, [1936] A.C. 1 (H.L.), quoted in *Canada v. Alta Energy Luxembourg S.A.R.L.*, [2021] S.C.J. No. 49, 2021 SCC 49 at para. 29 (S.C.C.); see also *Shell Canada Ltd. v. Canada*, [1999] S.C.J. No. 30, [1999] 3 S.C.R. 622 at para. 46 (S.C.C.).

[208] *Canada Life Insurance Co. of Canada v. Canada (Attorney General)*, [2018] O.J. No. 3326, 2018 ONCA 562 (Ont. C.A.).

[209] In other words, it was congruent with the CRA's interpretation at a time when the provision had not been judicially interpreted, and might never be.

them.[210] Hence, the reasoning was much the same in this context as the idea with respect to Contracts that since parties enjoy Freedom of Contract, they are not to expect relief when they make bad bargains.

The majority then addressed the issue of the transactions not having their desired effect: Brown J. drew from *Fairmont Hotels* and *Jean Coutu* the proposition that the economic consequences "flow from the freely chosen legal relationships, as established by their transactions . . . [They] do not flow from contracting parties' motivations or objectives" or "the intended or unintended effects of those arrangements".[211] Thus, Brown J. concluded that a court "may not modify an instrument" based on the failure of the latter. He added that "these principles are of general application".[212]

As can be seen from these statements, the distinction drawn by the majority's reasoning is between what the parties actually did versus what their subjective intentions were (and/or what those might have been but for some error or unexpected event). Framed in contractual terms, the question that would follow would be whether the law proceeds based on what the parties provided for, or proceeds based on their subjective intentions (which may have been conditional, as previously discussed). As noted earlier in this article, the general answer to this question is clear: Contract Law proceeds based on parties' *objective* intention, which the court infers from what the parties actually provided for; it does not rely on subjective intention.

Only in exceptional scenarios does the law give favour to subjective intention. A mistaken assumption can be one of those scenarios, but the courts are highly restrictive as to what mistaken assumptions qualify.[213]

In the context of the unilateral voluntary dispositions here, the majority shuts the door on the prospect of a mistaken assumption as to tax consequences qualifying.[214] In order to distinguish its position from the UKSC's, which does allow for this, the SCC cites the prohibition on retroactive tax planning in Canada, on account of

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[210] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 13 (S.C.C.).

[211] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at paras. 14-16 (S.C.C.).

[212] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 17 (S.C.C.).

[213] John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2020), s. 13.C. And similarly, in unilateral transactions as regards tax mistakes: *Pitt v. Holt*, [2013] UKSC 26 (S.C.); *Re Pallen Trust*, [2015] B.C.J. No. 1007, 2015 BCCA 222 (B.C.C.A.).

[214] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 24 S.C.C.).

which a mistaken assumption about tax liability is not relevant.[215] But the reasoning seems circular: to characterize the parties as engaging in retroactive planning because they requested rescission after learning of their mistake is to discount their prospective planning which relied on a mistaken assumption.

The assumption is subjective, and as discussed above, the majority emphasizes the fact that this makes the intent riding on it subjective also. In the terms of this article's focus on tensions between overarching themes in Contract, the correspond- ing tension would be between Freedom of Contract and subjective intention. In that case, it is hardly surprising that this tension is quickly and emphatically resolved in favour of Freedom of Contract: parties are free to try to craft obligations to give effect to their subjective intentions, but what will be enforced — whether to their benefit or detriment — is the contract made.[216]

The problem with all this is that in my view it is an inaccurate or inadequate account of the real issue in *Collins Family Trust*, which was frustration of the Purpose of the Transaction-Set. In contractual terms, one could say that the majority conflated Contractual Purpose and subjective intention. Contractual Purpose is not the parties' subjective motivations for entering a contract; it is an attribute of the contract itself, and is to be determined objectively as an exercise in construction.[217] Frustration of Contractual Purpose is one of the standard grounds for rescission of a contract by virtue of the doctrine of frustration.[218]

As noted earlier, in *Collins Family Trust*, it was determined at trial that reduction of tax liability was a major Purpose of the Transaction-Set.[219] But because the decision of the Tax Court in *Sommerer* is not considered a change in law, the claim was not that a supervening event frustrated the Purpose of the Transaction-Set.[220] Rather, the claim was that the Purpose of the Transaction-Set was frustrated by the parties' *mistake* of law, exposed by the Tax Court decision, of relying on the CRA's interpretation of the attribution rules prior to that decision.[221] While the CRA's interpretation is not considered an authoritative source of law, at the time relied on

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[215] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 24 (S.C.C.).

[216] See text to footnotes 210-212.

[217] Marcus Moore, "Developments in Contract Law: The 2020-2021 Term – Appeals to Fairness" (2022) 106 S.C.L.R. (2d) 3 at 40 and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 at para. 72 (S.C.C.).

[218] John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2020), s. 14.C.2.

[219] Text to note 193.

[220] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 72 (S.C.C.).

[221] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 71 (S.C.C.).

there were no court precedents interpreting the provision.[222] Moreover, even if the parties assumed some risk of the CRA's interpretation being legally wrong, they may have assumed that the CRA's discretion in such case was not to be used to *retroactively* reassess their tax liability if the CRA later changed its interpretation.[223] Most importantly, there is more at stake in whether a mistaken assumption made it impossible to attain the Purpose of the Transaction-Set than just to fall short of some party's subjective intention, and rescission might be appropriate in the former event, although it was not in the latter. I am not saying, as Côté J. (dissenting) did, that rescission necessarily was called for in the circumstances: the parties' sophistication, aggressive tax-planning, and the portion of the risk they did fairly assume, must also be weighed. The argument here is that tax-reduction being not merely the parties' subjective intent, but the judicially determined Purpose of the Transaction-Set, made rescission in this case a more difficult question than the one the majority addressed.

Thus, in contractual terms, the key tension here actually is between Freedom of Contract and Contractual Purpose. Contractual Purpose as a consideration highlights the instrumentality of contracts. No sense can be made of contracts merely as exercises of Freedom that provide for certain things. Contracts provide for certain things *for some purpose*.[224] A contract is of little or no value if it cannot achieve the purpose for which it is made.

The dilemma for the majority in *Collins Family Trust* is that the trial judge found that a major Purpose of the Transaction-Set was to reduce tax liability. This distinguishes the case from those the majority relied on — *Canada (Attorney General) v. Fairmont Hotels Inc.* and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)* — where the transactions had other purposes, and only ancillary to those did the parties subjectively intend to pursue them in a way that was tax-neutral.[225] In *Fairmont Hotels*, the Transactional Purpose was to finance an acquisition; in *Jean Coutu*, the Transactional Purpose was to shield the apparent value of an investment from currency fluctuations.[226] Regardless of the parties' subjective intent to pursue those purposes in a way that was tax-neutral, the *instruments*' Purposes could still be achieved. This is not the case in *Collins Family*

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[222] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 72 (S.C.C.).

[223] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 80 (S.C.C.).

[224] Angela Swan, "A Solicitor's Look at the Law of Contracts" in Marcus Moore & Samuel Beswick, eds., *The Power & Limits of Private Law* (2023) 109 S.C.L.R. (2d) 3.

[225] *Canada (Attorney General) v. Fairmont Hotels Inc.*, [2016] S.C.J. No. 56, [2016] 2 S.C.R. 720 (S.C.C.); *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, [2016] S.C.J. No. 55, [2016] 2 S.C.R. 670 (S.C.C.).

[226] *Canada (Attorney General) v. Fairmont Hotels Inc.*, [2016] S.C.J. No. 56, [2016] 2 S.C..R 720 (S.C.C.); *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, [2016] S.C.J. No. 55, [2016] 2 S.C.R. 670 (S.C.C.).

Trust, as reducing tax liability was not an ancillary subjective intention but a major Purpose of the Transaction-Set, as discussed earlier.

It may be that the majority did turn its mind to the issue of Purpose, but found it too fine a line for the Purpose in this case to occupy a liminal space, being more than ancillary like the purpose in *Fairmont Hotels* and *Jean Coutu*, but less than "primary" as would constitute illegitimate tax avoidance. In other words, the majority may have thought that there should be no intermediate position between the Purpose being ancillary and thus irrelevant or primary and thus tax-avoidance. However, this as mentioned was what the trial judge found, and the majority did not qualify that finding as an error. Thus, accepting tax reduction as a major Purpose of the Transactions in this case, the point of entering into them was substantially defeated by the mistaken assumption.

Contributing to the majority's conflation of Transactional Purpose and subjective intention was that it seemed to essentially treat the transactions involved as discrete, rather than a set entered into because of the value it had as such. This was probably encouraged by the fact that under Tax Law, the General Anti-Avoidance Rule looks to each transaction in a series to see whether tax-avoidance is its purpose.[227] But the question of whether the transactions constituted tax-avoidance was already settled at trial, and the Supreme Court did not revisit that question.[228] The question facing the Supreme Court was whether to give effect (through the equitable relief requested) to the Purpose of the Transaction-Set or (by enforcing the transactions as made) to the principle of Transactional Freedom. Looking at each transaction discretely — constructing a holding company, settling a trust, making a loan, paying a dividend, *etc.* — as the Court did, it might seem that the purpose of each is achieved, regardless of whether they form a set that reduces tax liability, especially given that they were found to also protect assets from creditors.[229] But the evidence suggests that the transactions at issue here were commonly seen as a set and entered into together in order to pursue the purpose of the set, not for the sake of the purposes of the individual transactions. From that standpoint, arguably it is misleading to disaggregate them, much as it would be to disaggregate a contract into individual terms and assess Contractual Purpose by asking what the purpose is of each individual term, without reference to the others or the contract as a whole.

Unlike subjective intention, giving effect to Contractual Purpose does not lead to evisceration of the stability or certainty of what the parties have provided for through the exercise of Freedom of Contract. Courts simply confine when they will override Freedom of Contract on the basis of Contractual Purpose to restrictive circumstances — well exemplified by the existing high thresholds for frustration and

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[227] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 245.

[228] Text to note 194.

[229] *Canada (Attorney General) v. Collins Family Trust*, [2022] S.C.J. No. 26, 2022 SCC 26 at para. 85 (S.C.C.).

mistake. In the *Collins Family Trust* context of tax planning, the test endorsed by the UKSC in *Pitt v. Holt* certainly fit this pattern, requiring "a causative mistake of sufficient gravity . . . either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction".[230]

The need to give some scope to Contractual Purpose in recognition of the instrumental aspect of contracts is also evident, for example, in how in other contexts, a term may be implied to avoid a contract lacking business efficacy, as a business instrument,[231] and to how Contractual Purpose is among the factors that in contractual interpretation may conflict with and potentially override the text.[232] In these contexts, Contractual Purpose is in fact partly determinative of the meaning of Freedom of Contract, rather than in conflict with it. These other contexts underscore more clearly than a case like *Collins Family Trust* the importance of not treating textual expression as the gospel of Freedom of Contract.

IV. CONCLUSION

The preceding discussion revealed how the contractual disputes and issues covered in this review of recent developments in Contract Law tended to be approached by weighing high-level considerations, rather than mechanistically selecting and applying the most applicable rule from a Contracts "rulebook".

Among those high-level considerations, Freedom of Contract enjoyed a privileged status: it was treated as the default governing principle; other values had to justify why they warranted an "exception" to it. Despite the Classical Law of Contract with which it is associated having had its high point in the 19th century, and it now being over half-a-century since scholars like Patrick Atiyah, Gerald Fridman and Wolfgang Friedmann hypothesized its decline and fall, Freedom of Contract is flourishing with tremendous influence over the jurisprudence.[233] It gives shape not just to general thinking about contracts, but also to court reasoning of individual cases.

Beyond enduring through time and social transformations, its continued status as the default law from which conflicting values must argue for an exception is remarkable in that so many contracts today are made in circumstances that hardly fit Freedom of Contract as a factual description. Clearly, as Roger Brownsword writes,

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[230] *Pitt v. Holt*, [2013] UKSC 26 at paras. 122, 132 (S.C.).

[231] *Moorcock (The)* (1889), 14 P.D. 64, [1886-90] All E.R. Rep. 530 (C.A.). Marcus Moore, "Demystifying Implied Terms" (2022) 33:3 King's L.J. 455 at 479.

[232] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] S.C.J. No. 37, [2016] 2 S.C.R. 23 (S.C.C.); *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, [2014] 2 S.C.R. 633 (S.C.C.).

[233] Patrick Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979); G.H.L. Fridman, "Freedom of Contract" (1967) 2 Ottawa L. Rev. 1; Wolfgang Friedmann, *Law in a Changing Society*, 2d ed. (Harmondsworth, Eng.: Penguin Books, 1972).

"the idea that contract involves voluntariness and control over the transaction is deeply embedded even in the modern legal consciousness. Freedom of contract, in other words, is not just an ideal for contract law; it speaks to the essence of what a contract is."[234] Or perhaps to the essence of what we think contracts should be.

Implicit in this view is the attitude that in an ideal world, every contract would be made under conditions of perfect Freedom of Contract.[235] And that much of contractual regulation could then simply be left to the pen held by the invisible hand, as parties negotiate contracts. One problem with this theory — as with so many popular theories — is that the real world is much too complex for such an attitude to give good guidance. As Fridman notes, Freedom of Contract "cannot be viewed in isolation, away from the surrounding commercial, industrial and social factors which influence and affect . . . contractual agreements . . . and . . . may be of greater importance than the free expression of wills by the parties".[236] For example, consider the inefficiency of trying to negotiate every term of every contract — hence the rise of adhesion contracts. Consider the open-ended, evolving nature of mutual obligations in long-term/intense relationships — hence scholarly thinking about relational contracts. Transactional efficiency and relationship management are but two examples of considerations that should be validated, rather than regretted for clouding the open sky of Freedom of Contract.

Courts should not be faulted in the slightest for their enduring cherish of private freedom. But it may be that we need to think more about whether Contract Law is best served by giving force to Freedom of Contract as the law's default position unless some other consideration has established a case for an exception. Otherwise, we run the risk that the allure of the *idea* of Freedom of Contract causes us to overapply it as a legal principle, at the expense of other important values. Paradoxically, it may even contribute to imbalances and inequities that come at the progressive expense of the *factual* presence of Freedom of Contract in society — perhaps in the case under consideration, and more probably in the long run.

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[234] Roger Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2d ed. (Oxford: Oxford University Press, 2006) at 64.

[235] By "perfect", I mean: actual, symmetric, future-regarding, *etc.*

[236] G.H.L. Fridman, "Freedom of Contract" (1967) 2 Ottawa L. Rev. 1 at 3.