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**THE HONOURABLE
MR. JUSTICE TODD L. ARCHIBALD
SUPERIOR COURT OF JUSTICE (ONTARIO)**

**THE LATE HONOURABLE
MR. JUSTICE RANDALL SCOTT ECHLIN
SUPERIOR COURT OF JUSTICE (ONTARIO)**



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Economic Duress after *Bhasin v. Hrynew*: Does the Organizing Principle of Good Faith Offer a New Framework?

BRANDON KAIN AND JUSTIN H. NASSERI*

*[O]ne holds the rod, and the other bows to it.*¹

I. INTRODUCTION

In *Bhasin v. Hrynew*,² the Supreme Court of Canada recognized the existence of a “general organizing principle” of good faith in contractual performance. According to the Court, this organizing principle “is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines” through which “the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance”.³ The organizing principle “is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”, and “exemplifies the notion that in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner”.⁴

In the wake of *Bhasin*, much of the critical commentary surrounding the decision has focused upon the Court’s recognition of a new doctrine under the “broad umbrella” of the organizing principle of good faith that was specific to the facts of *Bhasin* itself, i.e., the “duty of honest performance”.⁵ However, the implications of the organizing principle are potentially much wider. As the *Bhasin* Court explained, the organizing principle of good faith is “a standard that helps to understand and develop the law in a coherent and principled way”, by “stat[ing] in general terms a requirement of justice from which more specific legal doctrines may be derived”.⁶ Further, “it is a concept that underlies many elements of modern contract law”.⁷

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¹ *Smith v. Cuff* (1817), 6 M. & S. 160, 105 E.R. 1203 (K.B.), per Lord Ellenborough C.J. [2014] 3 S.C.R. 494.

² *Ibid.* at paras. 33 and 64.

³ *Ibid.* at paras. 63 and 65.

⁴ *Ibid.* at paras. 72 and 93.

Viewed in this way, the organizing principle has the ability to serve as a powerful hermeneutic tool for understanding and rationalizing the law of contracts.⁸ It is possible to conceive of many contractual doctrines as attempts to implement, to a greater or lesser degree, the principle's core requirements of honesty, reasonableness and mindfulness in particular contexts. Put simply, the decision in *Bhasin* invites a critical reappraisal of contract law, in which existing rules and concepts are measured against the organizing principle of good faith. If the principle is as the Supreme Court suggests, then this exercise "will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations".⁹

The purpose of this paper is to take a small step in this direction by exploring the organizing principle through the lens of economic duress. While *Bhasin* includes many different doctrines under the organizing principle — e.g., unconscionability, terms implied in law, various presumptions of contractual interpretation, and discrete obligations in certain situations and relationships¹⁰ — duress offers a particularly fertile subject for field study. Described as "one of the most exciting modern developments in English civil law",¹¹ economic duress has given rise to an immense body of literature since it was first recognized in the 1970s. Nevertheless, the rationale for the doctrine is unclear, and there is considerable debate among courts, practitioners and academics alike about how a framework for economic duress is best articulated.

The relationship between economic duress and *Bhasin* is especially intriguing given that duress is usually viewed as a contractual formation doctrine (despite the fact that it is often asserted in the context of variations to existing agreements). In *Bhasin*, the Court was careful to describe its new organizing principle as one that applies to the "performance" of contracts,¹² yet Cromwell

⁶ *Ibid.* at paras. 64.

⁷ *Ibid.* at para. 42. See also paras. 63 and 93.

⁸ See, e.g., *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104 at para. 75, additional reasons 2016 CarswellNS 45 (C.A.), leave to appeal refused 2016 CarswellNS 399, [2016] S.C.C.A. No. 18:

Bhasin's ruling involved an implied contractual duty of honest dealing. At issue here is the insurer's implied contractual duty of good faith. *Bhasin* makes it clear that these sibling duties stem from the same root – what Justice Cromwell termed "the organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance" (¶ 63 and also ¶ 55 and 93). From that common perspective, *Bhasin* helps us to understand the scope of the insurer's implied duty [emphasis added].

⁹ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 62.

¹⁰ *Ibid.* at paras. 42-56.

¹¹ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 267.

¹² *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at paras. 33 and 63. See also the British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 9-10 ("Unconscionability, duress, undue influence, and misrepresentation all apply to activities that take place during the

J. simultaneously extended the principle to another contractual formation doctrine, unconscionability, in the following critical passage:

. . . [G]ood faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. *It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability*, and plays a role in interpreting and implying contractual terms. . . .

Considerations 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: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, “When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability” (2005), 21 J.C.L. 226; Belobaba, at p. 86; S. M. Waddams, “Good Faith, Unconscionability and Reasonable Expectations” (1995), 9 J.C.L. 55.¹³

These comments raise important questions about the degree to which the organizing principle of good faith applies at the contractual formation stage.

In many respects, the story of economic duress is a microcosm for that of the organizing principle itself. The doctrine was originally based upon the “will theory” of contract law, under which a sufficient degree of economic coercion could vitiate one’s consent and render the contract invalid. This early approach to economic duress reflected a second organizing principle in contract law, which was particularly prevalent in the 19th century and which has traditionally run in opposition to the organizing principle of good faith — freedom of contract. Obviously, there can be no freedom of contract where a party lacks the ability to freely consent to contractual terms. However, as the law developed, courts came to recognize the poverty of freedom of contract as an explanatory framework for economic duress, and shifted the focus of the doctrine from the vitiation of one’s will to the illegitimacy of the pressure inflicted upon the promisor by the promisee. This evolution suggests a realignment of economic duress under the organizing principle of good faith, in which it is now viewed as wrong-based contractual formation doctrine similar to unconscionability or undue influence.

The discussion that follows is organized into three parts. First, we examine the genealogy of economic duress in Anglo-Canadian contract law, tracing its evolution as a doctrine focused primarily on coercion of the plaintiff’s will to

formation of a contract . . . Good faith, in contrast, typically arises in connection with a contract that creates a long-term relationship between the contracting parties without defining the standards of behaviour that are to apply over the course of that relationship”). *Cf. Brule v. Rutledge*, 2015 BCCA 25 at paras. 56-57, which leaves open whether *Bhasin* has relevance at the contractual negotiation stage.

¹³ *Bhasin, ibid.* at paras. 42-43, [emphasis added].

one that is defined by the illegitimacy of the defendant's conduct. Second, we offer a critical review of the three main approaches to economic duress that are now prevalent in Canada, and draw upon the ample body of academic literature in which the doctrine has been explored. As will be seen, none of the existing approaches offers an adequate framework for the doctrine. Third, we propose a new framework for economic duress that is based upon the organizing principle of good faith. This principle helps answer several fundamental questions about economic duress, including the rationale for the illegitimacy requirement, the circumstances in which it should apply to lawful versus unlawful threats, and how the doctrine may be developed in a way that balances judicial flexibility and concerns of unfairness with the important values of commercial certainty and freedom of contract.

In the end, we do not purport to resolve all of the theoretical difficulties associated with the law of economic duress. Our goal in this paper is a more modest one: to illustrate how the organizing principle of good faith in *Bhasin* may assist courts and lawyers in modernizing doctrines of contract law that have grown sterile under the weight of existing dogma. The project begun in *Bhasin* is a continuing one. What follows is one attempt to contribute to it.

II. ECONOMIC DURESS IN ANGLO-CANADIAN LAW

1. The Origins of Economic Duress

Anglo-Canadian law has long provided recourse to persons who are threatened with physical violence. Such conduct is prohibited by criminal law, and several well-established doctrines — such as duress of person — create remedies for this behaviour in private litigation.¹⁴ However, until the late 20th century, there was arguably a gap in contract law respecting agreements brought about by pressure to one party's economic interests,¹⁵ e.g., threats to breach an

¹⁴ A. Swan and J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2012) at 100, footnote 290.

¹⁵ See H. Lal, "Commercial Exploitation in Construction Contracts: The Role of Economic Duress and Unjust Enrichment" (2005) 21 Const. L.J. 590 at 592 ("It was only in 1976 that economic duress was recognised under English common law as an acceptable ground (under the general area of duress) to avoid an agreement"). It should be noted that, well prior to the development of the contractual doctrine of economic duress, courts had begun to address such threats through the tort of intimidation: *Garret v. Taylor* (1620), Cro. Jac. 567, 79 E.R. 485 (K.B.); *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.); *Central Canada Potash Co. v. Saskatchewan (Attorney General)*, [1979] 1 S.C.R. 42; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:200, p. 26-2. See also: *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* [1983] 1 A.C. 366 (H.L.) at 400, per Lord Scarman (dissenting on other grounds); *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3 at para. 54. However, the

existing contract unless the counterparty agreed to a contractual variation,¹⁶ at least outside the amorphous equitable doctrine of actual undue influence.¹⁷

tort of intimidation is directed towards the remedy of damages, whereas the contract law doctrine of economic duress is directed towards the remedy of avoiding an agreement (albeit often coupled with restitution): *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* [1983] 1 A.C. 366 (H.L.) at 385, per Lord Diplock. Further, the intimidation tort requires the coercer to assert its intention to use “unlawful means”, which is not the same as the requirement in the contract law doctrine of duress that the coercer apply “illegitimate pressure”, since such pressure may be lawful: *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* [1983] 1 A.C. 366 (H.L.) at 401, per Lord Scarman (dissenting on other grounds). Therefore, while acts giving rise to duress may amount to the tort of intimidation in some cases, this will not always be so: M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *78-80; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 256.

¹⁶ This is the most common form of economic duress, though other forms of threats may engage the doctrine as well: R. Bigwood, “Economic Duress By (Threatened) Breach of Contract” (2001) 117 L.Q.R. 376 at 376; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 267; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 385-386 and footnote 32. See M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *2-3:

It seems that there exists a common set of circumstances in many of the leading cases which give rise to a successful action in economic duress. Usually the coercing party threatens the victim by refraining from performance of an existing contractual duty. This occurs at a time when the coercing party knows that the victim is particularly vulnerable and that if it were to carry out its threat, it would financially devastate the victim. The coercing party then demands from the victim additional benefits to ensure that it performs its duty under the existing contract. No new obligation is undertaken by the coercing party in exchange for its demands. Such cases also frequently raise the related issue of whether there is any consideration for the contractual variation given the “pre-existing duty” rule in *Stilk v. Myrick* (1809), 2 Camp. 317, 170 E.R. 1168 (K.B.), which was the technique originally adopted by the common law to police contractual variations: see, e.g., *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.); H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 761-762.

¹⁷ The doctrine of actual undue influence was developed by the courts of equity to permit the rescission of contracts that were procured by undue pressure which impaired the promisor’s consent. An early case that applied this doctrine to economic pressure can be found in *Ormes v. Beadel* (1860), 2 Giff. 166, 66 E.R. 70 (V.C.), reversed on other grounds (1860), 2 De G.F. & J. 333, 45 E.R. 649 (Ch.). Such decisions are sometimes referred to in support of an early equitable doctrine of contractual economic duress or pressure: *North Ocean Shipping Co. v. Hyundai Construction Co.* [1979] Q.B. 705 (Q.B.) at 718; M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 291-295; M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 514-515 and 525-258; M.H. Ogilvie, “Economic Duress In Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 197, footnote 17. It has been observed, therefore, that the recent development of economic duress “blur[s] the traditional distinction between duress and undue influence”: H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet &

Historically, the common law courts were only willing to set aside contracts entered into under duress where the duress involved threats to the contracting party's person, such as physical violence or unlawful imprisonment.¹⁸ Consistent with the importance of the organizing principle of freedom of contract during the 19th century, early cases rationalized this duress doctrine on the basis that a party who entered into a contract under threats to their person was deprived of their "free agency" or "free will".¹⁹

The courts were unwilling to extend this contractual doctrine beyond duress of person to situations where the pressure took the form of proprietary or economic threats, such as a threat to breach an existing contract.²⁰ To be sure, a party who paid money under protest to prevent the wrongful seizure of their goods, or to recover goods wrongfully seized, could recover the money via the restitutionary action of money had and received,²¹ as could a person who paid

Maxwell, 2015), Vol. 1, at 756. Indeed, some have even suggested the economic duress is a product of equity, not the common law: M.P. Sindone, "The Doctrine of Economic Duress – Part 1", 1996 ABR LEXIS 2 at *15-16. Nevertheless, the equitable doctrine of actual undue influence has its own limits. As noted by M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 295, "while invoked by the courts more often, undue influence or pressure have lacked sufficient definition to be effective controls when economic coercion in the marketplace was at issue". In view of the similarities between the actual undue influence cases and economic duress, some commentators have suggested that the two doctrines should be merged: A. Kantic, "How a Clarification of Duress Renders the 'Equitable' Doctrine of Actual Undue Influence Futile" (2015) N.Z.U.L.R. 642. However, actual undue influence would appear to be broader than duress, in that it may apply even in cases where no pressure is brought to bear by the promisee upon the promisor: N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 2.

¹⁸ *Dimskal Shipping Co. SA v. International Transport Workers Federation (The Evia Luck)* (1991), [1992] 2 A.C. 152 (H.L.) at 165, per Lord Goff. See also M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: The Law Book Company Limited, 1985) at 1 ("[T]he early history of duress was closely connected with the primary function of primitive law, namely the control of private violence"). For a judicial review of the history of economic duress, see *North Ocean Shipping Co. v. Hyundai Construction Co.* [1979] Q.B. 705. The American courts seem to have embraced the concept of contractual economic duress much earlier: M.H. Ogilvie, "Wrongfulness, Rights and Economic Duress" (1984) 16 Ottawa L. Rev. 1 at 21-23; M.H. Ogilvie, "Economic Duress in Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 196, footnote 11.

¹⁹ *Skeate v. Beale* (1841), 11 Ad. E. 983 at 990, 113 E.R. 688 (Q.B.); *Cumming v. Ince* (1847), 11 Q.B. 112 at 120, 116 E.R. 418 (Q.B.) at 120 [Q.B.].

²⁰ M.P. Sindone, "The Doctrine of Economic Duress – Part 1", 1996 ABR LEXIS 2 at *22-23.

²¹ *Astley v. Reynolds* (1731), 2 Str. 915 at 916-917, 93 E.R. 939 (K.B.); *Ashmole v. Wainwright* (1842), 2 Q.B. 837 at 845-846, 114 E.R. 325 (Q.B.); *Somes v. British Empire Shipping* (1860), 8 H.L.C. 338 at 343-347, 11 E.R. 459 (H.L.); *Maskell v. Horner*, [1915] 3

tolls under protest because of economic pressure.²² But the result would be different if the plaintiff made an agreement (or varied an existing one) for payment of the money in exchange for consideration. In that case, English law held that the plaintiff could not avoid the contract on the basis of duress, and was therefore barred from recovering the amounts so paid by the existence of the agreement.²³ The reason given for this was one of degree: cases of duress not involving threats to the person did “not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert”.²⁴ This approach also hampered the parallel development of actual undue influence to the extent that it too involved the application of pressure in commercial situations.²⁵

Beginning in the 1970s, a handful of seminal English cases re-evaluated this position and gave birth to the doctrine of contractual economic duress.²⁶ The

- K.B. 106 (C.A.) at 118-119 and 123-124. See also *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419 at 423-425, a case involving the detention of real property.
- ²² *Parker v. Great Western Railway* (1844), 7 Man. & G. 253 at 292-294, 135 E.R. 107 (C.P.); *Great Western Railway v. Sutton* (1869), 4 H.L. 226 (H.L.) at 263, per Lord Chelmsford.
- ²³ *Atlee v. Backhouse* (1838), 3 M. & W. 633 at 650, 150 E.R. 1298 (Ex.), per Parke B.; *Skeate v. Beale* (1841), 11 Ad. & E. 983, 113 E.R. 688 (Q.B.) at 990-991; *Maskell v. Horner* [1915] 3 K.B. 106 (Eng. C.A.) at 118 and 124. See also M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *13. Some authors doubt whether this distinction was ever adopted in Canada: R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 658; M.H. Ogilvie, “Economic Duress In Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 196, footnote 10; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:200.20, p. 26-13.
- ²⁴ *Skeate v. Beale* (1841), 11 Ad. & E. 983 at 990, 113 E.R. 688 (Q.B.). This reflects the notion of the “constant man” found in common law duress jurisprudence and civilian law: see M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 290-292 and 294-295; M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: The Law Book Company Limited, 1985) at 1-2 and 6-7.
- ²⁵ M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *23. Conversely, it has been noted that “the persistence of some equitable notions retarded the development of a coherent approach to economic duress”: R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 659.
- ²⁶ See M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *40-41, suggesting that the “new ground” broken in these English cases can be traced to Australian case law and American academic literature. A review of the early Australian cases is found in A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 Melb. U. L. Rev. 410 at 416-421. For a slightly earlier English decision involving promissory estoppel, which some commentators now treat as an economic duress case, see the judgment of Lord Denning M.R. in *D. & C. Builders Ltd. v. Rees* (1965), [1966] 2 Q.B. 617 (C.A.). It has been suggested that the comparatively late development of economic duress in English law is attributable in part to the fact that,

first decision to seriously recognize the possibility of this doctrine was *Occidental Worldwide Investment Corp. v. Skibs A/S Avanti (The Siboen and the Sibotre)*.²⁷ The plaintiff in that case was a part of a group of oil companies, and held charter-parties with the defendant tanker owners for the transport of its oil. Owing to a decline in the oil market, the plaintiff's parent company falsely told the ship owners that the plaintiff would be liquidated if the owners did not lower their rates of hire. The owners — whose ships were mortgaged, and thus dependent on the income from the charter-parties — agreed to renegotiate the charter-parties at a lower cost, since there had been a fall in market hire rates, and they would otherwise be unable to charter out the tankers to the knowledge of the charterers. But the owners subsequently withdrew the tankers from the charterers when the market for charter rates improved and the charterers refused to return to the original rates.

In an action by the plaintiff for the damages it suffered from the withdrawal of the ships, the owners were successful in having the renegotiated rates voided. Although Kerr J. rescinded the contractual variation because of the charterers' misrepresentation about their financial position, he noted that severe economic pressure could also form a basis for relief based on the doctrine of duress. In doing so, Kerr J. rejected the historical distinction that precluded courts from avoiding contracts for duress not involving threats to the person, suggesting that such duress could also arise from economic pressure or duress of goods.²⁸ However, he concluded that the pressure in *Occidental* itself — under which the ship owners agreed to the rate reduction — was not sufficiently coercive to amount to duress. Justice Kerr did not elaborate any real framework for an economic duress doctrine, beyond suggesting that commercial pressure is not enough and there must be some factor “which could in law be regarded as a coercion of [the] will so as to vitiate . . . consent”.²⁹ Nonetheless, “the idea was implanted that, in appropriate instances, threats of this kind might permit the invocation of the defence of duress to render an agreement so produced voidable.”³⁰

historically, most duress cases involving economic pressure that came before the courts involved threats against property rather than economic interests more generally, thereby causing the courts to focus upon duress of goods: A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 *Melb. U. L. Rev.* 410 at 416. The result was different in the United States, where “American judges in the nineteenth century took over where the English courts had left off by relating the duress of goods cases to more generalised notions of economic pressure”: Stewart, *ibid.* at 421.

²⁷ [1976] 1 *Lloyd's Rep.* 293 (Eng. Q.B.D.).

²⁸ *Ibid.* at 335.

²⁹ *Ibid.* at 336.

³⁰ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 308.

Three years later, in *North Ocean Shipping Co. v. Hyundai Construction Co., (The Atlantic Baron)*³¹ a shipbuilding company under contract to finish a tanker for ship owners threatened to terminate the agreement unless the owners agreed to increase the contract price because of currency fluctuations. At the time, the ship owners were engaged in negotiations for a lucrative charter of the tanker, and agreed to the shipbuilder's demand "without prejudice" to their rights. Although the Court found that the owners were victims of economic duress, no relief was granted because the owners proceeded to affirm the contract by failing to make objections to the increased prices for over two years, during which they paid extra instalments and took delivery of the ship.³² As in *Occidental*, however, the *North Ocean* case recognized the possibility that a contractual variation could be rescinded if procured by economic duress, and reiterated the suggestion in *Occidental* that this contractual remedy was not limited to cases involving duress of person.³³

Shortly thereafter, in 1979, the Judicial Committee of the Privy Council released its seminal judgment in *Pao On v. Lau Yiu Long*,³⁴ which remains one of the most commonly cited economic duress cases throughout the Commonwealth. In *Pao On*, the defendant controllers of a public company, "Fu Chip", entered into two contracts with the plaintiff controllers of a private company, "Shing On", designed to enable the defendants to acquire a building that Shing On owned. Under the main agreement, the plaintiffs transferred their Shing On shares in exchange for shares in Fu Chip, 60 per cent of which the plaintiffs undertook not to sell for one year to avoid depressing the market value of Fu Chip's shares. Under a subsidiary agreement, the defendants agreed to repurchase the Fu Chip shares they sold to the plaintiffs after one year at a specified price, in order to protect the plaintiffs against a drop in the market price of Fu Chip shares during the period in which they were precluded from selling them.

The plaintiffs subsequently realized that the subsidiary agreement not only protected them from a possible drop in Fu Chip share prices, but prevented them from realizing any profit based on increased prices at year-end. They therefore refused to complete the main agreement unless the defendants cancelled the subsidiary agreement, and replaced it with a contract of guarantee requiring the defendants to indemnify the plaintiffs for any drop in Fu Chip shares below the specified price over the year. The defendants, who were concerned that litigation delays might precipitate a drop in the Fu Chip

³¹ [1979] Q.B. 705 (Eng. Q.B.D.).

³² *Ibid.* at 721 ("[T]he action and inaction of the owners can only be regarded as an affirmation of the variation").

³³ *Ibid.* at 719.

³⁴ *Pao On v. Lau Yiu Long* (1979), [1980] A.C. 614 (Hong Kong P.C.).

share prices, agreed to do so, but later sought to set the guarantee aside on the basis of duress when the plaintiffs moved to enforce their indemnity.

Lord Scarman, who delivered judgment for the Board, held that the facts of *Pao On* disclosed an instance of commercial pressure that fell short of duress. Nevertheless, Lord Scarman affirmed that a contract *could*, in principle, be voided for economic duress.³⁵ In doing so, he followed *Occidental* in adopting an “overborne will” framework for the doctrine, under which courts are to investigate whether the promisor was so overwhelmed by the duress exerted by the promisee that there could not have been a true agreement in the first place:

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in Occidental Worldwide Investment Corporation v. Skibs A/S Avanti [1976] 1 Lloyd’s Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor “which could in law be regarded as a coercion of his will so as to vitiate his consent.” . . .

. . . . Recently two English judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd’s Rep. 293 and *Mocatta J. in North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979] Q.B. 705. Both stressed that *the pressure must be such that the . . . victim’s consent to the contract was not a voluntary act on his part.* In their Lordships’ view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, *provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.*³⁶

In applying this test, Lord Scarman directed courts to have regard to four factors, colloquially referred to as the “*Pao On* factors” in subsequent case law:

. . . . In determining whether there was a coercion of will such that there was no true consent, it is material to inquire [1] whether the person alleged to have been coerced did or did not protest; [2] whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; [3] whether he was independently advised; and [4] whether after entering the contract he took steps to avoid it. All these matters are . . . relevant in determining whether he acted voluntarily or not.³⁷

³⁵ See also *Burmah Oil Co. v. Bank of England* [1980] A.C. 1090 (H.L.) at 1140, where Lord Scarman cited *Pao On*, *Occidental* and *North Ocean* in stating that “there are indications in the modern case law that economic duress in a commercial setting may well constitute a good cause of action”.

³⁶ *Pao On v. Lau Yiu Long* [1980] A.C. 614 (Hong Kong P.C.) at 635-636, [emphasis added].

³⁷ *Ibid.* at 635.

In the wake of *Pao On*, English courts took the view that “like the well-established duress to the person, [economic duress] is a ground of avoidance *only if the duress is such that the will of the contractor is overborne. His consent must be vitiated*”.³⁸

2. Rejection of the Overborne Will Framework in England

Although *Pao On* is widely regarded as a transformational economic duress case, Lord Scarman’s overborne will framework has been greatly diminished by the later evolution of the doctrine. Indeed, several years prior to *Pao On*, the Privy Council had already suggested in *Barton v. Armstrong*³⁹ that the test to avoid a contract for duress of person required establishing that the pressure was “illegitimate”, not merely that it deprived the promisor of their freedom of choice:

. . . [I]n life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb – and it has arrived at the modern generalisation expressed by Holmes J. – “subjected to an improper motive for action”: *Fairbanks v. Snow*, 13 N.E. Reporter 596, 598.⁴⁰

In other words, pressure alone is not sufficient to produce duress. Something further is required, which consists of “illegitimate” conduct by the promisee. The Board in *Barton* therefore proceeded to frame the test for duress pursuant to the following two-part inquiry:

. . . [T]he first step required of the plaintiff is to show that some illegitimate means of persuasion was used. . . .

The next necessary step would be to establish the relationship between the illegitimate means used and the action taken. . . .⁴¹

Although Lord Scarman in *Pao On* referred to these comments from *Barton* as being “in line” with his overborne will framework,⁴² his view was contrary to

³⁸ *Hennessy v. Craigmyle & Co. Ltd.*, [1986] I.R.L.R. 300 (C.A.) at 304, [emphasis added].

³⁹ [1976] A.C. 104 (New South Wales P.C.).

⁴⁰ *Ibid.* at 121, per Lord Wilberforce and Lord Simon (dissenting on other grounds), [emphasis added].

⁴¹ *Ibid.*

⁴² *Pao On v. Lau Yiu Long*, [1980] A.C. 614 (Hong Kong P.C.) at 635.

the House of Lords' earlier criminal law decision in *Director of Public Prosecutions for Northern Ireland v. Lynch*, where the Law Lords relied on *Barton* in holding that duress does not vitiate consent or overbear one's freewill even within the sphere of contract law.⁴³ Significantly, the *Lynch* case was not cited either to or by the Board in *Pao On*.

In 1983, the House of Lords definitively repudiated the *Pao On* framework in the now-leading judgment of *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation*.⁴⁴ The facts of *Universe Tankships* involved an attempt by the plaintiff ship owners to recover funds which they had paid to the defendant trade union, in order to lift a labour boycott or "blacking" of the plaintiffs that prevented them from obtaining a tug to remove to their ship from an English port. The Law Lords concluded that the payment had been made under economic duress, and found the plaintiffs were entitled to recover under the restitutionary cause of action for money had and received. In doing so, Lord Diplock for the majority made clear that the underpinning of economic duress is the application of "illegitimate" pressure which induces the promisor into an agreement:

It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. *The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate*, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.⁴⁵

⁴³ [1975] 1 A.C. 653 (H.L.) at 670, 679-680, 695 and 709-710. At 680 of *Lynch*, Lord Wilberforce explicitly addressed duress in the law of contract:

"Coactus volui" sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime. One may note – and the comparison is satisfactory – that an analogous result is achieved in a civil law context: *duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law: see the Privy Council case of Barton v. Armstrong . . .* [emphasis added]

See also 695, per Lord Simon (dissenting on other grounds):

Similarly with duress in the English law of contract. *Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side.* The contrast is with *non est factum*. The contract procured by duress is therefore not void: it is voidable – at the discretion of the party subject to duress. [emphasis added]

⁴⁴ [1983] 1 A.C. 366 (H.L.).

Lord Diplock then underscored this point by leaving open whether, in some cases, commercial pressure could be so great as to amount to a “coercion of the will” and yet still not give rise to a legal remedy if “legitimate”:

Commercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party. *It is not, however, in my view, necessary, nor would it be appropriate in the instant appeal, to enter into the general question of the kinds of circumstances, if any, in which commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress . . .*⁴⁶

Lord Scarman, who dissented on other grounds, expanded on these comments.⁴⁷ He proposed a two-part test for duress similar to that in *Barton*, which does not involve asking whether the promisor’s consent was vitiated, but instead whether the promisor had no other *practical* choice resulting from the exertion of *illegitimate* pressure upon them:⁴⁸

. . . The authorities . . . reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. *Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him. . . .*

The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred. . . . But none of these evidential matters goes to the essence of duress. The victim’s silence will not assist the bully, if the lack of any practicable choice but to submit is proved. . . .⁴⁹

⁴⁵ *Ibid.* at 384, [emphasis added].

⁴⁶ *Ibid.* at 384, [emphasis added]. See also 391-392, per Lord Cross.

⁴⁷ Lord Scarman’s judgment is usually viewed as the leading analysis of duress in *Universe Tankships*, even though he dissented in the result: M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 17.

⁴⁸ The two-part test for duress that Lord Scarman proposed here has antecedents not only in the Privy Council’s earlier judgment in *Barton*, but also in early English jurisprudence through Bracton, as well as American law and academic commentary: M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 290-291; M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *34-40; R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 208-209. Interestingly, it is very similar to the American test currently proposed in the *Restatement (Second) of Contracts*, §175(1):

175(1) If a party’s manifestation of assent is induced by an *improper threat* by the other party that leaves the victim *no reasonable alternative*, the contract is voidable by the victim. [emphasis added]

Lord Scarman then proceeded to emphasize the importance of the second element of the test, requiring that the pressure be “illegitimate” (which, along with Lord Diplock, he seems to have viewed as the “key” to economic duress”).⁵⁰ In doing so, he suggested that (i) pressure which is unlawful is likely to be *ipso facto* illegitimate, but that (ii) pressure can also be illegitimate even where it is *lawful* (though without explaining how or why this should be so, beyond suggesting it may depend upon the nature of the demand for which the pressure is applied):

As the two noble and learned Lords remarked [in *Barton v. Armstrong* [1976] A.C. 104 (P.C. (Australia))] at p. 121D, in life, including the life of commerce and finance, *many acts are done “under pressure, sometimes overwhelming pressure”: but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.*

In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.

The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that *the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police. In many cases, therefore, “What [one] has to justify is not the threat, but the demand . . .”*: see per Lord Atkin in *Thorne v. Motor Trade Association* [1937] A.C. 797, 806.⁵¹

Consequently, while many contractual economic duress cases continue to use the language of the “overborne will”,⁵² the modern English approach is no longer to ask whether the promisor was subject to such coercion of the will as to

⁴⁹ *Universe Tankships Inc. of Monrovia v. International Transport Workers’ Federation* [1983] 1 A.C. 366 (H.L.) at 400, [emphasis added]. As commentators have noted, the underlined words in this passage make clear that compulsion of the will under the *Universe Tankships* framework is different from the overborne will theory: E. Macdonald, “Duress By Threatened Breach of Contract”, [1989] J.B.L. 460 at 464; P. Koh, “Economic Duress and a Drop of Fairness: A Singapore Perspective” [2003] J.B.L. 572 at 574; R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 53.

⁵⁰ M.H. Ogilvie, “Economic Duress In Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 216. See also G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 199.

⁵¹ *Universe Tankships Inc. of Monrovia v. International Transport Workers’ Federation* [1983] 1 A.C. 366 (H.L.) at 400-401, [emphasis added].

⁵² H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 751.

vitate their consent, but instead whether they were subject to such illegitimate pressure that they had no practical choice but to enter into the agreement.⁵³ The *Pao On* factors are thus used only as tools to assess the causal effect of the alleged duress and whether the promisor had an alternative choice.⁵⁴ This has been confirmed at the highest level in England in three cases decided after *Universe Tankships*.

The first is the 1991 decision of the House of Lords in *Dimskal Shipping Co. SA v. International Transport Workers Federation (The Evia Luck)*, [1992] 2 A.C. 152 (H.L.) which like *Universe Tankships* was a trade union “blacking” case. In rescinding an agreement for economic duress, Lord Goff (who interestingly, had first made the economic duress argument in *Occidental* as counsel for the ship owners) said for the majority:

. . . [I]t is now accepted that economic pressure may be sufficient to amount to duress for this purpose, *provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract* (see *Barton v. Armstrong* [1976] A.C. 104, 121, per Lord Wilberforce and Lord Simon of Glaisdale (referred to with approval in *Pao On v. Lau Yiu Long* [1980] A.C. 614, 635, per Lord Scarman) . . . *It is sometimes suggested that the plaintiff's will must have been coerced so as to vitiate his consent. This approach has been the subject of criticism: see Beatson, The Use and Abuse of Unjust Enrichment* (1991), pp. 113-117; and the notes by Professor Atiyah in (1982) 98 L.Q.R. 197-202, and by Professor Birks in [1990] 3 L.M.C.L.Q. 342-351. *I myself, like McHugh J.A., doubt whether it is helpful in this context to speak of the plaintiff's will having been coerced. It is not however necessary to explore the matter in the present case. . .*⁵⁵

The second case is the 2003 decision of the Privy Council in *R. v. A.-G. for England and Wales*.⁵⁶ At issue there was the enforceability of a confidentiality

⁵³ H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 365 (“The importance of *Universe Tankships* is that it shifts the focus from the effect of A’s demand on B’s volition to the legitimacy of A’s demand and its effect on B’s opportunities”); R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010), 49 Can. Bus. L.J. 256 at 262-263 (“Lord Scarman reorientated the doctrine away from the apparently victim-centred formulation in *Pao On*, toward a two-element test for duress that implicated both the victim’s and the alleged coercer’s rights, interests and liberties in the inquiry”). It has also been observed that the *Universe Tankships* test is not limited to economic duress, but applies to duress of all kinds: R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 50-51.

⁵⁴ On the continued use of the *Pao On* factors in modern duress law, see the British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 34.

⁵⁵ *Ibid.* at 165-166, [emphasis added].

⁵⁶ [2004] 1 L.R.C. 132 (New Zealand P.C.).

agreement which the Ministry of Defence required the respondent special forces soldier to execute, failing which the soldier would be expelled from the special forces and returned to his parent unit. Lord Hoffmann for the majority of the Board found the agreement was not avoidable for duress, since the pressure imposed upon the soldier was not illegitimate, but was lawful and on account of a justifiable demand. In doing so, he adopted the test for duress which Lord Scarman proposed in *Universe Tankships*, including the suggestion that pressure is “generally” likely to be illegitimate when it concerns threats of the unlawful, and may exceptionally be illegitimate even where it involves threats of the lawful:

In Universe Tankships Inc of Monrovia v International Transport Workers Federation [1982] 2 All ER 67 at 88 Lord Scarman said that there were two elements in the wrong of duress. One was pressure amounting to compulsion of the will of the victim and the second was the illegitimacy of the pressure. R says that to offer him the alternative of being returned to unit, which was regarded in the SAS as a public humiliation, was compulsion of his will. It left him no practical alternative. Their Lordships are content to assume that this was the case. But, as Lord Wilberforce and Lord Simon of Glaisdale said in *Barton v Armstrong* [1975] 2 All ER 465 at 476-477:

[I]n life . . . many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. *Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.*

The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support: see Lord Scarman in Universe Tankships [1982] 2 All ER 67 at 89. *Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, the fact that the threat is lawful does not necessarily make the pressure legitimate.* As Lord Atkin said in *Thorne v Motor Trade Association* [1937] 3 All ER 157 at 160:

The ordinary blackmailer normally threatens to do what he has a perfect right to do – namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened . . . What he has to justify is not the threat, but the demand of money.⁵⁷

The third and final decision is the 2010 Privy Council judgment in *Borelli v Ting*.⁵⁸ In *Borelli*, the liquidators of a company entered into a settlement agreement with the company’s former chairman (“Ting”) and two of its minority shareholders whom he controlled, which released them from potential claims by the company. The liquidators agreed to the settlement only after Ting used forgery and false evidence to oppose a scheme of arrangement whose immediate approval was necessary to raise funds for the company’s liquidation.

⁵⁷ *Ibid.* at paras. 15-16, [emphasis added].

⁵⁸ [2010] UKPC 21 (Bermuda).

It was clear from the evidence that Ting's motivation for doing so was to escape litigation for misappropriations of the company's assets which he had sought to conceal from the liquidators. Lord Saville for the Board stated:

An agreement entered into as the result of duress is not valid as a matter of law. *Duress is the obtaining of agreement or consent by illegitimate means. Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653; *Universal Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366. Such means include what is known as "economic duress", where one party exerts illegitimate economic or similar pressure on another. An agreement obtained through duress is invalid in the sense that the party subject to the duress has the right to withdraw from the agreement, though that right may be lost if that party later affirms the agreement or waives the right to withdraw from it.

. . . James Henry Ting left the Liquidators with no reasonable or practical alternative but to enter into the Settlement Agreement.⁵⁹

3. Economic Duress in Canada

Canadian case law addressing the economic duress doctrine is fragmented and unsatisfactory. In contrast to the English jurisprudence, courts in Canada have yet to adopt a consistent framework for when the doctrine should apply. Further, there remains significant debate about whether the *Pao On* overborne will test is the more appropriate one, in addition to whether the illegitimate pressure requirement forms part of the doctrine (and if so, what it involves).

As a preliminary matter, the Supreme Court of Canada has yet to rule on these issues.⁶⁰ The Court was presented with the opportunity to do so in *Ronald*

⁵⁹ *Ibid.* at paras. 34-35, [emphasis added]. In light of the fact that Ting did not actually make threats in *Borelli*, but simply engaged in unlawful acts to pressure the liquidators to execute a settlement agreement, commentators have noted that illegitimate means in economic duress can include acts other than threats: H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 756. However, this point is largely immaterial to the present paper, which shall use the term "threats" as an omnibus description of the types of pressure capable of engaging the economic duress doctrine.

⁶⁰ See *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at para. 36 ("Our Supreme Court has not ruled on the tenets of the economic duress doctrine as articulated by the English courts and as presently being applied by the intermediate appellate courts of this country"). As noted in *Greater Fredericton*, an early instance in which the Supreme Court foreshadowed the doctrine of economic duress can be found in *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419. However, it is unclear whether the Court in *Knutson* was prepared to grant the relief associated with the modern doctrine of avoiding a contract or contractual variation backed by consideration, or whether it was only willing to permit a claim for money had and received where no contract existed. Further, M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 307 suggests that it is "far from clear" whether any "genuine economic duress" was involved in *Knutson*. Subsequent cases have displayed a tendency to rely

Elwyn Lister Ltd. v. Dunlop Canada Ltd.,⁶¹ where the argument was made that the wrongful seizure and retention of the appellants' goods by the respondent invalidated a settlement agreement which the appellants entered into under pressure of having the goods recovered. The issue of duress had been considered and rejected by both courts below,⁶² though only after the Court of Appeal cited *Pao On*⁶³ and the trial judge rejected the traditional common law rule that limits the avoidance of contracts for duress to threats involving one's person.⁶⁴ Nevertheless, the Supreme Court made no comment upon the duress issue, other than to offer the following cryptic observation in finding that the respondent invalidly exercised its debenture rights by not giving the appellants reasonable notice of its intention to do so:

. . . Failure to give such reasonable notice places the debtor *under economic, but nonetheless real duress, often as real as physical duress to the person*, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.⁶⁵

Despite the Court's silence in *Lister*, several Canadian appellate cases have since recognized that economic duress may afford a basis for contractual

upon *Knutson* in support of a restitutionary doctrine of "practical compulsion", though this concept has been somewhat displaced by the later reception of economic duress from the English jurisprudence (at least as regards the voidability of contracts): P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004 +), Vol. II, ¶26:300.10, p. 26-17 to 26-33; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 389-390. Another early Supreme Court case that presages the notion of economic duress can be found in the dissenting judgment of Cartwright J. in *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361 at 378-381. The Supreme Court's failure to address the economic duress doctrine in any principled way has been lamented by commentators: M.H. Ogilvie, "Economic Duress in Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 198; M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's L.J. 809 at 810; M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 237.

⁶¹ [1982] 1 S.C.R. 726.

⁶² *Ibid.* at 739.

⁶³ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1979), 105 D.L.R. (3d) 684 (Ont. C.A.) at 694-696, reversed [1982] 1 S.C.R. 726.

⁶⁴ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1978), 85 D.L.R. (3d) 321 (Ont. H.C.) at 348-349, reversed, (1979), 105 D.L.R. (3d) 684 (Ont. C.A.), reversed, [1982] 1 S.C.R. 726.

⁶⁵ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 at 746, [emphasis added]. See also M.H. Ogilvie, "Economic Duress In Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 198 ("When the Supreme Court of Canada decided the appeal in 1982 in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* by avoiding consideration of the economic duress issue, the only opportunity to date for a definitive articulation of the nature of economic duress was lost").

rescission. This includes the Supreme Court of Canada itself in *Martel Building Ltd. v. R.*⁶⁶ There, in rejecting the existence of a duty of care in pre-contractual negotiations, and leaving open the existence of a duty to bargain in good faith, the Court observed that doctrines such as economic duress already protect parties from improper behaviour during the contractual formation phase:

. . . It is undesirable to place further scrutiny upon commercial parties when other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, *economic duress* and unconscionability *provide redress against bargains obtained as a result of improper negotiation*. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.⁶⁷

The case law in this area has produced a patchwork of different approaches among the Canadian provinces, which are ripe for review by the Supreme Court. As matters currently stand, these approaches may be classified into at least three groups.

The first group of cases, which today emanates largely from Western Canada,⁶⁸ continues to apply the overborne will framework from *Pao On*, albeit often with some element of illegitimate pressure.⁶⁹ The B.C. Court of Appeal's decision in *Bell v. Levy*⁷⁰ is typical here. In *Bell*, the Court held that a settlement agreement acknowledging the defendants' indebtedness to the plaintiff could not be avoided on the basis of economic duress, since the individual defendant did not establish that "his will was coerced and that he did not truly consent to the Agreement" as a result of the alleged threats (i.e., that he would be sued, or his family members reported to the Canada Revenue Agency).⁷¹ While the Court did refer to *Barton* for the proposition that illegitimate pressure was required, it relied on *Pao On* to hold that the defendant's decision to enter into the agreement had to be as a result of the threats "overriding his free will", and suggested the *Pao On* factors were relevant in deciding whether the defendant acted "voluntarily".⁷²

⁶⁶ [2000] 2 S.C.R. 860.

⁶⁷ *Ibid.* at para. 70, [emphasis added].

⁶⁸ Early cases throughout Canada displayed a tendency to adopt the overborne will theory: J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 390-391. However, as discussed below, this approach has now been rejected in many parts of the country, particularly in Ontario.

⁶⁹ This tendency to use the overborne will rationale alongside the illegitimate pressure requirement can be found in other jurisdictions as well, where it has been criticized by commentators: A. Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 Mod. L. Rev. 107 at 109.

⁷⁰ (2011), 341 D.L.R. (4th) 652 (B.C. C.A.).

⁷¹ *Ibid.* at para. 73.

⁷² *Ibid.* at paras. 71-72 and 83. In fairness, the Court did note that the case below had been argued on the basis that *Pao On* established the correct test, and that no appeal on this

Similar reasoning can be found in the Alberta Court of Appeal's decision in *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*,⁷³ where a construction contractor who waived claims for delay against an engineering firm under their joint venture agreement was not found to have done so on the basis of economic duress. Citing *Pao On* and two recent English trial decisions, the Court framed the test for duress as follows:

The test for economic duress in a commercial setting requires a) an illegitimate form of pressure, b) which was sufficient to overcome the will of the protesting party, such that it vitiated any consent or agreement, and c) which caused the entering into of the challenged transaction . . .⁷⁴

In assessing whether this test was met, the Court suggested that judges may consider the *Pao On* factors as non-determinative “badges” or indicia of duress.⁷⁵ It then concluded that the test for duress was not met in *Attila* itself,

issue was taken: *ibid.* at paras. 45-47 and 70. However, in its subsequent decision in *Jestadt v. Performing Arts Lodge Vancouver* (2013), 44 B.C.L.R. (5th) 109 (B.C. C.A.) at paras. 48-50, the B.C. Court of Appeal again suggested that economic duress could not be made out where the promisor signed the contract “of her own free will” (though without citing any authority other than the application judge). See also the B.C. Court of Appeal's earlier judgment in *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 (B.C. C.A.) at 650-651 and 653, where the Court cited only *Pao On* rather than *Universe Tankships* for the elements of duress, and suggested the test was whether there was a “a coercion of the will so as to vitiate consent”. Cf. M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 200, who notes that *Byle* was a duress of person rather than economic duress case, and actually applied an “absence of practical alternatives” test.

⁷³ *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*, 569 A.R. 308 (C.A.), additional reasons 2015 CarswellAlta 12 (C.A.). See also: *Winfield Developments Ltd. v. Winnipeg (City)*, [1989] 4 W.W.R. 558 (Man. C.A.) at para. 24, leave to appeal refused [1989] S.C.C.A. No. 248 (citing *Pao On* for the principle that duress requires “a coercion of will such that there was no true consent”); and *Permaform Plastics Ltd. v. London & Midland General Insurance Co.*, [1996] 7 W.W.R. 457 (C.A.) at paras. 87, 88 and 98 (recognizing the requirement that pressure be illegitimate, but citing *Pao On* for the proposition that “[d]uress, whatever form it takes, is a coercion of the will so as to vitiate consent”). Cf. H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 386-387, who suggests that *Permaform* reflects more a rejection of the overborne will theory than an acceptance of it.

⁷⁴ *Attila*, *ibid.* at para. 18, [emphasis added].

⁷⁵ *Ibid.* at para. 20. At para. 19, the Court adopted the following additional principles from *Kolmar Group AG v. Traxpo Enterprises PVT Ltd.*, [2010] EWHC 113 (Q.B.D.) at para. 92, which to some extent appear inconsistent with its reliance on *Pao On*:

(i) Economic pressure can amount to duress, provided it may be characterised as illegitimate and has constituted a “but for” cause inducing the claimant to enter into the relevant contract or to make a payment . . .

(ii) a threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented;

since “there was insufficient evidence of ‘domination or control over its will, such that the plaintiff was incapable of independent decision making’”.⁷⁶

A second group of cases, arising principally in Ontario, accepts the modern English framework for economic duress, and requires that there be illegitimate pressure which only leaves the threatened party with no *practical* alternative but to comply with the demand.⁷⁷ The leading decision is *Stott v. Merit Investment Corp.*,⁷⁸ where the plaintiff, an employee of the defendant securities firm, managed a client’s account which — through no error of the plaintiff himself — suffered a loss. The defendant then requested that the plaintiff sign an agreement acknowledging his personal liability for the debt and undertaking to pay it off over a time, informing him that things would not “go well” for him at the firm if he refused to execute it. The plaintiff signed the agreement, and proceeded to make payments on the debts periodically through deductions from his sales commissions for about two years, after which time he left his employment and sued the defendant for these amounts, arguing that the acknowledgment of liability was invalid.

Though the Court of Appeal ultimately dismissed the claim on the basis that the plaintiff had acquiesced to the payments by not repudiating the agreement earlier, Finlayson J.A. for the majority concluded that the agreement was procured through economic duress.⁷⁹ In doing so, he quoted from the reasons of both Lord Diplock and Lord Scarman in *Universe Tankships*, together with *Pao On*,⁸⁰ and set forth the following test:

(iii) it is relevant to consider whether the claimant had a “real choice” or “realistic alternative” and could, if it had wished, equally well have resisted the pressure and, for example, pursued practical and effective legal redress. If there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat.

(iv) the presence, or absence, of protest, may be of some relevance when considering whether the threat had coercive effect. But, even the total absence of protest does not mean that the payment was voluntary.

⁷⁶ *Attila*, *ibid.* at para. 21.

⁷⁷ The acceptance of the modern English approach in the Ontario jurisprudence has been recognized by several commentators: R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010), 49 Can. Bus. L.J. 256 at p. 262, footnote 25; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 391-394. See also M.H. Ogilvie, “Economic Duress: An Elegant and Practical Solution”, [2011] 3 J.B.L. 229 at 237, who suggests that these Ontario Court of Appeal cases – which “largely follow the doctrinal trajectory set out earlier in the English case law of moving from a test that focused early on the overborne will alone to a test focused on the legitimacy of the pressure in the later cases” – are the most frequently cited economic duress cases in Canada.

⁷⁸ (1988), 48 D.L.R. (4th) 288 (Ont. C.A.), [1988] S.C.C.A. No. 185.

⁷⁹ *Ibid.* at 308.

⁸⁰ *Ibid.* at 305-307.

. . . [N]ot all pressure, economic or otherwise, is recognized as constituting duress. *It must be a pressure which the law does not regard as legitimate and it must be applied to such a degree as to amount to “a coercion of the will”, to use an expression found in English authorities, or it must place the party to whom the pressure is directed in a position where he has no “realistic alternative” but to submit to it*, to adopt the suggestion of Professor Waddams (S.M. Waddams, *The Law of Contract*, 2nd ed. (1984), at p. 376 et seq.). Duress has the effect of vitiating consent and an agreement obtained through duress is voidable at the instance of the party subjected to the duress unless by another agreement or through conduct, either express or implied, he affirms the impugned contract at a time when he is no longer the victim of the duress.⁸¹

Interestingly, the Court in *Stott* seems to have found that the defendant’s conduct amounted to “illegitimate” pressure even though it did not identify any threat of unlawful action by it.⁸² Fridman concludes that the *Stott* case “suggest[s] that it is illegitimate pressure that is the foundation of economic duress”.⁸³

The Ontario Court of Appeal reiterated the *Stott* test in *Taber v. Paris Boutique & Bridal Inc.*,⁸⁴ where it held that a promissory note in which locked-

⁸¹ *Ibid.* at 305, [emphasis added]. Although the Court refers here to coercion of the will, “it seems clear from the context and the facts of the case . . . that the term is used as a convenient shorthand to describe the situation where the pressured party has no ‘realistic alternative’ but to submit”: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-42. See also *Stott, Ibid.* at 308:

. . . [S]ince, as I have found, there was valid consideration, the question then becomes whether the contract was entered into as a result of duress. What coercion of the will took place here, or *what were the practical alternatives to submission to the pressures applied?* As I have indicated, I believe a case can be made to support a finding that . . . *Stott* was pressured into signing the agreement in question and that the pressure applied would not be recognized by law as legitimate. He was called into his superior’s office unexpectedly, he was confronted with a customer’s delinquent account for which he must have felt some responsibility, he was given no opportunity to consider his position at leisure even though there were no external reasons for urgency, he was effectively discouraged from consulting a lawyer, and he (with full justification) feared for his job. [emphasis added]

Thus, as noted by M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 203, the Court in *Stott* “seemed uninterested in the question of whether *Stott*’s will was actually compelled”.

⁸² This is also noted by M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 203, who states that in *Stott*, “the Ontario Court of Appeal clarified that pressure need not be illegal to be illegitimate, that is, pressure other than criminal or tortious conduct may qualify as illegitimate pressure”.

⁸³ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 311.

⁸⁴ 2010 ONCA 157. See also *Hill v. Forbes*, (2007), 225 O.A.C. 74 (C.A.) at paras. 12-14. Prior to these cases, the Ontario Court of Appeal took a somewhat different approach from *Stott* in *Gordon v. Roebuck* (1992), 92 D.L.R. (4th) 670 (Ont. C.A.) at 672-675, where it applied the *Pao On* factors to determine whether there was “economic duress”, and finding this to be so, held it was excused by the fact that the pressure was “justified”. However, a fair reading of the Court’s reasons in *Gordon* suggests it used the *Pao On* factors to assess whether there was “coercion” of the will, and then proceeded to consider whether the pressure was “legitimate”: *ibid.* at 674-675. Since the Court did not

out tenants agreed to pay the fees for their landlord's lawyer as part of a settlement was not procured by economic duress. The Court referred to *Universe Tankships* rather than *Pao On* as the "leading case",⁸⁵ and stated:

. . . [N]ot all pressure, economic or otherwise, can constitute duress . . . It must have two elements: *it must be pressure that the law regards as illegitimate; and it must be applied to such a degree as to amount to "a coercion of the will" of the party relying on the concept.* See: *Stott v. Merit Investment Corp.*, 63 O.R. (2nd) 545 (Ont. C.A.), at para. 89.⁸⁶

The third and final group of cases issues from the Maritimes, led by the decision of the New Brunswick Court of Appeal in *Greater Fredericton Airport Authority Inc. v. NAV Canada*.⁸⁷ In *Greater Fredericton*, the Court introduced a distinction between cases where pressure causes the promisee to agree to a *variation* of an existing contract, and where it causes them to agree to a new *contract* altogether. In cases falling within the former category, the Court took the "novel"⁸⁸ step of holding that the illegitimate pressure requirement in the English jurisprudence should be rejected:

define what coercion of the will required in this context, it is unclear whether it intended to resile from its acceptance of the *Universe Tankships* framework in *Stott*. The Court also suggested in *Techform Products Ltd. v. Wolda* (2001), 56 O.R. (3d) 1 (C.A.) at para. 31, leave to appeal refused [2001] S.C.C.A. No. 603, that under the *Stott* test, "[i]t must be pressure that the law does not accept as legitimate and it must be applied to such an extent that the person to whom the pressure is directed has no choice but to submit". But in doing so, the Court simply repeated a statement made by the trial judge, and it was unnecessary for it to consider the issue of whether the pressure must eliminate all choices or only all "practical" choices, since the focus of the appeal was on the legitimacy of the pressure. Thus, commentators seem to generally accept that *Stott*, *Gordon* and *Techform* involve an adoption of the *Universe Tankships* approach to economic duress: H. Stewart, "Economic Duress in Canadian Law: Towards a Principled Approach" (2003) 82 Can. Bar Rev. 359 at 380-386; M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's L.J. 809 at 818-819; M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 238; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 391-394; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-42, footnote 222.

⁸⁵ *Taber v. Paris Boutique & Bridal Inc.*, 2010 ONCA 157 at para. 12.

⁸⁶ *Ibid.* at para. 9, [emphasis added].

⁸⁷ (2008), 290 D.L.R. (4th) 405 (N.B. C.A.). For extensive reviews of this decision, see: R. Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*" (2010) 49 Can. Bus. L.J. 256; M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229.

⁸⁸ M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 238.

. . . There is jurisprudence that holds that the exercise of “illegitimate pressure” is a condition precedent to a finding of economic duress. I respectfully decline the invitation to recognize such pressure as an essential component of the duress doctrine, at least in cases involving the enforceability of variations to an existing contract. *It is not the legitimacy of the pressure that is important but rather its impact on the victim*, unless, perhaps, one is attempting to establish that a finding of economic duress qualifies as an independent tort.

. . .

Although Canadian Courts are no longer bound to follow the English authorities, regrettably, the criterion of illegitimate pressure has been absorbed into the fabric of the Canadian jurisprudence without comment. . . ⁸⁹

In place of the illegitimate pressure requirement, the Court proposed a new economic duress framework built around “[t]he true cornerstone of the doctrine which is the lack of ‘consent’”:⁹⁰

. . . [A] finding of economic duress is dependent *initially* on two conditions precedent. First, the promise (the contractual variation) must be extracted as a result of the exercise of “pressure”, whether characterized as a “demand” or a “threat”. Second, the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer’s demand to vary the terms of the underlying contract. However, even if those two conditions precedent are satisfied, a finding of economic duress does not automatically follow. Once these two threshold requirements are met, the legal analysis must focus on the ultimate question: whether the coerced party “consented” to the variation. To make that determination three factors should be examined: (1) whether the promise was supported by consideration; (2) whether the coerced party made the promise “under protest” or “without prejudice”; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable. Admittedly, the last two factors are more likely to have a bearing on the ultimate outcome of a case than the first. As well, note that under this general framework, no reference is made to the supposed victim having “independent legal advice” or to the “good faith conduct” on the part of the supposed coercer. . . ⁹¹

The Court found this test was met in circumstances where the respondent Airport Authority agreed to pay for certain equipment costs that NAV Canada demanded as the price for moving its instrument landing system to a new runway that the Authority wished to build.⁹² The *Greater Fredericton* approach has since been endorsed by the Newfoundland and Labrador Court of Appeal in cases involving the variation of existing contracts.⁹³ However, the conflict

⁸⁹ *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at paras. 7 and 44, [emphasis added].

⁹⁰ *Ibid.* at para. 7. See also para. 52 (“I begin with the premise that the hallmark of every commercial agreement is a ‘consensual bargain’”).

⁹¹ *Ibid.* at para. 53, [emphasis in original].

⁹² *Ibid.* at paras. 7 and 64-67.

between *Greater Fredericton* and the other cases discussed above which accept the illegitimacy requirement has yet to be resolved.⁹⁴

III. PROBLEMS WITH THE CURRENT APPROACHES TO ECONOMIC DURESS

The foregoing discussion suggests that there are significant problems with the current approach to economic duress in Canada. Indeed, despite the unwieldy body of literature that has grown up around the doctrine,⁹⁵ commentators are virtually unanimous that no clear framework for it exists.⁹⁶ As Bigwood

⁹³ *Burin Peninsula Community Business Development Corp. v. Grandy* (2010), 327 D.L.R. (4th) 752 (Nfld. C.A.) at paras. 23-25 and 31; *Hickey's Building Supplies Ltd. v. Sheppard*, 359 Nfld. & P.E.I.R. 27 (C.A.) at paras. 35 and 64.

⁹⁴ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 312.

⁹⁵ M.H. Ogilvie, "Economic Duress In Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 194 ("[S]cholarly articles on the meaning of economic duress in England and Canada combined have numbered only slightly fewer than the reported decisions"). This literature relates not only to contractual economic duress (i.e., where the duress produces a contract supported by valid consideration), but also to the concept of duress in restitution (i.e., where the duress results in the conferral of a benefit without a contract arising): see, e.g., G.H.L. Fridman, "Duress in the Canadian and English Law of Restitution: A Comparison" (1987) 11 Dalhousie L.J. 47. However, more recent commentary takes the view that it is no longer appropriate to draw a distinction between contractual and restitutionary duress, except insofar as the remedies they provide may have different characteristics: A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 259-262.

⁹⁶ M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 289; A. Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 Mod. L. Rev. 107 at 107, 109 and 113-114; R. Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 L.Q.R. 649 at 678; M.H. Ogilvie, "Economic Duress in Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 220-221; H. Stewart, "Economic Duress in Canadian Law: Towards a Principled Approach" (2003) 82 Can. Bar Rev. 359 at 359-360; M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's L.J. 809 at 820-822; G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 198; S. Scott, "Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases" (2010) 12 Otago L. Rev. 391 at 392; G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Carswell: Toronto, 2011) at 312; M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 229; N. Tamblyn, "Causation and Bad Faith in Economic Duress", 2011 JCL LEXIS 9 at *1; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 7; A. Kantic, "How a Clarification of Duress Renders the 'Equitable' Doctrine of Actual Undue Influence Futile" (2015) N.Z.U.L.R. 642 at 672; H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 762.

observes, “few doctrines have seemed to struggle so unsuccessfully for an underlying rationale and for sound theoretical conceptualization”.⁹⁷ Some even question the doctrine’s existence.⁹⁸

For their part, the courts have failed to provide concrete guidance. Instead of articulating a specific test, the jurisprudence has yielded general statements of principle, occasionally supplemented with long lists of overlapping factors designed to assess whether duress has taken place.⁹⁹ As Ogilvie observed in 2000, “[t]he Canadian cases do not consider the juridical nature of economic duress”, and “the English case law to date on economic duress is characterized by false starts, pregnant remarks and loose ends”.¹⁰⁰ Further, the conflict between *Greater Fredericton* and other Canadian authorities makes it impossible to determine the proper approach under the current state of the law. McCamus writes:

. . . Until our highest court has the opportunity to examine the doctrine of practical compulsion in the context of the English approach to economic duress, the Canadian position on the matter remains uncertain.¹⁰¹

The problems with economic duress become apparent upon a critical review of the three major frameworks applied by the Canadian courts. None of the frameworks is capable of adequately explaining the doctrine, and each one produces logical inconsistencies and uncertainties that threaten to overwhelm the doctrine’s practical value.

1. The Overborne Will Framework

Since the Privy Council decision in *Pao On*, numerous commentators have rejected the theory that economic duress reflects an overbearing of one’s will.¹⁰²

⁹⁷ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 270.

⁹⁸ See M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *10.

⁹⁹ S. Scott, “Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases” (2010) 12 Otago L. Rev. 391 at 392; N. Tamblin, “Causation and Bad Faith in Economic Duress”, 2011 JCL LEXIS 9 at *1.

¹⁰⁰ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 200 and 221.

¹⁰¹ P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-45.

¹⁰² M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 19-20 and 31; M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: The Law Book Company Limited, 1985) at 54-57; G.H.L. Fridman, “Duress in the Canadian and English Law of Restitution: A Comparison” (1987) 11 Dalhousie L.J. 47 at 69-70; E. Macdonald, “Duress By Threatened Breach of Contract”, [1989] J.B.L. 460 at 461; R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 665-667; J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991)

Even apart from its lack of judicial support,¹⁰³ serious problems with this framework exist at the level of principle. The primary objections are as follows.

First, economic pressure does not render a promisor incapable of consenting to what they are doing. To the contrary, “the more extreme the pressure, the more real is the consent”.¹⁰⁴ The overborne will theory is ultimately “simplistic and misleading insofar as it suggests a kind of ‘automatism’ on the part of the party coerced”.¹⁰⁵ As Stewart notes, “[i]n a typical situation of duress, the weaker party is not rendered an automaton, but acts wilfully”.¹⁰⁶ He explains the correct position as follows:

. . . B’s problem is not that he or she acts without any real will, like an automaton or a person subject to undue influence; indeed, B may be entirely rational and completely competent in choosing to submit to A’s demand. B’s problem is simply that his or her freedom of action has been wrongfully reduced, and this problem has little if anything to do with the state of his or her will.¹⁰⁷

at 160-163; M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *79-80; R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 207-208; M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 513; H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 360 and 389-390; G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 191; S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 375-376 and footnote 274; C. Mitchell *et al.*, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 299-300; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 256 and 269; British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 29; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 394; H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 753; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-35 to 26-38.

¹⁰³ As noted by P.S. Atiyah, “Economic Duress and the ‘Overborne Will’” (1982) 98 L.Q.R. 197 at 198-200, the overborne will theory was “totally demolishe[d]” by the House of Lords in *Lynch*. See further McHugh J.A.’s reasons in *Crescendo Management Pty Ltd. v. Westpac Banking Corp.* (1988), 19 N.S.W.L.R. 40 (C.A.). It is worth noting that earlier Canadian cases which developed the concept of “practical compulsion” in the restitutionary context also recognized that the lack of practical alternatives rather than the complete vitiation of one’s will was the benchmark for coercion: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-42.

¹⁰⁴ P.S. Atiyah, “Economic Duress and the ‘Overborne Will’” (1982) 98 L.Q.R. 197 at 200.

¹⁰⁵ A. Phang, “Whither Economic Duress? Reflections on Two Recent Cases” (1990) 53 Mod. L. Rev. 107 at 109.

¹⁰⁶ H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 360. See also 366.

¹⁰⁷ *Ibid.* at 373.

The same point is made by Halson:

. . . [T]he consent obtained by a threat is in every meaningful sense a real consent. All that has happened is that a party has been faced with a choice between two evils, submission to a demand or the threatened consequences of resistance. It is true that it is a choice which the law deprecates. However, that should not lead courts to the conclusion that the consent was unreal. Indeed, there is a sense in which one can say that the more extreme the threatened wrong and the concomitant desire of the victim to avoid it, the more “real” the consent obtained. Therefore the consent obtained as the result of a threat is a more sincere, more genuine consent than is generally manifested by so-called voluntary agreements.¹⁰⁸

Moreover, whatever the attractions of the overborne will theory during the Victorian era, it seems ill equipped to deal with the increasingly sophisticated transactions of the 21st century. As Ogilvie notes, “[i]t is ridiculous in any case, when dealing with corporate bodies, whether large companies or large trade unions, to speak of one such body coercing the ‘will’ of another”.¹⁰⁹ The reality is that the overborne will framework is much too facile to accommodate all the nuances of economic duress, such as the nature of the pressure, consent and resulting agreement involved. As Ogilvie notes, “[t]he classic formulation, ‘coercion of the will so as to vitiate consent’ disguises at least as much as it reveals”.¹¹⁰

Second, the overborne will test establishes a very difficult threshold to meet.¹¹¹ It is virtually impossible to establish economic duress if one must engage in a subjective inquiry into the mind of the promisor.¹¹² This is noted by Atiyah, who warns that the theory “is surely bound to divert attention into quite irrelevant inquiries into the psychological motivations of the party pleading duress”.¹¹³ Surely an approach that asks whether the promisor had any practical alternatives is preferable. In addition to being a more workable test, the absence of practical alternatives approach does not limit the inquiry to whether the pressure “in fact” induced the contract. Instead, it permits courts to engage in a broader normative review of the promisor’s post-threat alternatives and whether their decision to succumb to the pressure was justified.¹¹⁴

¹⁰⁸ R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 665.

¹⁰⁹ M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 20.

¹¹⁰ M.H. Ogilvie, “Economic Duress: An Elegant and Practical Solution”, [2011] 3 J.B.L. 229 at 229.

¹¹¹ H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 360.

¹¹² J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 387.

¹¹³ P.S. Atiyah, “Economic Duress and the ‘Overborne Will’” (1982) 98 L.Q.R. 197 at 202.

¹¹⁴ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus.

Third, the overborne will theory lacks explanatory force. The doctrine cannot tell us why the effect of economic duress is only to render a contract voidable, even though a total lack of consent — as in doctrines like *non est factum* — makes contracts void *ab initio*.¹¹⁵ Nor does it describe what courts actually do when confronted with allegations of economic duress. While the terminology of the overborne will survives in many cases, the concurrent judicial tendency to invoke the *Pao On* factors “suggests that the requirement of an overborne will is an unnecessary conclusion rather than the actual test for economic duress. An overborne will adds nothing once other factors, such as absence of practical alternatives, are found to be present”.¹¹⁶

Finally, the theory’s focus upon the effect of pressure vis-à-vis the promisor ignores the fact that pressure on its own is not forbidden by the courts.¹¹⁷ As Scott notes, “[t]he doctrine of duress is not concerned with the use of pressure *per se*. Pressure is a part of everyday life. Rather, the doctrine is concerned with the use of pressure that the law regards as improper”.¹¹⁸ The same point is made by Bigwood:

. . . [A] person does not act ‘involuntarily’ — hence cannot be ‘coerced’ — if all that constrained her decision-making, when she acted, was either nature itself or else a set of alternatives presented by another person acting within his or her rights. *The essence of duress, then, must be seen to lie not in the choice situation itself but rather in its source: in the type of behaviour, on the part of D, that created the loss of freedom of which P now*

L.J. 256 at 275-276; R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 Victoria U. Wellington L. Rev. 83 at 92-93.

¹¹⁵ P.S. Atiyah, “Economic Duress and the ‘Overborne Will’” (1982) 98 L.Q.R. 197 at 201.

¹¹⁶ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-end?” (2001) 34 Can. Bus. L.J. 194 at 201.

¹¹⁷ H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 362.

¹¹⁸ S. Scott, “Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases” (2010) 12 Otago L. Rev. 391 at 395. See also: M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 25-26; A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 Melb. U. L. Rev. 410 at 423-424; R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 208; M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 511; M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 200; R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 287-288; O. Lennox-King, “Laying the Mark to Port and Starboard: Salvage Under Duress and Economic Duress at Contract Law” (2007) 21 Austl. & N.Z. Mar. L.J. 32 at 46; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 256; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 8. Cf. G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 204-206.

complains in seeking to disclaim responsibility for a transaction that was produced as a result of D's behaviour. Contractual duress is a feature of P's pre-transactional choice situation as it was created by another individual, D, and not as it existed in a state of nature, in P's own mind, or in P's pre-existing lack of alternatives for which D is not responsible. As it is sometimes put, duress 'must come from without, and not from within'. . .¹¹⁹

This is particularly so for economic duress. Unlike more traditional forms of duress such as threats to the person — where the law has already concluded, for independent reasons, that the type of pressure in question is not one the defendant is permitted to employ — economic pressures can arise in a range of different contexts, many of which are not unlawful but simply part of normal commercial interactions.¹²⁰ As Waddams observes, "in many contracts the enforceability of which has never been doubted, one party acts under economic pressure. An example is a loan, at fair market rates, to a needy borrower".¹²¹ The challenge, therefore, is to formulate a framework for economic duress that not only articulates a causal test for pressure, but provides a meaningful basis by which to distinguish *acceptable* from *unacceptable* uses of economic power.¹²²

In its emphasis upon the effects rather than the type of the pressure, the overborne will theory harkens back to the organizing principle of freedom of

¹¹⁹ R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U.Q. Law J. 41 at 54, [emphasis added]. See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 288, where the requirement for something beyond simple pressure is grounded in notions of corrective justice:

. . . Corrective justice . . . requires sufficient positive reason for linking P and D in a bipolar justice relationship, and impaired consent on P's part, where D has not acted wrongly, cannot plausibly supply that reason . . . This is because it would simply fail to respect D's interest as an agent in freedom of action, effectively 'punishing' him randomly for states of affairs for which he is not directly responsible. It would be to condemn D for the very thing that contract law serves to facilitate and exists to protect: the self-interested pursuit of an individual's preferences and values. What is required instead, then, is a linking reason beyond P's defective consent that *both* excuses P of her legal contractual obligation *and* legitimately deprives D, the object of that obligation, of the rights he expected to enjoy thereunder. This linking reason is found in the 'wrongfulness' or 'illegitimacy' of the pressure responsible for affecting the consent upon which D's enforcement rights are ordinarily founded . . . [emphasis in original]

¹²⁰ S. Scott, "Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases" (2010) 12 Otago L. Rev. 391 at 397. Of course, this does not mean that economic duress should be viewed as something other than a species of contractual duress. It simply means that distinctive considerations apply to economic duress: R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U.Q. Law J. 41 at 50.

¹²¹ S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 375, footnote 274.

¹²² H. Stewart, "Economic Duress in Canadian Law: Towards a Principled Approach" (2003) 82 Can. Bar Rev. 359 at 362. See also R. Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 L.Q.R. 649 at 660.

contract that dominated the theoretical discourse during the 19th century.¹²³ As Ogilvie explains:

The ascendancy of freedom of contract was accompanied by a growth of formalism in curial contractual analysis. . . . If the basis for legal liability was now thought to reside in the will, anomalous eighteenth century doctrines such as duress and mistake had to be reinterpreted. Duress came to be explained as a defective consent or an unfree will. If a manifestly unfair contract was upset on this ground, it was as if the contract had been vitiated from the start by the absence of voluntary consent. In short, the rationale for permitting such a defence was no longer simple unfairness. . . .¹²⁴

However, the last 100 years have witnessed a move away from classical *laissez-faire* notions like freedom of contract. This is reflected in “the rise of socialism . . . the welfare state . . . and . . . statutory controls over contract”,¹²⁵ together with the growth of doctrines such as unconscionability and the Supreme Court of Canada’s recognition of the organizing principle of good faith itself. These developments in contract law have produced a “perceptible shift in economic duress from a will-based emphasis to a moral-based one”.¹²⁶ As Ogilvie observes:

. . . Judicial determination of whether the will was truly overborne is now less a question of voluntariness and more one of fairness, so that economic duress appears to fit more within contemporary discussions of the fundamental nature of contract than 19th century discussions, as its original formulation suggested.¹²⁷

¹²³ See: M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 289 (“The doctrine of duress has long languished in the shadow of freedom of contract and judicial *laissez-faire*”); H. Lal, “Commercial Exploitation in Construction Contracts: The Role of Economic Duress and Unjust Enrichment” (2005) 21 Const. L.J. 590 at 597-598 (“Market-individualism appears to be the chief ideology operating in this area. Market-individualism involves two related ideologies: the market philosophy and the individualistic philosophy. The former sees the function of the law of contract as the means of competitive exchange. Individualism is about ‘freedom of contract’ and ‘sanctity of contract’”).

¹²⁴ M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 4. See also *Schroeder Music Publishing Co. v. Macaulay*, [1974] 3 All E.R. 616 (H.L.) at 623, per Lord Diplock (“Under the influence of Bentham and of *laissez-faire* the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally”).

¹²⁵ M. Littlewood, “Freedom from Contract: Economic Duress and Unconscionability” (1985) 5 Auckland U.L. Rev. 164 at 164-166. See also M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 4-6 and 11 (noting “[t]he restoration of ‘morality’ to contract law in the late twentieth century, after its repudiation in the nineteenth century in favour of value-free scientific principles”).

¹²⁶ M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 24.

¹²⁷ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 195.

In the end, the justification for economic duress cannot be said to reside in the legal fiction of the overborne will. It is clear that something more than simple pressure is required, and that courts are making value judgments about whether the pressure in question is unfair. While decided in a different context, the Supreme Court of Canada's comments about the unconscionability doctrine are relevant here as well:

It may be argued that an unconscionable transaction does not, in fact, vitiate consent: the weaker party retains the power to give real consent but the law nevertheless provides relief on the basis of social policy. This may be more in line with Lord Denning's formulation of "inequality of bargaining power" in *Lloyds Bank Ltd. v. Bundy*, *supra*, when one takes into account his statement that it is not necessary to establish that the will of the weaker party was "dominated" or "overcome" by the other party. But whichever way one approaches the problem, the result is the same: *on grounds of public policy, the legal effectiveness of certain types of contracts will be restricted or negated*¹²⁸

. . . [T]he doctrine of unconscionable transactions has hitherto been confined to setting aside unconscionable contracts, not negating defences to tort actions. Second, where applicable, *it serves not to negate the consent, but to set aside a consensual agreement on grounds of inequality of bargaining power and fairness: Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326 (C.A.), per Lord Denning M.R.¹²⁹

. . .

. . . [T]he weight of academic and judicial opinion is that the doctrine of unconscionability operates to set aside transactions even though there may have been consent or agreement to the terms of the bargain. *It is not that this doctrine vitiates consent but rather that fairness requires that the transaction be set aside notwithstanding consent.*¹³⁰

2. The Illegitimate Pressure/No Practical Alternative Framework

The dominant trend among courts and commentators is to adopt the test for duress proposed by Lord Scarman in *Universe Tankships*, which requires both the application of pressure that deprives the promisor of practical alternatives, and that such be "illegitimate".¹³¹ This is a more sophisticated test than the overborne will framework, and better reflects the structure of modern contract

¹²⁸ *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 250, per La Forest J., [emphasis added].

¹²⁹ *Ibid.* at 282, per McLachlin J., [emphasis added].

¹³⁰ *Ibid.* at 307-308, per Sopinka J., [emphasis added].

¹³¹ See the British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 28-29 (noting that the two duress requirements set out by Lord Scarman in *Universe Tankships* "[a]rguably . . . now form the main line of the courts' approach to economic duress" in both England and Canada).

law, under which freedom of contract is increasingly tempered by concerns of unfairness.

At the same time, the *Universe Tankships* approach carries significant problems of its own. Most fundamentally, the scope of the “illegitimate” pressure requirement is highly uncertain.¹³² With the abandonment of the overborne will framework, “[w]e are left instead with a general and open-textured requirement of ‘illegitimacy,’ or ‘unconscionability,’ which has tended greatly to enlarge the instances of conduct brought within the doctrine’s constabulary ambit”.¹³³ Ogilvie, who is particularly critical of the illegitimacy criterion, identifies the myriad issues which are unresolved:

. . . [W]hy should the standard for economic duress be illegitimate pressure? Is the illegitimacy of the pressure the sole substantive test? Or is it one part of a two-part test, the other part being an absence of practical alternatives? Is an absence of practical alternatives evidentiary, used to determine whether pressure is illegitimate? How does one determine when an illegitimate pressure overbears a victim’s will? Are other criteria also required to be satisfied, such as absence of protest or of subsequent affirmation? What is illegitimate pressure? If it extends beyond crime and tort to otherwise lawful conduct, does it include threatened breach of contract or lawful conduct leaving the victim without practical alternatives? Why should lawful pressure be illegitimate in commercial relationships? . . .¹³⁴

The depth of uncertainty is such that some have questioned whether a single formula for distinguishing legitimate from illegitimate pressure will ever emerge.¹³⁵ This is particularly so where the analysis concerns the illegitimacy of *lawful* threats.¹³⁶ While Lord Scarman expressly referred to this possibility in *Universe Tankships*, some raise the concern that permitting recovery for lawful act duress will cause the doctrine to become so open-ended that it undermines

¹³² A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) N.Z.U.L.R. 642 at 647-648.

¹³³ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 271. See also M.P. Sindone, “The Doctrine of Economic Duress – Part 2”, 1996 ABR LEXIS 5 at *10 (“A review of the cases on duress gives the reader an indication of what the law would countenance as illegitimate pressure, but gives no concrete guidance as to what falls on the side of legitimacy or illegitimacy”).

¹³⁴ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 222-223. See also M.H. Ogilvie, “Wrongfulness, Rights and Economic Duress” (1984) 16 Ottawa L. Rev. 1 at 19-20.

¹³⁵ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 214 and 242.

¹³⁶ A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 Melb. U. L. Rev. 410 at 441; A. Phang, “Whither Economic Duress? Reflections on Two Recent Cases” (1990) 53 Mod. L. Rev. 107 at 109; M.P. Sindone, “The Doctrine of Economic Duress – Part 2”, 1996 ABR LEXIS 5 at *14-15; M.H. Ogilvie, “Forbearance and Economic Duress: Three Strikes and You’re Still Out at the Ontario Court of Appeal” (2004) 29 Queen’s L.J. 809 at 819-821.

the confidence of the commercial world in contracts.¹³⁷ It has thus been suggested that the illegitimacy requirement should be confined to threats of unlawful acts,¹³⁸ and abandoned for threats of lawful ones.¹³⁹

The problem is illustrated by Scott, who suggests that it is possible to formulate a hierarchy of different pressures, with threats of criminal conduct at the top, threats contrary to public policy (e.g., torts and abdications of public duty) in the middle, and merely economic pressures at the bottom.¹⁴⁰ As one moves through this hierarchy, it becomes increasingly difficult to assess whether pressure is improper, to the point that courts must have recourse to a correspondingly broader range of factors beyond the nature of the pressure itself in making their assessment (e.g., the parties' relationship, the promisee's motives, and the appropriateness of the outcome).¹⁴¹ By the time the court approaches the bottom of the scale, involving cases of lawful act duress, there exists "little detailed consideration" of when such pressure will qualify as improper.¹⁴² Instead, courts must posit the existence of an "invisible line" which, once crossed, renders otherwise lawful conduct illegitimate for contractual purposes.¹⁴³

Part of the difficulty is that Lord Scarman gives very little guidance for ascertaining the illegitimacy of lawful threats beyond his example of blackmail, which in Canada is likely to amount to a criminal act under s. 346 of the *Criminal Code* even if the conduct it threatens is not.¹⁴⁴ Lord Scarman's

¹³⁷ A. Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 Mod. L. Rev. 107 at 111-113.

¹³⁸ D. Tan, "Constructing a Doctrine of Economic Duress" (2002) 18 Const. L.J. 87 at 92-93. For an important Australian case which took this approach in the context of restitutionary duress, see *Smith v. William Charlick Ltd.* (1924), 34 C.L.R. 38 (H.C.A.), and the discussion of it by R.J. Sutton, "Duress by Threatened Breach of Contract" (1974) 20 McGill L.J. 554 at 562-563 and R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 318-319 and 323-329.

¹³⁹ M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 314-316; M.H. Ogilvie, "Economic Duress In Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 224-229.

¹⁴⁰ S. Scott, "Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases" (2010) 12 Otago L. Rev. 391 at 401.

¹⁴¹ *Ibid.* at 400-405.

¹⁴² *Ibid.* at 404-405.

¹⁴³ M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 239. See also R.J. Sutton, "Duress by Threatened Breach of Contract" (1974) 20 McGill L.J. 554 at 586 ("If a solution based solely on technical unlawfulness is unsatisfactory, so too is one which would commit the whole matter to the court's sense of what is the 'fair thing' in the particular case").

¹⁴⁴ Section 346(1) provides:

346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to

assertion in *Universe Tankships*, later taken up in *R. v. A.-G.*, that one must examine the lawfulness of the “demand” in cases where the threatened act is lawful, yields little in the way of a concrete approach.¹⁴⁵

. . . When [the threatened act] is unlawful, illegitimacy will convert economic pressure into economic duress. When it is lawful, only Lord Scarman thinks it will also convert economic pressure to economic duress. In his view, the question is answered by the nature of the demand, not the pressure: if the demand is lawful, then the pressure is legitimate and there is no economic duress, but if the demand is unlawful, then the pressure is illegitimate and there is economic duress. *Lord Scarman does not state how to assess the lawfulness of the nature of the demand.* If the criteria are crime and tort, then this second step seems unnecessary. If other criteria are to be used, then *it is difficult to understand how Lord Scarman has advanced the discussion.* Since the actual outcome in the case was dependent on statutory criteria, no further elucidation is available to assist in purely common law fact situations. At the end, *The Universe Sentinel* remains unhelpful.¹⁴⁶

Further, even where the analysis concerns *unlawful* threats, it is unclear precisely when courts should treat the pressure as illegitimate. While the

induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

See also ss. 302(1) (involving extortion by libel) and 423(1) (involving intimidation by threats of violence or “other injury” to person or property). The elements of the crime under s. 346(1) were set out in *R. v. Barros*, [2011] 3 S.C.R. 368 at para. 54:

Extortion requires the Crown to establish beyond a reasonable doubt (i) that the accused has induced or attempted to induce someone to do something or to cause something to be done; (ii) that the accused has used threats, accusations, menaces or violence; (iii) that he or she has done so with the intention of obtaining something by the use of threats; and (iv) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse . . .

¹⁴⁵ Lord Scarman took this concept from *Thorne v. Motor Trade Assn.*, [1937] A.C. 797 (H.L.), where the House of Lords suggested *in obiter* that a threat to engage in a lawful act could nevertheless constitute “a demand of money with menaces and without reasonable or probable cause” under the criminal extortion provisions of the U.K. *Larceny Act* if the threat involved blackmail. At 806-807 of *Thorne*, Lord Atkin stated:

. . . In *Ware & De Freville v. Motor Trade Association* and again in *Hardie & Lane v. Chilton Scrutton L.J.* appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. With great respect this seems to me to be plainly wrong; and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in *Rex v. Denyer*. *The ordinary blackmailer normally threatens to do what he has a perfect right to do – namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened.* Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. *What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause: and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a “menace” within the Act or in itself provides a reasonable or probable cause for the demand.* . . . [emphasis added]

See also 822-823, per Lord Wright.

¹⁴⁶ M.H. Ogilvie, “Economic Duress In Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 216, [emphasis added].

unlawfulness of a threat no doubt creates a *prima facie* basis for concluding it is illegitimate,¹⁴⁷ might there not exist circumstances in which a finding of illegitimacy is inappropriate, e.g., if the unlawfulness is trivial?¹⁴⁸ As in the area of lawful threats, a number of different tests have been devised to assess whether threats of unlawful action are legitimate. However, it would appear that none of these tests are satisfactory, and that no single approach can fully reconcile the various cases.¹⁴⁹ Instead, there continue to exist serious difficulties in assessing whether threats of unlawful conduct are legitimate.¹⁵⁰

Nowhere is this problem more acute than in the primary category of economic duress threats, breaches of contract. In Canadian jurisprudence, a breach of contract is usually regarded as an unlawful act.¹⁵¹ Thus, the Supreme Court of Canada has held that a threat to breach a contract may serve as the “unlawful means” for the tort of intimidation,¹⁵² which of course closely parallels the contractual doctrine of economic duress. It is true that this may not be so if the contract is with the plaintiff rather than a third party, but that is only because the plaintiff then “would have been entitled to pursue its contractual remedies had that contract been *illegally breached*”.¹⁵³

¹⁴⁷ A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 *Melb. U. L. Rev.* 410 at 441.

¹⁴⁸ S.A. Smith, “Contracting Under Pressure: A Theory of Duress” (1997) 56 *Cambridge L.J.* 343 at 351-352. See also A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 *Melb. U. L. Rev.* 410 at 428 (“If it is appropriate for present purposes to stigmatise pressure as illegitimate on grounds which go beyond the question of technical illegality, then equally it would appear permissible to excuse pressure which, while unlawful, is commercially justifiable”).

¹⁴⁹ N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 22. See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 332; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 72.

¹⁵⁰ A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 *Melb. U. L. Rev.* 410 at 428 and 441.

¹⁵¹ *Canadian Pacific Railway v. Zambri*, [1962] S.C.R. 609 at 615-616 and 624. Indeed, s. 422(1) of the *Criminal Code* provides that certain breaches of contract may even be criminal (e.g., those which endanger human life, cause serious bodily injury, or expose valuable real or personal property to destruction or serious injury).

¹⁵² *Central Canada Potash Co. v. Saskatchewan (Attorney General)*, [1979] 1 S.C.R. 42 at 87; *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177 at para. 79. The same is true for the tort of unlawful interference with economic relations where the contract is with a third party rather than the plaintiff (*A.I. Enterprises, ibid.* at paras. 59-61 and 80; *Gaur v. Datta*, 2015 ONCA 151 at para. 29; *Low v. Pfizer Canada Inc.* (2015), 393 D.L.R. (4th) 108 (C.A.) at para. 82, leave to appeal refused, [2016] S.C.C.A. No. 55), and unlawful means conspiracy (*Agribrands Purina Canada Inc. v. Kasamekas* (2011), 106 O.R. (3d) 427 (C.A.) at paras. 37 and 39).

¹⁵³ *Central Canada Potash Co. v. Saskatchewan (Attorney General)*, [1979] 1 S.C.R. 42 at 87, [emphasis added].

Despite this, threatened breaches of contract remain “[t]he most debated category of duress”.¹⁵⁴ Several cases have found that threatened contractual breaches were not illegitimate,¹⁵⁵ and some commentators point to *Pao On* itself as an illustration of this.¹⁵⁶ It would thus appear that threats to breach an existing contract are neither necessarily illegitimate or legitimate.¹⁵⁷ Rather, courts must consider all the circumstances surrounding each threatened breach.¹⁵⁸ While such an approach leaves judges with considerable flexibility, the ambiguous nature of this discretion is problematic. Thus, Bigwood states:

. . . [A] major challenge confronts the developing doctrine of economic duress: it must enunciate clearly the proper discriminations to be made in determining the propriety, or otherwise, of a proposal not to perform an existing contract which is made to support a demand to renegotiate that contract or to create a new one”.¹⁵⁹

In the final analysis, the fundamental defect of the *Universe Tankships* framework is that courts have failed to identify a principled rationale for the illegitimacy requirement.¹⁶⁰ This is apparent from Lord Diplock’s observation in *Universe Tankships* that “[t]he rationale [for economic duress] is that his apparent consent was induced by pressure exercised upon him by that other

¹⁵⁴ A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 72.

¹⁵⁵ H. Stewart, “Economic Duress in Canadian Law: Towards a Principled Approach” (2003) 82 Can. Bar Rev. 359 at 373, footnote 60; R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 333; D. O’Sullivan *et al*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 147-148; S. Scott, “Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases” (2010) 12 Otago L. Rev. 391 at 404; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 20-30.

¹⁵⁶ See M.P. Sindone, “The Doctrine of Economic Duress – Part 2”, 1996 ABR LEXIS 5 at *17. *cf.* R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 662, who notes that *Pao On* in fact suggests that threats to breach a contract *always* qualify as illegitimate pressure, since the reason why Lord Scarman found such threats did not amount to duress was not a lack of illegitimacy but the fact that they may not always produce a coercion of the will. A similar view is taken by A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 269.

¹⁵⁷ R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 661-664 and 667.

¹⁵⁸ M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *40-41 and *64-68.

¹⁵⁹ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 241-242.

¹⁶⁰ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 219-220 (“Why legitimacy should be the sole criterion or even a criterion, as Lord Goff suggests in *The Evia Luck*, is unclear, especially once it is extended beyond criminal and tortious conduct”).

party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind”.¹⁶¹ Nowhere in his discussion of the rationale for duress does Lord Diplock consider the reason for the *illegitimacy requirement itself*.

The speeches in *Barton* and *Universe Tankships* do little more than suggest that the illegitimacy criterion is designed to serve as a control mechanism which will prevent economic duress from swallowing up all forms of commercial pressure, thereby threatening the security of transactions. While this does suggest an important policy reason for the requirement, the problem with this approach is that it tells us very little about what illegitimacy actually means.¹⁶² Why, for instance, did the courts choose to define the control mechanism as “illegitimacy” specifically? On what basis did they extend the control mechanism beyond merely *unlawful* pressure, to all pressure that is illegitimate, particularly when “unlawful means” control mechanisms are frequently used in the law of torts?¹⁶³ What features of contract law justify defining the control mechanism in this way as opposed to some other?

These are critical questions, and the answers are necessary if *Universe Tankships* is to provide a workable framework for the doctrine of economic duress. Until we know what it is about illegitimacy that justifies its role as the control mechanism, and how this relates to the broader law of contract, it is impossible to formulate a principled approach for assessing why certain types of pressures are illegitimate.¹⁶⁴ We shall return to this issue below, after reviewing the final major Canadian duress framework, *Greater Fredericton*.

¹⁶¹ *Universe Tankships Inc. of Monrovia v. International Transport Workers’ Federation*, [1983] 1 A.C. 366 (H.L.) at 384.

¹⁶² See M.H. Ogilvie, “Economic Duress: An Elegant and Practical Solution”, [2011] 3 J.B.L. 229 at 238, noting that the Ontario Court of Appeal cases “adopt[ing] the *Universe Tankships* approach of assessing the illegitimacy of the threat and the availability of practical alternatives” have generally done so “without further consideration of what precisely either might mean”.

¹⁶³ See, e.g., *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177.

¹⁶⁴ See by analogy the Supreme Court’s comments in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177 at paras. 7 and 36, when determining the scope of the tort of unlawful interference with economic relations:

In order to sort out the scope of liability for causing loss by unlawful means, we must delve deeply into the rationale of the tort and its place in the larger scheme of tort liability for causing economic harm. . . .

. . . .
As Hazel Carty wisely said, “the scope of this tort can only be established by clarifying its rationale so that there is a principled definition of unlawful means”: *An Analysis of the Economic Torts* (2nd ed.), at p. 102. . . . [emphasis added]

3. The *Greater Fredericton* Framework

One obvious solution to the uncertainties created by the illegitimacy requirement is to abandon it entirely. This is the approach taken by the New Brunswick Court of Appeal in *Greater Fredericton*, at least as regards threats which procure the variation of existing contracts (as opposed to the execution of entirely new ones). Nevertheless, while the *Greater Fredericton* approach is endorsed by Ogilvie,¹⁶⁵ the majority of commentators take the view that the decision should be rejected.¹⁶⁶

As an initial matter, the Court's decision to abandon the illegitimacy requirement is in many respects a return to the overborne will framework, since it leaves judges with the single question of whether the promisor "consented" to the variation (albeit through a conception of consent that can extend to a lack of practical alternatives).¹⁶⁷ Many "doubt that this radically simplified test is sufficiently fine-grained to produce satisfactory answers in every case".¹⁶⁸ This is emphasized by Bigwood, who states that *Greater Fredericton* "will leave

¹⁶⁵ M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229. The *Greater Fredericton* decision is in many respects an affirmation of Ogilvie's earlier work, in which she has criticized the illegitimate pressure requirement and suggested that lawful pressure only becomes illegitimate where it "eliminates the victim's options to the extent of inducing compliance", such that "[t]he legitimacy, or lack thereof, of the pressure is not . . . the most important element in the test for economic duress; the pressure's impact on the victim is": M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's L.J. 809 at 821. See also: M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 314-316; M.H. Ogilvie, "Wrongfulness, Rights and Economic Duress" (1984) 16 Ottawa L. Rev. 1 at 31-34. Some support for the *Greater Fredericton* approach, albeit predating the decision, is also found in S.A. Smith, "Contracting under Pressure: A Theory of Duress" (1997) 56 Cambridge L.J. 343 at 371-373.

¹⁶⁶ This includes the British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 29. For an early critique of the approach later taken in *Greater Fredericton*, see A. Stewart, "Economic Duress – Legal Regulation of Commercial Pressure" (1984) 14 Melb. U. L. Rev. 410 at 423-424.

¹⁶⁷ It is noteworthy here that the two questions raised by the new "consent" test introduced in *Greater Fredericton* – i.e., whether the pressure caused the promisee to consent in fact, and whether it left the promisee with no practical alternative but to do so – were already contemplated within the first branch of the *Universe Tankships* test, as later cases applying *Universe Tankships* make clear: R. Bigwood, "Economic Duress By (Threatened) Breach of Contract" (2001) 117 L.Q.R. 376 at 378; R. Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick; *NAV Canada v. Greater Fredericton Airport Authority Inc.*" (2010) 49 Can. Bus. L.J. 256 at 275-276. Accordingly, *Greater Fredericton* achieves little beyond the elimination of the second branch of the *Universe Tankships* test, i.e., the illegitimacy requirement.

¹⁶⁸ C. Mitchell *et al.*, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 316, footnote 135.

Canada with an analytical framework for duress that is conceptually inferior to the prior, and relatively stable, Anglo-Commonwealth jurisprudence on the subject, which . . . had, at least until the *NAV Canada* decision, achieved general, if not universal, acceptance among Canadian intermediate courts and legal commentators”.¹⁶⁹ In Bigwood’s view, the Court’s decision to reject the illegitimate pressure criterion in favour of a “unifocal, victim-sided, consent-based conception of legal coercion” results in a framework that is incapable of treating duress on a normative basis, since it no longer considers “what each party’s respective background ‘rights’ (including their respective liberties, privileges and immunities) were in the circumstances of the encounter that produced the impugned transaction”.¹⁷⁰

Further, despite representing an attempt to simply the law of duress, the Court’s elimination of the illegitimacy requirement has the potential to introduce even greater uncertainties. This is pointed out by Enonchong, who gives several reasons why *Greater Fredericton* should be rejected:

- (1) The illegitimacy requirement serves an important function in limiting the scope of duress, since without it, any agreement entered into under significant pressure could become voidable, thereby undermining the security of transactions.¹⁷¹
- (2) Abandonment of the illegitimacy requirement for economic duress would mean that a different test applies to it than to duress of person and duress of goods, despite the rationale for the various forms of duress being the same.¹⁷²

¹⁶⁹ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 257.

¹⁷⁰ *Ibid.* at 269-270 (“Lord Scarman’s dual test for duress is superior to Robertson J.A.’s new analytical framework precisely because it responds to both the quality of the conduct of the promisee and the quality of its effect on the promisor’s contractual assent, acknowledging their respective roles in the reckoning”). See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 285-291. Bigwood goes on to note that the *Greater Fredericton* approach is also inconsistent with the principle of corrective justice, since it offers no account of why the promisee should be deprived of the benefits of the contract on the basis of having some form of responsibility for the promisor’s lack of genuine consent: R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 271-272.

¹⁷¹ N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 10. See also J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 400, who notes the following in commenting on *Greater Fredericton*:

. . . The illegitimacy test speaks to the need to find that the “coercer” has behaved in an exploitative manner. Indeed, if the test for economic duress is focussed exclusively on the promisor’s lack of practical alternatives, it may be virtually impossible to enter into a binding contractual arrangement with someone who is, for example, facing intense financial pressures – perhaps insolvency – that, although it has not been caused by the promisee, is a circumstance of which the promisee is aware. . . .

¹⁷² Enonchong, *ibid.*

- (3) Abandonment of the illegitimacy requirement for contractual modification cases only, as opposed to cases concerning the promisor's entry into a contract, would introduce an unnecessary complexity into the law of duress.¹⁷³

The *Greater Frederickton* test is also incapable of explaining the results in prior cases. If the test for duress is simply the lack of consent, then why have some courts — e.g., the Privy Council in *R. v. A.-G.*¹⁷⁴ — been prepared to find that there was compulsion of the will, but still no duress because the pressure in question was legitimate?¹⁷⁵

Finally, none of the reasons the Court gives for abandoning the illegitimacy requirement can withstand serious scrutiny. While the Court offers three main arguments to support its conclusion, each one is flawed.

First, the Court notes that the distinction between legitimate and illegitimate pressure is difficult to draw, particularly in cases where the threatened conduct is lawful:

No one questions that tortious or criminal conduct amounts to unlawful pressure and that unlawful pressure qualifies as illegitimate pressure. However, it is equally clear that pressure does not have to be characterized as “unlawful” in order to be found “illegitimate”. This leads one to ask when lawful pressure moves from the category of legitimate to illegitimate pressure? Regrettably, no one, judge or commentator alike, has been able to explain how one goes about answering that question. . .

. . .

. . . [T]he criterion of illegitimate pressure adds unnecessary complexity to the law of economic duress, and presently lacks a compelling juridical justification, at least with respect to its application in the context of the enforcement of contractual variations. The law does not provide a workable template for distinguishing between legitimate and illegitimate pressure. Admittedly, we know that tortious or criminal conduct qualifies as illegitimate pressure and I would be prepared to go so far as to say that a party who acts in “bad faith” in demanding a variation to a contract is exerting illegitimate pressure. However, without a template for distinguishing between legitimate and illegitimate pressure in other contexts, litigants and courts are forced

¹⁷³ *Ibid.* at 10-11. The same point is made by J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 399.

¹⁷⁴ For a discussion of this aspect of *R. v. A.-G.*, see P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Toronto: Canada Law Book, 2004+), Vol. II, ¶26:300.20, p. 26-39 to 26-40. Note also that in *Universe Tankships*, two of the Law Lords (Lords Scarman and Brandon) found in dissent that there was compulsion of the will on the facts of that case, but that it was legitimate, and the possibility of this was also expressly left open by Lord Diplock for the majority: see the text accompanying footnote 46 above.

¹⁷⁵ See also P. Koh, “Economic Duress and a Drop of Fairness: A Singapore Perspective” [2003]J.B.L. 572 at 575 (“It must be correct that there cannot be duress unless the victim was coerced *and* coerced by wrongful or illegitimate pressure. The fact of coercion by itself does not make the pressure applied illegitimate”).

to find that some other aspect of the demand for the variation is unacceptable conduct that justifies a finding of illegitimate pressure . . .¹⁷⁶

This “uncertainty” rationale is unconvincing. Even if the illegitimacy requirement is incapable of reduction to a precise test given its complexity, courts may still perform a useful function by clarifying and describing its operation.¹⁷⁷ Indeed, “judges are paid precisely to perform such difficult evaluative analytical tasks, and . . . they cannot absolve themselves of such a responsibility by the simple device of surgically excising whatever doctrinal criteria happen to tax them”.¹⁷⁸ As Bigwood explains:

If vagueness were a sufficient reason for repudiating legal concepts and criteria, large portions of current law would be eviscerated. Vagueness, to some extent, is unavoidable in relation to legal rules, principles, criteria, etc that are required to operate in the face of normative complexity, epistemological uncertainty, and circumstantial variability. The law, accordingly, is replete with vague but manageable concepts. Indeterminacy usually just calls for care in application rather than rejection.

. . . Granted, concepts like economic duress and illegitimate pressure lack sharp boundaries, and this is brought home especially in those controversial or borderline cases that tend to be litigated, but the absence of bright-line borders in this area of the private law should be of little or no concern when the relevant determinations are themselves capable of being rendered within a framework of understanding and analysis that is *conceptually* tractable, which, it is submitted, the two-pronged, normative-baseline approach to contractual duress is. . .¹⁷⁹

These comments are particularly germane in the wake of *Bhasin*. It is difficult to understand why the illegitimacy requirement should be too uncertain to form a workable component of the duress doctrine when the Supreme Court of Canada has made all contract law subject to a general organizing principle of good faith that is potentially much broader and ambiguous in its effect.

Second, the *Greater Fredericton* Court asserts that a threatened breach of contract is not itself an “unlawful” act, so virtually no variation cases can meet

¹⁷⁶ *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at paras. 43 and 47.

¹⁷⁷ A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) N.Z.U.L.R. 642 at 669-670.

¹⁷⁸ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 274.

¹⁷⁹ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 79. See also J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 400 (stating in relation to this aspect of *Greater Fredericton* that “even if one takes the view that this line-drawing exercise is a matter of some subtlety, it is surely not palpably more so than many similar such exercises engaged in routinely by members of the judiciary”).

the illegitimacy threshold since breaches of contract are almost always the threat at issue in them:

. . . If we apply Lord Scarman’s approach [in *Universe Tankships*] it should follow that most contractual variations will be classified as having been procured through the exercise of legitimate commercial pressure. Let me explain. According to Lord Scarman, two matters must be considered when determining what pressure is illegitimate: (1) the nature of the pressure; and (2) the nature of the demand. In cases involving the variation of an existing contract, inevitably the nature of the pressure is the threatened breach of the contract: the “coercer” threatens to withhold performance under the contract until such time as the “victim” capitulates to the coercer’s demands. Of course, *a threatened breach of contract is not only lawful but in fact constitutes a right which can be exercised subject to the obligation to pay damages and possibly to an order for specific performance* . . . This takes us to the second prong of Lord Scarman’s framework: the nature of the demand. Once again, the typical variation case is one in which the coercer demands a variation to the contract. Invariably, the coercer demands that the victim pay or do more than is required under the existing contract. But once again there is nothing to support the argument that the nature of this typical demand should be classified as illegitimate. In brief, the application of the two-fold test articulated by Lord Scarman, when applied to cases involving a contractual modification, should lead to the conclusion that the pressure typically exerted falls within the “legitimate” category. In other words, courts would be forced to begin their analysis on the premise that the pressure exerted falls within the category of “legitimate commercial pressure”.¹⁸⁰

However, it is quite problematic for the Court to conclude that a breach of contract is never unlawful.¹⁸¹ Threats to breach a contract are routinely included within the category of unlawful act duress,¹⁸² and have been found to

¹⁸⁰ *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at para. 46 [emphasis added].

¹⁸¹ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 272-273; R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 Victoria U. Wellington L. Rev. 83 at 88, footnote 26; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 12.

¹⁸² G.H.L. Fridman, “Duress in the Canadian and English Law of Restitution: A Comparison” (1987) 11 Dalhousie L.J. 47 at 51-52; M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *64-64; R. Bigwood, “Economic Duress By (Threatened) Breach of Contract” (2001) 117 L.Q.R. 376 at 379-381; D. Tan, “Grounds of Economic Duress – Further Clarification or Further Confusion?” (2001) Sing. J. Legal Stud. 268 at 270; D. Tan, “Constructing a Doctrine of Economic Duress” (2002) 18 Const. L.J. 87 at 90, 93 and footnote 31; P. Koh, “Economic Duress and a Drop of Fairness: A Singapore Perspective” [2003] J.B.L. 572 at 577; G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 192; N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) Sing. J. Legal Stud.

constitute illegitimate pressure by other appellate courts.¹⁸³ Further, as discussed earlier in this paper,¹⁸⁴ there is well-established jurisprudence from the Supreme Court of Canada which treats breaches of contract as sufficiently “unlawful” to ground the economic torts. While a contractual breach that is threatened against the counterparty itself rather than a third party may not substantiate the tort of intimidation, that is only because the counterparty has an adequate remedy for breach of contract, not because the breach itself would not be unlawful. Moreover, it is possible for economic duress to arise from a threat which the promisee makes in relation to a third party.¹⁸⁵ In such a case, the *Greater Fredericton* approach would create the anomalous result that in cases where a promisee threatens to breach a contract with a third party, the promisor would have an action in tort for intimidation based on the unlawful threat, but not an action for rescission under unlawful act duress.

It is also not the case that the only types of pressure likely to be exercised in contractual variation cases are threats of breach of contract.¹⁸⁶ Other types of pressure may also be employed, which clearly involve threats of the unlawful irrespective of whether threatened breaches of contract are lawful or not. For instance, a promisee may threaten to commence legal proceedings for the purpose of exploiting the promisor by delaying the implementation of their

400 at 400, 404 and 408; R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 *Victoria U. Wellington L. Rev.* 83 at 89-91; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 277; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 20; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 71. Cf. J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 394 (suggesting that “a threat to breach a contract is normally a lawful act”).

¹⁸³ See, e.g., *B & S Contracts & Design Ltd. v. Victor Green Publications Ltd.*, [1984] I.C.R. 419 (Eng. C.A.) at 425, per Griffiths L.J. (“[A] threatened breach of contract may impose such economic pressure that the law will recognise that a payment made as a result of the threatened breach is recoverable on the grounds of duress”) and 428, per Kerr L.J. (“[A] threat to break a contract unless money is paid by the other party can, but by no means always will, constitute duress.”). See also: *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419; and *McIntyre v. Nemesis DBK Ltd.*, [2010] 1 N.Z.L.R. 463 (C.A.) at para. 31.

¹⁸⁴ See the text accompanying footnotes 150-152, *infra*.

¹⁸⁵ *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 (B.C. C.A.) at 649-650. For examples of cases where agreements were declared void based on threats against a third party, see *Williams v. Bayley* (1866), L.R. 1 H.L. 200 (H.L.); *Burris v. Rhind*, (1899) 29 S.C.R. 498. See also H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 779.

¹⁸⁶ N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 12.

commercial plans. That would amount to a threat to commit the tort of abuse of process.¹⁸⁷

Finally, assuming *arguendo* that the *Greater Fredericton* Court is correct, and that the only threats in contractual variation cases are lawful breaches of contract, it still does not follow that the illegitimacy criterion will be impossible to establish. As noted above, there are appellate cases in which courts have held that threats to breach contracts amount to illegitimate pressure, and some breaches of contract may clearly be so egregious that threats of them can be labelled illegitimate whether they are lawful or not. Indeed, the Court in *Greater Fredericton* itself accepts that “a party who acts in ‘bad faith’ in demanding a variation to a contract is exerting illegitimate pressure”.¹⁸⁸ In some cases, a threatened breach of contract may also itself amount to a wrongful act via the doctrine of anticipatory breach. Against this backdrop, the Court’s suggestion that threatened breaches of contract cannot give rise to illegitimate pressure under the *Universe Tankships* framework is difficult to understand.

Third, the *Greater Fredericton* Court concludes that the introduction of the illegitimate pressure requirement into English law was based upon Lord Scarman’s “novel” view in *Universe Tankships* that duress can also be a tort:

I cannot help but wonder why Lord Scarman chose to introduce the concept of illegitimate pressure into the analytical framework. One possible explanation lies in a forgotten passage of his Lordship’s reasons in *Universe Tankships* . . . [t]hat . . . recognizes economic duress to be an independent tort, a novel proposition under Canadian law . . . Moreover, Lord Scarman does not qualify this statement by holding that such pressure is limited to tortious or criminal conduct. I cannot help but wonder whether Lord Scarman was of the view that “illegitimate pressure” is a condition precedent to the actionable tort of economic duress. If that were his intention, then perhaps the concept of illegitimate pressure should be directed at or reserved for those cases where the exercise of economic duress results in the formation of a contract rather than its modification. . . Be that as it may . . . illegitimate pressure is not a condition precedent to a finding of economic duress where the remedy being sought is declaratory or restitutionary in nature. . .¹⁸⁹

Yet as Bigwood notes, it is unclear why the Court was so puzzled over Lord Scarman’s articulation of the illegitimate pressure requirement in *Universe Tankships*. The criterion was already established in *Barton*, and “as a matter of intellectual history, the process of reception of the illegitimacy criterion into

¹⁸⁷ *Harris v. GlaxoSmithKline Inc.* (2010), 106 O.R. (3d) 661 (C.A.) at paras. 27-28, leave to appeal refused [2011] S.C.C.A. No. 85. See also N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) *Sing. J. Legal Stud.* 400 at 409.

¹⁸⁸ *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at para. 47.

¹⁸⁹ *Ibid.* at para. 49. Similar questions about why the illegitimate pressure requirement was adopted in *Universe Tankships* are raised by M.H. Ogilvie, “Economic Duress In Contract: Departure, Detour or Dead-End?” (2000) 34 *Can. Bus. L.J.* 194 at 224.

English and Commonwealth law has been well traced”.¹⁹⁰ Indeed, the requirement for some “wrongfulness” in the threat may be traced as far back as the 13th century according to Bracton,¹⁹¹ and is a fundamental feature of the duress framework in all major Commonwealth legal systems.¹⁹²

Additionally, the Court’s suggestion that it is “novel” to treat economic duress as a tort completely ignores the existence of the tort of intimidation. While the facts underlying a finding of economic duress will not necessarily engage the intimidation tort in all cases — partly because economic duress can be premised upon illegitimate pressure, not merely threats of unlawful acts like intimidation — the two theories of liability will frequently overlap.¹⁹³ This was confirmed by the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, where it noted that “[d]uress first found recognition as a limited ground for the recovery of damages against an intimidating party in tort”.¹⁹⁴ Accordingly, even if the Court in *Greater Fredericton* were correct in asserting that the reason for the illegitimacy requirement in *Universe Tankships* was Lord Scarman’s recognition of economic duress as a tort — which it was not — that would still not justify the rejection of the requirement in Canada.

IV. ECONOMIC DURESS AND THE ORGANIZING PRINCIPLE OF GOOD FAITH

1. Economic Duress after *Bhasin*: A New Framework?

It is clear from this review that the law of economic duress is in a state of confusion. While there appears to be broad agreement — at least among commentators — that the overborne will theory was properly rejected in *Universe Tankships*, courts have failed to provide a compelling rationale for the illegitimacy/lack of practical alternatives framework that replaced it. This has led to further confusion in cases such as *Greater Fredericton*, which reject the illegitimacy branch of Lord Scarman’s framework for no principled basis other than an understandable aversion to the uncertainty it creates. If economic duress is to survive and play a meaningful role in modern contract jurisprudence, it is essential that a firmer foundation for the doctrine be found.

¹⁹⁰ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 271.

¹⁹¹ M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 290-291 and 314.

¹⁹² R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 292.

¹⁹³ See, e.g., M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *77-80. See also footnote 15 above.

¹⁹⁴ [2007] 1 S.C.R. 3 at para. 54.

In our view, the organizing principle of good faith supplies this foundation. The brilliance of the approach taken in *Bhasin* is that the organizing principle does not require the creation of any “new” duty of good faith. It is not an invitation to erect a freestanding obligation, separate and apart from the existing precepts of contract law, which will interject new uncertainties into commercial relationships. Instead, the organizing principle simply collects a series of existing contract law doctrines together under the banner of a common rationalizing force. The important feature of these doctrines is their grounding in shared values of honesty, reasonableness and mindfulness. But the alterity of the doctrines remains.

From this perspective, it is possible to view duress as one aspect of a broader judicial concern with good faith in contractual formation. Several other contractual formation doctrines can be identified as examples of this, e.g., unconscionability, undue influence, fraudulent misrepresentation, knowing incapacity and unilateral mistake. Grouping these doctrines together under the organizing principle does not imply recognizing a novel “duty to negotiate” in good faith. It is simply a logical application of the Court’s statement in *Bhasin* that “[c]onsiderations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability”, which are “based on considerations of . . . preventing one contracting party from taking undue advantage of the other”.¹⁹⁵

The starting point is that each of these contractual formation doctrines requires an element of wrongdoing by the promisee. It is not sufficient for the promisor merely to show that its bargaining capacity was impaired. Instead, the law requires *something further* to make the bargain with the promisee voidable. This is noted by Bigwood, who states that “[o]rdinarily, under the various exculpatory doctrines of contract law, there is insufficient reason for disappointing the contractual expectations of a promisee unless that promisee ought to bear some responsibility for the promisor’s inability to bring a genuine consent to the transaction”.¹⁹⁶ The comments of the Supreme Court of Canada in *Lister* are germane here:

Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration

¹⁹⁵ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 43.

¹⁹⁶ R. Bigwood, “Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49 Can. Bus. L.J. 256 at 272-273. The same point is made by J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 397, footnote 77.

passing between the parties, *and where there is no evidence of oppression or operative misrepresentation*, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. . . .¹⁹⁷

Thus, unconscionability is frequently said to require not merely an inequality of bargaining power on the part of the promisor, but some proof that there was an “unconscientious or extortionate abuse” of this power by the promisee, i.e., by knowingly taking unfair advantage of the promisor, resulting in “moral culpability or impropriety”.¹⁹⁸ Similarly, undue influence — which was

¹⁹⁷ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 at 745, [emphasis added]. Similar comments were made in *Pao On v. Lau Yiu Long* [1980] A.C. 614 (Hong Kong P.C.) at 634: See also *Hart v. O'Connor*, [1985] A.C. 1000 (New Zealand P.C.) at 1018 and 1024:

. . . Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing. . . .

. . . .
[V]ictimisation . . . can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

Their Lordships have not been referred to any authority that a court of equity would restrain a suit at law where there was no victimisation, no taking advantage of another’s weakness, and the sole allegation was contractual imbalance with no undertones of constructive fraud. . . .

This is also reflected in the principle stated by Lord Scott in *Royal Bank of Scotland plc v. Etridge*, [2002] 2 A.C. 773 (H.L.) at para. 144 (“Deficiencies in the quality of consent to a contract by a contracting party, brought about by undue influence or misrepresentation by a third party, do not, in general, allow the victim to avoid the contract. But if the other contracting party had had actual knowledge of the undue influence or misrepresentation the victim would not, in my opinion, be held to the contract”).

¹⁹⁸ *Hart v. O'Connor*, [1985] A.C. 1000 at 1027-1028; *Dyck v. Manitoba Snowmobile Assn. Inc.*, [1985] 1 S.C.R. 589 at 593; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 247, 256, 261, 307 and 311; *Boustany v. Piggott* (1993), 69 P. & C.R. 298 (Eastern Caribbean); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 406 and 412; *Blackburn v. Eager* (2002), 203 N.S.R. (2d) 77 (C.A.) at para. 39; *Cain v. Clarica Life Insurance Co.* (2006), 263 D.L.R. (4th) 368 (Alta. C.A.) at paras. 31-33 and 72-73; *Titus v. William F. Cooke Enterprises Inc.* (2007), 284 D.L.R. (4th) 734 (Ont. C.A.) at paras. 37-39 and 51-52; *Birch v. Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.) at paras. 42-45, leave to appeal refused [2009] S.C.C.A. No. 29; *Lydian Properties Inc. v. Chambers*, [2009] 3 W.W.R. 426 (Alta. C.A.) at paras. 14-15 and 19. There are other cases which suggest that unconscionability may arise even absent a knowing abuse or other wrongdoing by the promisee, and only requires a substantially unfair bargained coupled with an inequality of bargaining power: see, e.g., *Woods v. Hubley* (1995), 130 D.L.R. (4th) 119 (N.S. C.A.) at 128-129, leave to appeal refused, [1996] S.C.C.A. No. 11; *Burkardt v. Gawdun*, [2005] 2 W.W.R. 31 (Sask. C.A.) at para. 9. However, as the British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) noted at 31 in rejecting these latter cases, “it would strain the idea of contractual unfairness if it were expanded to cover cases in which a stronger party is not aware that it is exploiting a weaker party’s disadvantage”.

developed to prevent “vicimiz[ation]” — arises where a transaction was procured by the promisee’s abuse of influence, whether through improper overt acts such as pressure or coercion, or taking unfair advantage of a position of influence it acquired over the promisor (which may be rebuttably presumed where the promisor’s ability to dominate the promisee’s will is inherent in the nature of their relationship).¹⁹⁹ Another manifestation of this is found in the rule that prohibits the rescission of an executed contract for the sale of land induced by a misrepresentation absent error *in substantialibus* except where the misrepresentation involved fraud.²⁰⁰ Likewise, a unilateral mistake by the promisor will not enable it to obtain rescission unless the promisee’s reliance on the mistake would amount to “fraud or the equivalent of fraud” (e.g., because the promisee knew or ought to have known of the mistake and failed to draw it to the promisor’s attention).²⁰¹ Contracts with various categories of incapacitated persons, such as drunkards and the insane, may not be avoided absent “equitable fraud”, e.g., where the promisee knew of the promisor’s incapacity at the time of bargaining and hence did not contract in “good faith”.²⁰² And a promisee who offers to compromise or forbear from pursuing a clearly invalid claim will only be said to have provided inadequate consideration to the promisor if they lacked a good faith and reasonable belief in the claim’s validity.²⁰³

It is difficult to deny the strong affinity that exists between these doctrines and economic duress. Pursuant to Lord Scarman’s two-part test in *Universe Tankships*, pressure leading to a compulsion of the will is insufficient on its own to entitle a promisor to relief. In addition, the promisor must establish that the pressure is *illegitimate*.²⁰⁴ As Bigwood notes, “[e]ach test is necessary, but neither is on its own sufficient, to establish duress”.²⁰⁵ Therefore, as with the other doctrines outlined above, courts generally require an element of

¹⁹⁹ *National Westminster Bank plc v. Morgan*, [1985] 1 A.C. 686 (H.L.) at 704-707; *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 at 368-369, 375-379 and 392-394; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 406 and 412; *Royal Bank of Scotland plc v. Etridge*, [2002] 2 A.C. 773 (H.L.) at paras. 6-9, 14, 17-18, 32, 93, 103-104 and 107.

²⁰⁰ *Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360 at paras. 45-46.

²⁰¹ *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 at paras. 31, 38-39 and 50-53; *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 77 O.R. (3d) 269 (C.A.) at paras. 30-32, leave to appeal refused 2006 CarswellOnt 2544 (S.C.C.); *McNeill v. Vandenberg*, 2010 BCCA 583 at para. 14.

²⁰² *Bawlf Grain Co. v. Ross* (1917), 55 S.C.R. 232 at 234-235, 237 and 262; *Wilson v. R.*, [1938] S.C.R. 317 at 321-322 and 338; *Hart v. O’Connor*, [1985] A.C. 1000 (New Zealand P.C.) at 1018-1027.

²⁰³ *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 at 742-743.

²⁰⁴ R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 Victoria U. Wellington L. Rev. 83 at 87.

²⁰⁵ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46

wrongdoing by the promisee before the impairment of the promisor's bargaining capacity will entitle it to relief under economic duress. In effect, the courts apply not only "a plaintiff-focused consideration (did the defendant's illegitimate pressure bring 'about an absence of practical choice' for the plaintiff)", but also "a defendant-focused consideration (the defendant's pressure must be 'regarded in law as illegitimate')".²⁰⁶

Perhaps because of this, many authors have noted the "significant 'linkages' between the doctrines of economic duress on the one hand, and other contractual formation doctrines like undue influence and unconscionability on the other".²⁰⁷ Several perceive a common theme of "victimization" or

U. Toronto L.J. 201 at 209. See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 293.

²⁰⁶ S. Scott, "Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases" (2010) 12 Otago L. Rev. 391 at 394. See also: R. Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 L.Q.R. 649 at 660; R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U.Q. Law J. 41 at 51-52; R. Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*" (2010) 49 Can. Bus. L.J. 256 at 262-263. However, Bigwood notes that it would be a mistake to assume the illegitimate pressure criterion is focused solely on the promisee, since it also involves an examination of the promisor's relative rights, expectations, bargaining power, etc.: R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 U. Toronto L.J. 201 at 269-270.

²⁰⁷ P. Koh, "Economic Duress and a Drop of Fairness: A Singapore Perspective" [2003] J.B.L. 572 at 582. For an excellent review of the legal developments and academic arguments in this area, see R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 362-371. At 371, Bigwood concludes that "all cases of actual undue influence (at least by way of pressure) are cases of duress as well, namely, lawful act duress" and "[a]ll lawful act duress cases are also (extreme) cases of unconscionable dealing". See also: M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 318-319; M.H. Ogilvie, "Wrongfulness, Rights and Economic Duress" (1984) 16 Ottawa L. Rev. 1 at 30; J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 231; R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 U. Toronto L.J. 201 at 217; M.D.J. Conaglen, "Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 N.Z.L.U.R. 509; M.H. Ogilvie, "Economic Duress In Contract: Departure, Detour or Dead-End?" (2000) 34 Can. Bus. L.J. 194 at 226-229; R. McKeand, "Economic Duress – Wearing the Clothes of Unconscionable Conduct?", 2001 JCL LEXIS 6 at *28-*32; R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U.Q. Law J. 41 at 78 and 83; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 1; A. Kantic, "How a Clarification of Duress Renders the 'Equitable' Doctrine of Actual Undue Influence Futile" (2015) N.Z.U.L.R. 642 at 653-654; H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 749-750 and 755-756.

“exploitation” running throughout them,²⁰⁸ and view duress as an example of a broader tendency to grant relief against unconscionable or unfair bargains.²⁰⁹ Some authors have even proposed abandoning the distinctions between economic duress and actual undue influence entirely,²¹⁰ or replacing duress with a general unconscionability test.²¹¹

For their part, the courts have also emphasized the relationship between duress and other wrong-based contractual formation doctrines (e.g., undue influence,²¹² unconscionability²¹³ and fraudulent misrepresentation²¹⁴). Indeed, one of the reasons the Supreme Court of Canada gave in *Martel* for refusing to

²⁰⁸ M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 532 and 545; R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 Victoria U. Wellington L. Rev. 83 at 85; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 1. See also *Westpac Banking Corporation v. Cockerill* (1998), 152 A.L.R. 267 (F.C.A.F.C.) at 290, per Kiefel J. For an extensive review of this concept, see R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003). For a contrary view, see A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) N.Z.U.L.R. 642 at 652-658. Cf. R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 2-3, who suggests that victimization is a more expansive concept than exploitation.

²⁰⁹ See, e.g., M. Littlewood, “Freedom from Contract: Economic Duress and Unconscionability” (1985) 5 Auckland U.L. Rev. 164 at 174-175. For a contrary view, see M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 312.

²¹⁰ P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 174 and 184-185; M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: The Law Book Company Limited, 1985) at 61; R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 202-203, footnote 8; M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 525; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 255; A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) N.Z.U.L.R. 642.

²¹¹ S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 376. A similar proposal was made by the Court in *Australia & New Zealand Banking Group v. Karam* (2005), 64 N.S.W.L.R. 149 (C.A.). For a criticism of this decision, see R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41.

²¹² *Universe Tankships Inc. of Monrovia v. International Transport Workers’ Federation*, [1983] 1 A.C. 366 (H.L.) at 384, per Lord Diplock; *Stott v. Merit Investment Corp.* (1988), 48 D.L.R. (4th) 288 (Ont. C.A.) at 305, leave to appeal refused, [1988] S.C.C.A. No. 185.

²¹³ *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 247, per La Forest J.

²¹⁴ *Barton v. Armstrong* (1973), [1976] A.C. 104 (New South Wales P.C.) at 118, per Lord Cross.

recognize a duty of care in contractual negotiations was that “the doctrines of undue influence, economic duress and unconscionability [already] provide redress against bargains obtained as a result of improper negotiation”.²¹⁵ Thus, as Kiefel J. stated in *Westpac Banking Corporation v. Cockerill*:

It has been observed that the boundaries between common law duress, undue influence recognised in equity, and unconscionable pressure or “equitable duress”, are becoming blurred . . . that the importance of common law duress and undue influence as distinct categories recognised in equity is diminishing . . . and that the two jurisdictions may be said to be concerned, essentially, with exploitation or victimisation. . . Nevertheless the distinction remains . . .²¹⁶

There have been many attempts to consolidate these wrong-based contractual formation doctrines under the aegis of a single principle.²¹⁷ The most famous example is *Lloyd’s Bank v. Bundy*, where Lord Denning M.R. (speaking with respect to, *inter alia*, duress, unconscionability and undue influence) stated in his concurring but minority judgment:

. . . There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. *Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them.* I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court.

. . .

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on “inequality of bargaining power.” By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly

²¹⁵ *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 at para. 70.

²¹⁶ (1998), 152 A.L.R. 267 (F.C.A.) at 290.

²¹⁷ A notable proponent of this approach is S.M. Waddams, who makes the following observation in *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 323:

Several generations of common lawyers were educated in the belief that the common law of contracts admits no relief from contractual obligations on grounds of unfairness, or inequality of exchange. The rule might seem hard, it is said, in an individual case, but it is justified by the need for certainty and commercial stability, for “the Chancery mends no man’s bargain”. It will be suggested, however, that the law of contracts, when examined for what the judges do, as well as for what they say, shows that relief from contractual obligations is in fact widely and frequently given on the ground of unfairness, and that general recognition of this ground of relief is an essential step in the development of the law.

*inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word “undue” I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being “dominated” or “overcome” by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. . . .*²¹⁸

Lord Denning’s attempt to “erect a general principle of relief against inequality of bargaining power” was not accepted in England.²¹⁹ It has received some approval in Canada,²²⁰ particularly through the decision of the British Columbia Court of Appeal in *Harry v. Kreuziger*, where Lambert J.A. referred to Lord Denning’s judgment and concluded:

. . . [Q]uestions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case and the *Bundy* case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.²²¹

The Supreme Court of Canada also made liberal reference to *Lloyds*, along with *Harry* itself, in its sexual battery decision of *Norberg v. Wynrib*.²²²

²¹⁸ [1975] Q.B. 326 (Eng. C.A.) at 336-337 and 339, [emphasis added].

²¹⁹ *National Westminster Bank plc v. Morgan*, [1985] 1 A.C. 686 (H.L.) at 707-708.

²²⁰ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 323.

²²¹ (1978), 95 D.L.R. (3d) 231 (B.C. C.A.) at 241, [emphasis added].

²²² [1992] 2 S.C.R. 226 at 248-250, 256, 282, 308-309 and 311. See also: *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 at 462, per Dickson C.J.C. (“[A]s Professor Waddams has argued, the doctrine of ‘fundamental breach’ may best be understood as but one manifestation of a general underlying principle which explains judicial intervention in a variety of contractual settings”); and *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 at 372, per Wilson J. (“[O]thers think that Lord Denning was on the right track when he suggested *in obiter* in *Bundy* that the courts should adopt the concept of inequality of bargaining power. With appropriate modification to the gifts context, power imbalances are a useful yardstick for equitable intervention”). Cf. *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 at 739, where the

Nevertheless, it is unclear whether the Supreme Court in *Norberg* actually intended to endorse the notion that a single principle is capable of uniting the various wrong-based contractual formation doctrines. Further, while *Lloyds* has been cited with approval in several cases, the courts in this country continue to differentiate between the doctrines of duress, unconscionability and undue influence. In the end, therefore, it does not appear that Canadian courts are ready to assimilate these doctrines under a single principle such as inequality of bargaining or community standards of commercial morality.²²³

There are also significant problems with *Lloyds* and *Harry* at the level of theory. Reducing multiple contractual formation doctrines to a single concept tends to elide the real differences these doctrines have.²²⁴ For instance, the focus on substantive unfairness in unconscionability is absent in actual undue influence and duress,²²⁵ and presumed undue influence is concerned more with abuse of trust than with pressure.²²⁶ Moreover, some have questioned whether broad equitable notions such as inequality of bargaining power are capable of contributing any certainty to this area of the law.²²⁷ Several commentators therefore recommend that duress be kept distinct from wrong-based contractual formation doctrines like undue influence and unconscionability,²²⁸ noting there is little to gain by shifting the courts' focus away from traditional duress laws.²²⁹

The Supreme Court of Canada's recognition of the organizing principle of good faith in *Bhasin* radically alters this debate. Because the organizing principle "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines" through which "the common law, in

- Court referred to the inequality of bargaining power principle from *Lloyd's*, but proceeded to make the comments quoted in the text accompanying footnote 197 above.
- ²²³ J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 449-450.
- ²²⁴ M.P. Sindone, "The Doctrine of Economic Duress – Part 1", 1996 ABR LEXIS 2 at *7-8; H. Stewart, "A Formal Approach to Contractual Duress" (1997) 47 U. Toronto L.J. 175 at 176-177; H. Stewart, "Economic Duress in Canadian Law: Towards a Principled Approach" (2003) 82 Can. Bar Rev. 359 at 367-369 and 379.
- ²²⁵ M.D.J. Conaglen, "Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 N.Z.L.U.R. 509 at 526-530 and 532. Cf. British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief: BCLI Report No. 60* (Vancouver: British Columbia Law Institute, 2011) at 31, which makes the curious statement that "[t]here has never been much doubt that . . . duress ha[s] a substantive component".
- ²²⁶ S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 382.
- ²²⁷ M.H. Ogilvie, "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L.J. 289 at 313.
- ²²⁸ N. Tamblin, "Contracting Under Lawful Act Duress" (2010) Sing. J. Legal Stud. 400 at 401.
- ²²⁹ R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 371; R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 U.Q. Law J. 41 at 77-78 and 83.

various situations and types of relationships, recognizes obligations of good faith contractual performance”,²³⁰ it is capable of accommodating several wrong-based contractual formation doctrines like duress, unconscionability and undue influence without sacrificing the individual features that make each one unique. Indeed, while clearly a broad notion, the *Bhasin* Court was acutely aware that the organizing principle could lead to uncertainty, and sought to minimize this risk by tying the principle to existing precedent:

This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

...

The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. . .

...

*Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.*²³¹

The organizing principle of good faith in *Bhasin* thus carries considerable potential as a tool for rationalizing wrong-based contractual formation doctrines like economic duress. While it is true that Anglo-Canadian courts have been reluctant to extend a duty of good faith to contractual negotiations,²³² the doctrines under consideration here are hardly novel, but reach back hundreds of years into both common law and equity jurisprudence. To call doctrines such as duress, unconscionability and undue influence manifestations of an overarching principle of good faith in contractual formation is not to create a new duty of good faith in commercial negotiations, but only to provide a better explanation for duties that already

²³⁰ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at paras. 33 and 64.

²³¹ *Ibid.* at paras. 66, 69 and 71, [emphasis added].

²³² *Bell v. Lever Brothers Ltd.*, [1932] A.C. 161 (H.L.); *Walford v. Miles*, [1992] 2 A.C. 128 (H.L.); *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860; *Oz Optics Ltd. v. Timbercon Inc.* (2011), 107 O.R. (3d) 509 (C.A.).

exist. It is, as the Supreme Court put it in *Bhasin*, to recognize “a standard that helps to understand and develop the law in a coherent and principled way”.²³³

We note that the position being advanced here is not an isolated one. Other commentators have also suggested that the concept of good faith extends to wrong-based contractual formation doctrines. As Swan and Adamski write:

. . . [I]nstances of what could be brought under the heading of “good faith” are often distributed across several other headings . . .

. . .

One large collection of such cases is often put in the category of promissory estoppel . . . Other cases give relief from misrepresentation. . . . In still other situations, the courts are prepared to move the creation of a recognizable and enforceable contract forward in time so that the duty to behave decently becomes a simple contractual one. Another large group of cases is often placed in the category of mistake. The special characteristic of these cases . . . is that one party made a mistake in its offer which the other knew was a mistake. . . .

. . .

What all these cases have in common is a concern that the conduct of negotiations (or, if there are no negotiations in any real sense, then the conduct of the offeror at the pre-contractual stage) is subject to rules and that the content of these rules reflects the expectations of the parties and the need to prevent unfair surprise. The importance of these cases to the argument for a wider acceptance of an obligation of good faith at the negotiation or pre-contract stage is that they illustrate that the courts are concerned about bad behaviour and will protect relations of all kinds at that (or those) stage(s).²³⁴

Thus, in an article published in 1999, that was particularly prescient in light of *Bhasin*, Conaglen observes that the doctrines of duress, undue influence and unconscionability demonstrate that “the law already possesses a concept of good faith”²³⁵ in the area of contractual formation:

²³³ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 63. See also *Gnys v. Narbutt*, 2016 ONSC 2594 (Div. Ct.) at paras. 60-97. *cf. Bank of Montreal v. Javed*, 2016 ONCA 49 at para. 12 (“*Bhasin* does not provide any basis for the appellants’ argument that the Supreme Court extended the common law test for unconscionability”).

²³⁴ A. Swan and J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2012) at 316-319. See also J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 225 (noting that “even if English law does not enforce a rule of fair dealing, it does take account of *unfair dealing*”).

²³⁵ M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 545.

. . . As Finn has explained, *the basic concept underpinning a duty of good faith is that when negotiating, and perhaps also when performing a contract, each of the parties must pay due regard to the legitimate interests of the other.* . . .

*If one is to give any real meaning to the concept of a duty of good faith it is necessary to know in the context of a particular case which of the interests of each party are to be considered “legitimate”, and what it means for the other party to pay proper regard to those interests. I suggest that the answers to these questions are already, in the main, to be found in the law in the form of doctrines such as duress, undue influence, and unconscionable bargains. These doctrines operate in slightly differing ways but they are all united by a general concern to ensure that the parties abide by the moral dictates of society as they deal with one another. Put another way, they are all examples of duties of good faith.*²³⁶

Conaglen rightly notes that the role being proposed for good faith here is different from Lord Denning’s theory in *Lloyd’s*, because it does not purport to unite the wrong-based contractual formation doctrines into a single concept, but merely recognizes that each of these doctrines, though distinct, reflects the existence of a larger principle of good faith in contractual formation:

There is, I think, a distinction to be drawn. I do not propose that all of the doctrines be melded into one conglomerate doctrine. That may yet occur in the future, but for now it is important to recognise that the nature of the imbalance in power relations differs in variant situations, and in response to those variances the law has developed doctrines with differing methodologies. If Lord Denning intended that his principle of inequality of bargaining power should replace the distinctions, then it is different from the concept of duties of good faith which I have advanced. In ignoring the doctrinal distinctions, *Lord Denning’s principle would operate as a development in the law, rather than as the recognition of an extant over-arching principle as I intend for the concept of good faith . . . The discussion here of the concept of duties of good faith is not intended to replace the distinctions among the doctrines of duress, undue influence, and unconscionable bargains with a single principle, but rather to recognise a general principle which encompasses and encapsulates the theoretical explanation of the inter-relationship among the individual doctrines as they currently exist.*²³⁷

However, if it is correct that duress and other wrong-based contractual formation doctrines may be viewed as manifestations of the organizing principle of good faith, the question arises, what does good faith in this context mean? And how does locating economic duress within the organizing principle assist in developing a framework for the doctrine?

The Supreme Court in *Bhasin* provides little concrete guidance about the content of the organizing principle, noting that it “is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”.²³⁸ However, the Court does suggest that the

²³⁶ *Ibid.* at 541, [emphasis added].

²³⁷ *Ibid.* at 542-543, [emphasis added].

organizing principle — like the doctrine of economic duress itself — is infused with the concept of “legitimacy”. On the one hand, the principle requires attention, though not subordination, to the counterparty’s legitimate interests. On the other, it does not preclude a party from pursuing their own self-interests, and even intentionally causing loss to the counterparty in the process, provided they do so legitimately:

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner . . . [I]t does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

. . .

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. *In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest: A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: Bank of America Canada v. Mutual Trust Co., 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or “palm tree? justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.”²³⁹*

The *Bhasin* Court also emphasized that legitimacy here is dependent on the context, and will mean different things in different situations:

. . . “[A]ppropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship . . .

. . .

. . . Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at §

²³⁸ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 63.

²³⁹ *Ibid.* at paras. 65 and 70, [emphasis added].

1.24; B. Dixon, “Common law obligations of good faith in Australian commercial contracts — a relational recipe” (2005), 33 A.B.L.R. 87.²⁴⁰

Based on these observations, we would draw three conclusions about the contributions which the organizing principle of good faith may make to the doctrine of economic duress.

First, because good faith is concerned with legitimacy, it assists in answering the question posed earlier in this paper of why “illegitimate pressure” is the second element of the test for duress. If economic duress is a manifestation of the organizing principle, then it should logically share the focus on legitimacy which lies at the organizing principle’s core. The selection of illegitimacy rather than unlawfulness or some other criterion as the limiting factor for duress in *Universe Tankships* is therefore not fortuitous, but a natural consequence of the organizing principle. Put simply, economic duress requires illegitimacy because good faith is itself a legitimacy-based concept.

Second, while *Bhasin* does not define illegitimacy with precision, it does place important limits around the outer boundaries of the concept. Viewing economic duress from the perspective of the organizing principle suggests that a promisee is likely to act illegitimately where it applies pressure to undermine the legitimate interests of the promisor in a dishonest, unreasonable, arbitrary or capricious manner. Conversely, a promisee is unlikely to act illegitimately where it applies pressure to reasonably and honestly pursue its economic self-interests, even if this means preferring those interests over the interests of the promisor and intentionally causing them loss in the process. Further, illegitimacy will usually be determined on the basis of the existing categories of illegitimate pressure already recognized in prior cases. It should only be extended to new situations where the existing categories are wanting, and where recognition of a new category of illegitimacy would constitute an incremental development that is consistent with the structure of the common law of contract — particularly the concerns exemplified by other wrong-based contractual formation doctrines, such as exploitation or victimization — and gives due weight to the importance of private ordering and certainty in commercial affairs (which are concerns that have preoccupied the law of economic duress since *Pao On*).²⁴¹

Third, what is required to establish illegitimacy is context-specific. This is an important feature of the law of duress, and suggests that courts should adopt a

²⁴⁰ *Ibid.* at paras. 65 and 69, [emphasis added]. See also *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357 at para. 313, per MacDonald J.A.:

We are dealing with large, sophisticated and well-informed corporations on the one hand, and lay people, including the proverbial “little old lady in the nursing home” on the other. The need for the former to act in good faith when discharging their contractual obligations to the latter has been highlighted with the recent Supreme Court of Canada decision in *Bhasin v Hrynew*, 2014 SCC 71 (CanLII), [2014] 3 SCR 494. . .

²⁴¹ See *CTN Cash & Carry Ltd. v. Gallaher Ltd.*, [1994] 4 All E.R. 714 (Eng. C.A.), a case discussed in detail below.

flexible approach to the illegitimacy requirement. A context-specific approach is supported by the many criteria, such as the *Pao On* factors, that courts and commentators have proposed to assess whether pressure is illegitimate or whether the promisor has been subject to practical compulsion of the will.²⁴² Moreover, such an approach is capable of resolving several of the problems that have arisen in this area of the law. One example is the *Greater Fredericton* distinction between pressure that leads the promisor to enter into a contract, and that which leads them to agree to the modification of an existing contract. Since good faith may demand more of a promisee who is already in a long-term contractual relationship with the promisor at the time the threat is made,²⁴³ the context suggests that courts should apply greater scrutiny to such a promisee than to a pre-contracting party in assessing whether the pressure they have applied is illegitimate.

In summary, the organizing principle of good faith appears to carry great promise as a standard for developing the law of economic duress. Nevertheless, we recognize that one of the most important tests of a theory is whether it is actually consistent with the case law. A framework for duress that is theoretically satisfying but does not align with the jurisprudence would be a poor candidate for rationalizing the doctrine, since it would have no explanatory force. In the discussion that follows, we therefore review the role that good faith has played in the law of duress to date. As will be seen, the organizing principle articulated in *Bhasin* is consistent with recent trends in the jurisprudence, and is central to resolving perhaps the most difficult question to arise under the *Universe Tankships* framework, i.e., how to distinguish legitimate from illegitimate pressure.

2. The Role of Good Faith in Economic Duress

As with many other areas of economic duress, there is considerable disagreement about the role that good faith does or should play in the doctrine. Several commentators perceive a clear place for good faith, particularly when it comes to assessing whether lawful pressure is illegitimate,²⁴⁴ with some also arguing that good faith is helpful in

²⁴² S. Scott, “Duress and the Variation of Contracts—Looking Beyond General Statements of Principle to the Results in Particular Cases” (2010) 12 Otago L. Rev. 391 at 398 (and 392-393) (“[T]he courts must evaluate the pressure against a range of considerations, including the specific context in which it was exerted”).

²⁴³ *Ibid.* at 405:

. . . Pressures that may properly be used against a stranger may become improper when the parties are in a more complex relationship. This is because the parties’ relationship may make the plaintiff dependent upon the defendant or particularly vulnerable to the defendant’s pressure. . . .

²⁴⁴ R.J. Sutton, “Duress by Threatened Breach of Contract” (1974) 20 McGill L.J. 554 at 575-576; G. England and N. Rafferty, “Contractual Variations: Considerations and

determining whether unlawful pressure is legitimate.²⁴⁵ Others take the view that good faith is largely irrelevant to duress,²⁴⁶ and assert that notions of good and bad faith are too vague to allow parties to predict whether duress will be made out in any given case.²⁴⁷ A potentially third approach suggests that a lack of good faith may be helpful to a finding of duress, but it is far from determinative, and should not be the predominant focus of the court's inquiry.²⁴⁸

A similar ambivalence pervades much of the case law. As H.G. Beale observes, "the role of good or bad faith in economic duress is uncertain. While one judge has expressed the view that good or bad faith is irrelevant, other judges have said that the good or bad faith of the party making the threat may be a relevant factor".²⁴⁹ At the present time, therefore, no clear consensus about the place of good faith in economic duress exists.

All the same, it is undeniable that considerations of good faith have influenced the courts. Indeed, there are several cases in which the promisee's reasons for applying pressure were weighed in the balance when determining whether they engaged in economic duress.²⁵⁰ Further, one of the main cases

Duress" (1980) 18 Osgoode Hall L.J. 627 at 637-638; R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 U. Toronto L.J. 201 at 218-221 and 237-238; G. McMeel, "Threatened Breach of Contract and Refusal to Supply as Grounds for Duress" (1996) 5 Nottingham L.J. 120 at 120 and 138-139; P. Koh, "Economic Duress and a Drop of Fairness: A Singapore Perspective" [2003] J.B.L. 572 at 577; G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 219-220; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 39-40 and 46-50.
²⁴⁵ N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 27-30.

²⁴⁶ M.H. Ogilvie, "Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal" (2004) 29 Queen's L.J. 809 at 820; N. Tamblyn, "Contracting Under Lawful Act Duress" (2010) Sing. J. Legal Stud. 400 at 407; N. Tamblyn, "Causation and Bad Faith in Economic Duress", 2011 JCL LEXIS 9 at *1-2 and *22-37; M.H. Ogilvie, "Economic Duress: An Elegant and Practical Solution", [2011] 3 J.B.L. 229 at 240.

²⁴⁷ N. Tamblyn, "Causation and Bad Faith in Economic Duress", 2011 JCL LEXIS 9 at *22 and 36-37.

²⁴⁸ D. O'Sullivan *et al.*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 146-147; A. Swan and J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2012) at 106 and footnote 315.

²⁴⁹ H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 771-772.

²⁵⁰ For an excellent review of the case law, see S. Scott, "Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases" (2010) 12 Otago L. Rev. 391 at 408-413. Scott concludes that "courts are influenced by the defendant's motives, in particular why they sought that benefit from the plaintiff", and suggests the existence of a descending scale of judicial acceptance of such motives, with cases where the promisee is responding to a genuine commercial dispute at the top, and those where the promisee seeks to exploit the

which commentators point to in arguing that good faith is irrelevant is *Occidental*, where Kerr J. rejected as “much too wide” the submission of Robert Goff, Q.C. (as he then was) that duress would be made out “when the party threatening to break the contract is putting forward some justification for doing so without any *bona fides*”.²⁵¹ Yet *Occidental* was decided prior to the extension of the illegitimate pressure requirement to economic duress in *Universe Tankships*, and made no reference to *Barton* or its recognition of illegitimacy as a component of duress. Accordingly, Kerr J.’s dismissive attitude towards the promisee’s lack of *bona fides* may be explained on the basis that, at the time of *Occidental*, there was no formal need to inquire into the moral quality of the pressure which the promisee employed.

With the subsequent endorsement of the illegitimacy requirement, the situation has changed. That is particularly so insofar as *Universe Tankships* includes threats of both lawful and unlawful acts within the illegitimacy requirement. This aspect of Lord Scarman’s judgment has been called the most “significant development” to date under the modern doctrine of duress.²⁵² It is clearly of special relevance to a good faith framework, for if the line between legitimate and illegitimate pressure is not to be drawn according to its lawfulness, then the organizing principle in *Bhasin* has the potential to fill a fundamental gap. This is not to suggest that the importance of *Bhasin* to the law of duress is limited to the illegitimacy requirement; to the contrary, there are cases which suggest that the promisee’s good or bad faith may also be relevant to the issue of causation.²⁵³ Nevertheless, the illegitimacy requirement is the most contentious issue in modern duress jurisprudence, and the feature of *Universe Tankships* that has been most heavily criticized in cases like *Greater Fredericton*. If the organizing principle of good faith can assist in understanding the scope of the illegitimacy requirement, it will have gone a long way towards proving its utility in developing a framework for economic duress.

In considering the relevance of good faith to the illegitimacy requirement, it is helpful to approach that matter from two perspectives. The first is where a threat concerns unlawful action, such that it is presumptively illegitimate. In such a case, the issue is whether the presence of good faith by the promisee is

promisor’s vulnerability to obtain a windfall at the bottom. See also: M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 ABR LEXIS 2 at *25-32; G. McMeel, “Threatened Breach of Contract and Refusal to Supply as Grounds for Duress” (1996) 5 Nottingham L.J. 120 at 132-137.

²⁵¹ *Occidental Worldwide Investment Corp. v. Skibbs A/S Avanti (The Siboen and the Sibotre)*, [1976] 1 Lloyd’s Rep. 293 (Eng. Q.B.D.) at 335.

²⁵² M. Cope, *Duress, Undue Influence and Unconscientious Bargains* (Sydney: The Law Book Company Limited, 1985) at 28.

²⁵³ *Huyton S.A. v. Peter Cremer GmbH & Co.*, [1999] C.L.C. 230 (Eng. Q.B.D.) at 248-249; *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at para. 62.

capable of excusing or justifying the threat and making it legitimate. The second is where a threat concerns lawful action, in which case it is presumptively legitimate. There, the issue is whether a lack of good faith by the promisee can make the pressure illegitimate. We review each of these issues in turn.²⁵⁴

(a) Unlawful pressure

It is clear that a threat to commit an unlawful act will almost invariably amount to illegitimate pressure. Lord Scarman recognized this in *Universe Tankships*, where he noted that “[t]he origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand”.²⁵⁵ The Privy Council was slightly more equivocal in *R. v. A.-G.*, stating that “[g]enerally speaking, the threat of any form of unlawful action will be regarded as illegitimate”.²⁵⁶ Nevertheless, exceptional cases aside, the presumptive rule must be that unlawful threats are illegitimate. This is intuitively correct, and fits well with the organizing principle in *Bhasin*. Simply put, a party who threatens to commit an unlawful act cannot be said to be pursuing their self-interest in a “reasonable” way, since unlawful conduct is by definition almost always unreasonable.

The same principle should apply where, even though the threat is not to commit an unlawful act, the *making* of the threat is itself unlawful,²⁵⁷ such as where a promisee engages in the criminal offence of blackmail/extortion under s. 346 of the *Criminal Code*. In such a case, the pressure is equally illegitimate — indeed, perhaps even more so — since the very act of applying the pressure involves the promisee in unlawful conduct.²⁵⁸ Some authors in fact prefer to view this as the real basis of the second category of illegitimacy set out by Lord Scarman in *Universe Tankships* given his reference there to the crime of blackmail.²⁵⁹

²⁵⁴ This bipartite division follows the general illegitimacy framework proposed by several authors: see, e.g., R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 301; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 16.

²⁵⁵ *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* [1983] 1 A.C. 366 (H.L.) at 401.

²⁵⁶ *R. v. A.-G. for England and Wales*, [2004] 1 L.R.C. 132 (New Zealand P.C.) at para. 16 [emphasis added].

²⁵⁷ G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 192; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 17-18 and 32-39.

²⁵⁸ D. O’Sullivan *et al.*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 151 (“Because a blackmailer’s demand is itself unlawful, blackmail always gives rise to illegitimate pressure”).

²⁵⁹ J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 165-166.

The difficulty lies in identifying the exceptional cases that, despite falling within one of these categories of unlawfulness, still manage to avoid the presumptive rule. As to that, a number of different tests exist in the literature. However, it has been observed that none are satisfactory, and that no single test fully reconciles the cases.²⁶⁰

Several commentators take the view that threats of unlawful action are intrinsically illegitimate, such that no further inquiry into the promisee's good faith is required.²⁶¹ For instance, Virgo criticizes the idea that good faith has a role to play in assessing the illegitimacy of unlawful act duress, noting that:

- (1) It would be difficult for the promisor to show the promisee's motive in making the threat.²⁶²
- (2) The test inverts the traditional law of contract, in which a defendant's bad faith has no effect (e.g., upon the assessment of damages), since the common law permits parties to act in their own self-interest provided the counterparty is compensated for any loss.²⁶³
- (3) A focus on the motives of the defendant is inconsistent with other grounds of restitution, which focus on the effect of the particular act upon the plaintiff.²⁶⁴

A similar position is taken by Bigwood, who argues that while bad faith motives can cause threats of lawful acts to become illegitimate (i.e., where the promisee either has no legal right to do what it is proposing, or is engaging in such exorbitant or exploitative behaviour that it may be viewed as an abuse of their legal right to do the act in question), they cannot work in the reverse direction, and cause threats of unlawful acts to become legitimate.²⁶⁵ In his

²⁶⁰ N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 22. See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 332; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 72.

²⁶¹ See, e.g., D. Tan, "Grounds of Economic Duress – Further Clarification or Further Confusion?" (2001) *Sing. J. Legal Stud.* 268 at 270-270-273 and 275; D. Tan, "Constructing a Doctrine of Economic Duress" (2002) 18 *Const. L.J.* 87 at 90-91. See also D. O'Sullivan *et al.*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 147-148.

²⁶² G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 204.

²⁶³ *Ibid.* at 205.

²⁶⁴ *Ibid.* at 205.

²⁶⁵ R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 *U. Toronto L.J.* 201 at 214-218 and 237; R. Bigwood, "Economic Duress By (Threatened) Breach of Contract" (2001) 117 *L.Q.R.* 376 at 379; R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 23-24, 281-283 and 365-371; R. Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 *U.Q. Law J.* 41 at 41; R. Bigwood, "Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?" (2011) 42 *Victoria U.*

view, a contrary position would be inconsistent with a “rights-based” approach to contract law, under which “[t]he law of duress seeks to vindicate the scheme of rights that is the context of the parties’ interaction rather than to alter it”.²⁶⁶ The first branch of Lord Scarman’s illegitimacy test therefore does not admit of any exceptions.²⁶⁷ When it comes to threats of unlawful acts, the presence of good faith on the part of the promisee is only relevant to the coercion branch of the inquiry, e.g., because it may temper the extent to which the promisor was influenced by the pressure.²⁶⁸

Some of these commentators would also extend this position to threatened breaches of contract. Under this account, unlawful act duress would not be limited to “all threats to commit a civil wrong” (such as torts and breaches of contract), as well as crimes and demands by public authorities made in breach of public duty.²⁶⁹ In addition, threatened contractual breaches would be regarded as *ipso facto* illegitimate, at least barring some orthodox principle of contract law that excuses them.²⁷⁰

However, despite the well-reasoned arguments developed by these authors, there are significant problems with their approach. Virgo’s belief that bad faith has no effect in the traditional law of contract is inconsistent with the many wrong-based contractual formation doctrines discussed above — e.g., fraudulent misrepresentation, unilateral mistake, unconscionability, undue

Wllington L. Rev. 83 at 90-91; R. Bigwood, “Fairness Awry? Reflections on the BCLI Report On Proposals for Unfair Contracts Relief” (2012) 52 Can. Bus. L.J. 197 at 206-208.

²⁶⁶ R. Bigwood, “Economic Duress By (Threatened) Breach of Contract” (2001) 117 L.Q.R. 376 at 379.

²⁶⁷ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 58. See also R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 302-304.

²⁶⁸ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 58.

²⁶⁹ G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 192; C. Mitchell *et al.*, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 298; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 71.

²⁷⁰ R. Bigwood, “Economic Duress by (Threatened) Breach of Contract” (2001) 117 L.Q.R. 376 at 379-381; D. Tan, “Grounds of Economic Duress – Further Clarification or Further Confusion?” (2001) Sing. J. Legal Stud. 268 at 270; D. Tan, “Constructing a Doctrine of Economic Duress” (2002) 18 Const. L.J. 87 at 90, 93 and footnote 31; R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 340-344; R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 Victoria U. Wllington L. Rev. 83 at 89-91. *Cf.* R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 242-243 and 251, where the author seems to take a different view.

influence and knowing incapacity — in which relief is denied absent some improper conduct on the part of the defendant. And his notion that it is too “difficult” to employ a concept of good faith has been exploded by *Bhasin*. As to Bigwood’s “rights-based” approach, this assumes that the doctrine of duress is designed to vindicate rights. But duress often arises in a pre-contractual context when parties have no existing rights to vindicate. And even at the later stages of contractual performance, *Bhasin* reveals that the law of contracts may operate to protect a party’s legitimate *interests*, not simply their rights. One may recall here the words of Cromwell J. in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, when explaining the Supreme Court of Canada’s preferred rationale for the unlawful means tort:

*The second potential objection to the liability stretching rationale is that it provides a cause of action even though no right of the plaintiff has been engaged by the defendant’s conduct: see Neyers, at p. 232. But the question is whether there ought to be a right of recovery. The affirmative answer rests on the notion that a modest expansion of the range of persons who can sue is justified where the breach of an existing duty to one party is intended to, and does, economically harm another.*²⁷¹

Further, the views expressed by parties like *Virgo* and *Bigwood* are far from unanimous.²⁷² Many commentators perceive a role for good faith in assessing whether threats of unlawful action are illegitimate, particularly where the threat is to breach an existing contract.²⁷³ As Conaglen notes:

²⁷¹ *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177 at para. 48, [emphasis added].

²⁷² P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 177; J. Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 166-167; C. Mitchell *et al.*, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 317; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 21. Some commentators also suggest that a focus upon unconscionability can assist in establishing when threats of unlawful acts are illegitimate: A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 *Melb. U. L. Rev.* 410 at 441. See as well S.M. Waddams, *The Law of Contracts*, 6th ed. (Aurora, Ont.: Canada Law Book, 2010) at 376, who proposes replacing the traditional duress test altogether with “the general test of unfairness or unconscionability, that is, whether the promise has taken undue advantage of inequality of bargaining power”.

²⁷³ R.J. Sutton, “Duress by Threatened Breach of Contract” (1974) 20 *McGill L.J.* 554 at 575; G. England and N. Rafferty, “Contractual Variations: Considerations and Duress” (1980) 18 *Osgoode Hall L.J.* 627 at 637-638; P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 183; M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 *ABR LEXIS* 2 at *40-41, *64-68 and *84; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 273-276; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 394-395. See also: G. McMeel, “Threatened Breach of Contract and Refusal to Supply as Grounds for Duress” (1996) 5 *Nottingham L.J.* 120 at 131 and 138 (arguing that even though a

. . . It is not a matter simply of determining the lawfulness or otherwise of a particular threat. The illegality of the proposal does provide a good indication that it would constitute illegitimate pressure if used in a coercive manner, but the link between illegality and illegitimacy is no more than a useful guide. The relationship between the two is not one of direct logic: not all illegal acts necessarily constitute illegitimate pressure; nor need all legal courses of conduct necessarily be considered legitimate.²⁷⁴

Thus, while H.G. Beale accepts that good faith may be too uncertain to serve as a complete touchstone for duress, he describes it as the primary factor in assessing whether threatened breaches of contract are illegitimate in the most difficult cases:

It is thus difficult to state with confidence *whether a threat of a breach of contract will ever be regarded as legitimate* and, if so, in what circumstances. *It is submitted that deliberate exploitation of the victim's position with a view to gaining some advantage, particularly one unrelated to the contract and to which the threatening party knows he is not entitled, is clearly illegitimate.* At the other end of the scale, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform. *The difficult case is that of the party who has a genuine belief that he is entitled to the amount demanded. It is submitted that, by analogy to the cases in which it has been held that there is consideration for a compromise of a claim which is in fact bound to fail if the party making the claim honestly and reasonably believed in its validity, a party who honestly and not unreasonably believes that he has a legal claim is not acting in bad faith by demanding what he thinks is due. A court should hesitate to find that the demand was illegitimate. It is also suggested that a demand made in good faith in the sense that the party demanding has a genuine belief in the moral strength of his claim — for example, because he has encountered serious and unexpected difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract — may in some circumstances also be treated as legitimate. . .*²⁷⁵

Burrows adopts a similar position, stating that of all the tests to be applied in assessing whether a threatened breach of contract is illegitimate:

. . . [T]he most appealing is that focusing on bad faith. A threatened breach of contract should be regarded as illegitimate if concerned to exploit the claimant's weakness rather

threat of a breach of contract will typically be illegitimate, it nonetheless requires a more searching examination of the nature of the underlying demand than threats to commit a crime or a tort); C. Mitchell *et al.*, eds., *Goff & Jones: The Law of Unjust Enrichment*, 8th ed. (London: Sweet & Maxwell, 2011) at 335-336 (suggesting that, while illegitimacy cannot be rebutted where the unlawful act involves a crime or a tort, it can in cases involved a threatened breach of contract).

²⁷⁴ M.D.J. Conaglen, “Duress, Undue Influence and Unconscionable Bargains – The Theoretical Mesh” (1999) 18 N.Z.L.U.R. 509 at 511-512.

²⁷⁵ H.G. Beale *et al.*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 773-774, [emphasis added].

than solving financial or other problems of the defendant. To this can be added two supplementary or clarificatory ideas . . . First, a threat should not be considered illegitimate (made in bad faith) if the threat is a reaction to circumstances that always constitute frustration. And, secondly, a threat should not be considered illegitimate (made in bad faith) if it merely corrects what was always clearly a bad bargain.²⁷⁶

Several cases also suggest that the promisee's mental state is relevant to whether a threatened unlawful act, such as a breach of contract, is illegitimate.²⁷⁷ Thus, in *Huyton S.A. v. Peter Cremer GmbH & Co.*, Mance J. (as he then was) stated:

That *good or bad faith may be particularly relevant* when considering whether a case might represent a rare example of 'lawful act duress' is not difficult to accept. *Even in cases where the pressure relied on is an actual or threatened breach of duty, it seems to me better not to exclude the possibility that the state of mind of the person applying such pressure may in some circumstances be significant*, whether or not the other innocent party correctly appreciated such state of mind. 'Never' in this context also seems too strong a word.²⁷⁸

An example is provided by *DSND Subsea Ltd. v PGS Offshore Technology AS*,²⁷⁹ where a contractor for the construction of an off-shore oil rig argued that its subcontractor caused it to agree to a variation of the subcontract under duress. The subcontractor had refused to begin work on the subcontracted component unless the contractor's insurance would cover certain problems with it, which led the parties to execute a supplementary agreement that varied the insurance and indemnity provisions in the main contract. In finding that the contractor could not set the supplementary agreement aside for duress, Dyson J. (as he then was) held *in obiter* that even if the subcontractor's threats to suspend work amounted to a breach of contract, they still did not constitute illegitimate pressure since they were made in good faith:

. . . *In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.*

²⁷⁶ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 275, [emphasis added]. Cf. A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 72.

²⁷⁷ *Kolmar Group AG v. Traxpo Enterprises Pvt Ltd.*, [2011] 1 All E.R. (Comm) 46 (Eng. Q.B.D.) at para. 92.

²⁷⁸ [1999] C.L.C. 230 (Eng. Q.B.D.) at 251, [emphasis added].

²⁷⁹ [2000] All E.R. (D) 1101 (Eng. Q.B.D. (T.C.C.)).

...

... DSND were in my view entirely justified in being reluctant to go offshore without at least a reliable assurance that, if there were a problem with the RTIAs, PGS' all risks policy would cover it ... [T]he consequences might well be disastrous for DSND, unless that contingency was adequately covered by insurance/indemnity arrangements. The Contract did not contain a provision which entitled DSND to suspend work. The Contract simply did not make provision for a situation such as occurred. *If it were necessary so to hold, I would say that the suspension of work on the RTIAs pending resolution of the insurance/indemnity question, even if it was a breach of contract, and even if it amounted to pressure, did not amount to illegitimate pressure. It was reasonable behaviour by a contractor acting bona fide in a very difficult situation.*²⁸⁰

The *DSND* criterion of bad faith has since been cited in several first instance decisions of English courts,²⁸¹ as well as by Australian appellate courts.²⁸²

Conversely, the courts have also relied upon the promisee's bad faith as confirmatory of the conclusion that unlawful acts give rise to illegitimate pressure. The recent decision of the Privy Council in *Borelli* is a case in point. As discussed above, *Borelli* involved a settlement agreement that the liquidators of an insolvent company reached with its former chairman, Ting, after he used forgery and false evidence to oppose a scheme of arrangement whose immediate approval was necessary for the liquidation, in breach of his duties under winding-up legislation. In finding the pressure exerted by Ting was illegitimate, the Board did not rest its decision solely upon the unlawful nature of Ting's conduct, but also on the fact that he had "no good reason" for opposing the scheme other than to escape further investigation for misappropriating the company's assets, which the Board elsewhere called a lack of "good faith":

... James Henry Ting procured the opposition to the scheme by Blossom Holdings Ltd and Costner Assets Ltd "solely so as to defeat [the scheme] with the desire and intention of thereby depriving the Liquidators of funds with a view to preventing any further investigation of his conduct of the affairs of the company." In other words, James Henry Ting's opposition was not made in good faith, but for an improper motive

...

²⁸⁰ *Ibid.* at paras. 131 and 133-134, [emphasis added].

²⁸¹ *Carillion Construction Ltd. v. Felix (UK) Ltd.* (2000), 74 Con. L.R. 144 (T.C.C.) at para. 24; *Bulmer v. Owlett*, [2003] EWHC 2929 (Ch.) at para. 34; *Harrison v. Landau*, [2004] EWHC 1316 (Q.B.) at paras. 92-93; *XS Racing and Event Marketing Ltd. v. Sunseeker Europe AG*, [2005] EWHC 3023 (Q.B.) at paras. 28 and 33; *Capital Structures Plc v. Time & Tide Construction Ltd.*, [2006] EWHC 591 (T.C.C.) at para. 16; *Adam Opel GmbH v. Mitras Automotive UK Ltd.*, [2007] EWHC 3252 (Q.B.) at para. 25; *Amsalem (t/a MRE building Contractors) v. Raivid*, [2008] EWHC 3028 (T.C.C.) at paras. 78-79; *Farm Assist Ltd. (in Liquidation) v. Secretary of State for Environment, Food and Rural Affairs*, [2008] EWHC 3079 (T.C.C.) at para. 8; *Bank of India v. Riat*, [2014] EWHC 1775 (Ch.) at para. 57.

²⁸² *Mitchell v. Pacific Dawn Pty Ltd.*, [2011] QCA 98 at para. 52.

...

In the view of the Board James Henry Ting's failure to provide any assistance to the Liquidators; his opposition to the scheme; and his resort to forgery and false evidence in order to further that opposition *amount to unconscionable conduct on his part*. Against the background of his failure to co-operate with the Liquidators, as it was his duty to do under the winding up rules of both Hong Kong and Bermuda, had he not *opposed the scheme for purely personal and selfish reasons*, in the process using forgery and false evidence, then there would have been no need for the Settlement Agreement. In other words, *by agreeing to withdraw the opposition to the scheme James Henry Ting did no more than he should have done from the outset, had he acted in good faith* rather than in an attempt to avoid responsibility for his conduct of the affairs of Akai Holdings Ltd.

...

The Board is of the view that in the present case the Liquidators entered into the Settlement Agreement as the result of the illegitimate means employed by James Henry Ting, namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims against him arising out of that conduct. . . .²⁸³

While the law in Canada is less well-developed, the Court in *Greater Fredericton* accepted that good faith is relevant to establishing whether pressure is illegitimate:

. . . I would be prepared to go so far as to say that a party who acts in "bad faith" in demanding a variation to a contract is exerting illegitimate pressure. . .²⁸⁴

However, as previously noted, the Court in *Greater Fredericton* went on to reject the requirement for illegitimate pressure in its entirety, in part because it was concerned that such a criterion could lead courts into a good faith inquiry.²⁸⁵ In explaining why good faith should have no part in its economic duress framework, the Court stated:

. . . [B]oth the literature and jurisprudence make reference to the motives or reasons underscoring the coercer's demands for a contractual variation, as though they are a

²⁸³ *Borrelli v. Ting*, [2010] UKPC 21 (Bermuda) at paras. 28, 32 and 35, [emphasis added]. At para. 41, the Board went on to leave open the interesting point whether, as an alternative to duress, the settlement agreement could also be avoided because Ting did not provide the liquidators with any consideration for it, since "in truth all he was offering to do was to cease acting in bad faith and to do what he should have done in the first place".

²⁸⁴ *Greater Fredericton Airport Authority Inc. v. NAV Canada* (2008), 290 D.L.R. (4th) 405 (N.B. C.A.) at para. 47.

²⁸⁵ *Ibid.* at para. 48 ("I am afraid that the distinction between legitimate and illegitimate pressure will soon lead to the understanding that a plea of economic duress can be defeated by a plea of 'good faith' on the part of the coercer").

relevant consideration. I label this the “good faith” argument or requirement. For example, if the coercer refuses to perform under an existing contract unless the other party agrees to pay more than the contract price and the reason for the demand is that the coercer’s supplier has imposed a corresponding increase in price, it could be perceived that the coercer’s demands reflect good faith on his or her part. More so, if the price increase is critical to the coercer’s survival as a commercial enterprise. Implicit in all of this is the understanding that if the promisor is not acting “opportunistically” one should be less sympathetic to the plea of economic duress. The question remains whether that fact should have an impact on the finding of economic duress. In my view, it should not . . .

. . . *I do not believe that a plea of good faith should be regarded as either a complete defence to a plea of economic duress or a central tenet of the economic duress doctrine. A person who puts a gun to my head and demands my wallet should be in no better a legal position because he or she is acting in response to a third person who placed a gun against his or her head. I am still entitled to be restored to the position I was in before the gun was put to my head. My wallet must be returned despite the good faith exercised by my coercer.*

In summary, *the supposed good faith of the coercer should not impact on the victim’s contractual right and expectation to receive performance in accordance with the original terms of the contract.* This is why it is important to reiterate that it is not the legitimacy of the pressure that is important, but rather its impact on the victim. The victim may also regret having agreed to the original terms of the contract. But neither party has the right to cry “hardship” and demand changes to the underlying contract in the absence of a contractual provision that provides such relief (e.g. a force majeure clause) or the application of the frustration doctrine.²⁸⁶

The reasons given by the Court for rejecting the relevance of good faith are unpersuasive. As a starting point, because the Court in *Greater Fredericton* rejected the illegitimacy requirement as a whole (at least for contractual variation cases), it is unclear whether its comments should have any significance to the role of good faith if one were to accept the *Universe Tankships* framework. Indeed, the *Greater Fredericton* Court itself seemed to accept that good faith is relevant to the illegitimacy analysis if one applies the orthodox approach to duress. In any event, the example given by the Court in dismissing the importance of good faith is problematic. First, the pressure contemplated in the example is a threat to murder the promisor, which is clearly at the extreme end of the unlawfulness scale and hence not something — like a threatened breach of contract — that good faith could be expected to justify under the contextual approach advocated by *Bhasin*. Second, the promisor in this example would

²⁸⁶ *Ibid.* at paras. 61-63, [emphasis added]. The Court was only prepared to find the promisee’s good faith relevant insofar as it could impact the causation question of whether the promisor actually did consent to the demand for sound business reasons: *ibid.* at para. 62.

have a tort claim for unlawful interference with its economic relations against the third party whose threats induced the promisee to make their own, so the promisor's need to rely upon the economic duress doctrine against the promisee itself would be muted.²⁸⁷ Third, the example does not result in the creation or variation of a contract, but simply the theft of the promisor's wallet. Why such a scenario is thought to support the irrelevance of good faith in circumstances where a promisee threatens a breach of contract on its own initiative to procure a contractual variation is unclear.

In the end, it is difficult to see why courts should adopt an inflexible approach that necessarily treats all good faith threats of unlawful acts as illegitimate, particularly where the threatened acts in question involve breaches of contract. If the law of contracts is subject to an organizing principle of good faith, as *Bhasin* suggests, we should not be surprised to find that the moral context of a wrong-based contractual formation doctrine permits the justification of certain breaches of contract where the promisee acts in the good faith pursuit of its economic self-interests. One obvious example is an efficient breach. Assume that a promisee threatens to immediately terminate a 12-year contract containing a termination right exercisable by them on 6 months' notice, by paying the promisor 12 months' worth of consideration unless the promisor agrees to increase the value of its counter-obligations in the remaining 11 years within the next 10 days. In such a case, can the promisee truly be said to have exerted "illegitimate" pressure if the promisor agrees to vary the contract (e.g., because the promisor wishes to continue a profitable sub-arrangement with a third party for those 11 years)? There is clearly nothing unreasonable or dishonest about this demand. As the Supreme Court of Canada stated in a decision cited in *Bhasin*, "[e]fficient breach should not be discouraged by the courts".²⁸⁸

A final point worth noting here is the approach that civil law takes to economic duress. This is particularly important given the reliance which the *Bhasin* Court placed upon Quebec law and the desirability of harmonizing it with the common law of contracts when establishing the organizing principle of good faith.²⁸⁹ As with the common law doctrine of economic duress, arts. 1385, 1399, 1402-1403 and 1407 of the *Civil Code of Québec*²⁹⁰ contemplate that a

²⁸⁷ The third party would have committed a civilly actionable wrong against the promisee, in the form of intimidation or civil assault, which intentionally caused economic loss to the promisor: see *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177 at para. 5.

²⁸⁸ *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 at para. 31.

²⁸⁹ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at paras. 32, 41, 82-83 and 85. See also *Bou Malhab c. Diffusion Métromédia CMR inc.*, [2011] 1 S.C.R. 214 at para. 38 (noting that legal principles in the civil and common law "often serve as a source of inspiration" for one another, since "[t]he two legal communities have the same broad social values").

²⁹⁰ C.Q.L.R. c. C-1991.

contract may be annulled where the consent of one of the parties has been vitiated by fear, which commentators have suggested may include economic fear.²⁹¹ However, art. 1404 goes on to prohibit such relief where the counterparty is acting in good faith:

1404. *Consent to a contract the object of which is to deliver the person making it from fear of serious injury is not vitiated where the other contracting party, although aware of the state of necessity, is acting in good faith.* [emphasis added]

As Bradley observes, this good faith component of the civilian test for duress parallels the “illegitimate pressure” requirement in the common law.²⁹² Clearly the two concepts have a similar end. It is to be hoped that common law courts in Canada will recognize the value of the civilian approach in fashioning a framework for economic duress.

(b) Lawful pressure

Perhaps no area of economic duress has provoked greater debate than the suggestion in *Universe Tankships* that illegitimate pressure can include threats of lawful acts. As discussed earlier in this paper, several commentators have suggested that this aspect of *Universe Tankships* should be rejected, so that illegitimate pressure is restricted to unlawful acts.²⁹³ The concern here, as in many other wrong-based contractual formation doctrines, is that extending illegitimate pressure to lawful acts would undermine the values of certainty and private ordering by affording courts too much discretion to set aside commercial agreements.

While this concern is clearly an important one,²⁹⁴ it is also directly addressed by the organizing principle of good faith. The Court in *Bhasin* held that extending the organizing principle to new doctrines, such as lawful act duress, must be approached with caution for precisely the same reasons relating to commercial certainty and private ordering.²⁹⁵ As a result, *Bhasin* instructs that a

²⁹¹ S.P. Bradley, “Conflict of Interest, Duress and Unconscionability in Quebec Civil Law: Comment on ‘The Origins of a Coming Crisis: Renewal of the Churchill Falls Contract’” (2007) 30 *Dalhousie L.J.* 259 at 268.

²⁹² *Ibid.* at 268-269.

²⁹³ See the text accompanying footnotes 135-138 above.

²⁹⁴ Note also the point made by N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) *Sing. J. Legal Stud.* 400 at 400 that if courts were overly willing to characterize threats of lawful action as illegitimate pressure, parties would not be free to communicate a particular negotiation stance as their “last offer” without running the risk that this would be found to conceal an implicit threat not to contract.

²⁹⁵ While the possibility of lawful act duress was recognized in *Universe Tankships*, it still appears to represent a “new” doctrine given the lack of cases in which such claims have been successful. Indeed, some authors assert that “no case has actually been decided upon grounds of lawful act duress”: N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) *Sing. J. Legal Stud.* 400 at 415.

new good faith doctrine will only be recognized where (i) the existing categories are wanting, (ii) it would constitute an incremental development that is consistent with the structure of the common law of contract, and (iii) it would give due weight to the importance of private ordering and certainty in commercial affairs.²⁹⁶

The organizing principle thus provides a framework within which to approach the issue of lawful act duress. Further, lawful act duress would appear to satisfy all three of the above *Bhasin* parameters.

First, if the illegitimacy requirement were limited to unlawful acts, the doctrine of economic duress would be wanting, since “the threat of a technically lawful act may be as coercive and as unjustifiable in commercial terms as the threat of an unlawful act”.²⁹⁷ As the English Court of Appeal said in *CTN Cash & Carry Ltd. v. Gallaher Ltd.*:

I also readily accept that the fact that the defendants have used lawful means does not by itself remove the case from the scope of the doctrine of economic duress. Professor Birks, in *An Introduction to the Law of Restitution* (1989) p 177, lucidly explains:

Can lawful pressures also count? This is a difficult question, because, if the answer is that they can, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality. In other words, the judges must say what pressures (though lawful outside the restitutionary context) are improper as contrary to prevailing standards. That makes the judges, not the law or the legislature, the arbiters of social evaluation. On the other hand, *if the answer is that lawful pressures are always exempt, those who devise outrageous but technically lawful means of compulsion must always escape restitution until the legislature declares the abuse unlawful. It is tolerably clear that, at least where they can be confident of a general consensus in favour of their evaluation, the courts are willing to apply a standard of impropriety rather than technical unlawfulness.*

And there are a number of cases where *English courts have accepted that a threat may be illegitimate when coupled with a demand for payment even if the threat is one of lawful action* (see *Thorne v Motor Trade Association* [1937] 3 All ER 157 at 160-161, [1937] AC 797 at 806-807, *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 All ER 657, [1937] 2 KB 389 and *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1982] 2 All ER 67 at 76, 89, [1983] 1 AC 366 at 384, 401). . .²⁹⁸

²⁹⁶ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 66.

²⁹⁷ A. Stewart, “Economic Duress – Legal Regulation of Commercial Pressure” (1984) 14 Melb. U. L. Rev. 410 at 427. See also: R.J. Sutton, “Duress by Threatened Breach of Contract” (1974) 20 McGill L.J. 554 at 586; M.H. Ogilvie, “Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract” (1981) 26 McGill L.J. 289 at 314; H.G. Beale *et al*, eds., *Chitty on Contracts*, 32nd ed. (London: Sweet & Maxwell, 2015), Vol. 1, at 774. It would also severely restrict the utility of duress given the many other areas of the law which already address unlawful conduct: A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) N.Z.U.L.R. 642 at 647.

Canadian courts have made the same point in finding that the offence of extortion under s. 346 of the *Criminal Code* may extend to threats of lawful acts:

A distinction between threats used to collect legitimate debts that is based exclusively on whether the conduct constituting the threat is in and of itself unlawful would undermine the rationale for the crime of extortion. *The potential for a threat to overwhelm a person's free choice and compel that person to act in the manner dictated by the threat is not necessarily tied to the lawfulness of the conduct constituting the threat. Some threats, while not per se unlawful (e.g., the threat to disclose some despicable act from one's distant past), will have a much more coercive effect than a threat to do something which is in and of itself unlawful (e.g., a threat to trespass on property).*²⁹⁹

As Tamblyn observes, “[t]he challenge, therefore, is not to rule out all threats of lawful action as illegitimate, but to distinguish between those which are legitimate and those which are not”.³⁰⁰

Second, extending the illegitimacy requirement to threats of lawful conduct where a promisee acts in bad faith would be an incremental development that is consistent with the structure of the common law of contract.³⁰¹ This follows

²⁹⁸ (1993), [1994] 4 All E.R. 714 (Eng. C.A.) at 718, [emphasis added]. That economic duress should extend to cases of lawful pressure has also been recognized by other appellate courts: see, e.g., *Westpac Banking Corp. v. Cockerill* (1998), 152 A.L.R. 267 (F.C.A.F.C.) at 289, per Kiefel J.

²⁹⁹ *R. v. Blake*, (2005) 202 O.A.C. 54 (C.A.) at para. 79, leave to appeal refused [2005] S.C.C.A. No. 526, [emphasis added]. This aspect of *Alexander* was approved in *R. v. Barros*, [2011] 3 S.C.R. 368 at para. 55. See also A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 257.

³⁰⁰ N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) *Sing. J. Legal Stud.* 400 at 400.

³⁰¹ It is interesting to note here that a focus upon the legitimacy of the defendant’s motives is also found in the tort of lawful means conspiracy: see *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 469 (accepting that “[t]he main effect of a finding that a conspiracy by unlawful means has been made out is to exclude the negative defence of predominant legitimate motive, that is, the advancement of the defendants’ own legitimate interests”). The analogy between lawful act duress and lawful means conspiracy is noted by N. Tamblyn, “Contracting Under Lawful Act Duress” (2010) *Sing. J. Legal Stud.* 400 at 403-404, who points out that *Thorne v. Motor Trade Assn.*, [1937] A.C. 797 (H.L.) – the case which Lord Scarman cited in *Universe Tankships* as support for the existence of lawful act duress through conduct such as blackmail – itself drew upon lawful act conspiracy case law, and has been treated as an example of the pursuit of legitimate business interests in later tortious conspiracy cases (the allegation of blackmail in *Thorne* itself being unsuccessful). Drawing upon this analogy to conspiracy, Tamblyn proposes the following test for lawful act duress at 415-416, which is framed in terms very similar to the *Bhasin* concept of appropriate regard for the counterparty’s legitimate interests:

A test for lawful act duress can be identified in the following terms. A threat to do something lawful will be illegitimate if the accompanying demand has as its predominant purpose the injury of the duressee rather than the honest (but not necessarily reasonable) pursuit of the duressor’s own legitimate interests. In a commercial context, legitimate interests include

from the selection of the term “illegitimate” over “unlawful” in *Universe Tankship*,³⁰² and the presence of a bad faith element in many other wrong-based contractual formation doctrines. In this regard, the law of contracts may be distinguished from the law of torts, where the presence of bad faith does not generally suffice to make an otherwise lawful action prohibited.³⁰³

Indeed, several commentators have drawn analogies between lawful act duress and other wrong-based contractual formation doctrines.³⁰⁴ For instance, Bigwood asserts that there should be a requirement of “knowing” exploitation in lawful act duress cases, based on the requirement for some degree of knowledge on the part of the promisee in cases of unconscionability and unilateral mistake.³⁰⁵ He makes a further analogy to consider cases in which compromises are set aside because the promisee lacks a *bona fide* belief in the validity of its claim, arguing that if the duress takes the form of a threat to bring civil proceedings, the resulting contract should be avoided only “if D knows or (perhaps) has reason to know that he has no valid cause of action against P”.³⁰⁶ Some have also suggested that the most fitting cases to include within lawful act duress are those which have traditionally been classified as instances of actual undue influence.³⁰⁷ The seminal decision in *Williams v. Bayley*³⁰⁸ is frequently

simply increasing profit, and so threats not to contract, made with a view to increasing business profit, will not be illegitimate.

³⁰² That Lord Scarman in *Universe Tankships* used the “milder” language of illegitimate over unlawful leaves little doubt that he intended to include lawful acts within the framework of economic duress: R. Bigwood, “Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing – Kiwi Style?” (2011) 42 *Victoria U. Wellington L. Rev.* 83 at 90. See also N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd ed. (London: Sweet & Maxwell, 2012) at 15-16; A. Kantic, “How a Clarification of Duress Renders the ‘Equitable’ Doctrine of Actual Undue Influence Futile” (2015) *N.Z.U.L.R.* 642 at 647. Some commentators have suggested the more appropriate term is “improper pressure”, so as to underscore the importance of the promisee’s motivations in the analysis: S. Scott, “Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases” (2010) 12 *Otago L. Rev.* 391 at 394.

³⁰³ *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 *S.C.R.* 177 at paras. 33, 56, 72-73 and 75 (“The possibility that immoral or malicious conduct may not be remediable through the economic torts in some cases is simply a consequence of the Anglo-Canadian conception of the limited role of the common law and is a price worth paying for certainty in this area”).

³⁰⁴ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 *U. Toronto L.J.* 201 at 233.

³⁰⁵ *Ibid.* at 234 and footnote 158.

³⁰⁶ *Ibid.* at 219.

³⁰⁷ G. McMeel, “Threatened Breach of Contract and Refusal to Supply as Grounds for Duress” (1996) 5 *Nottingham L.J.* 120 at 129 and 131; G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 203 and 219-220.

³⁰⁸ (1866), 1 *H.L.* 200 (H.L.). For discussions of how *Williams* fits into the lawful duress framework, see: M.P. Sindone, “The Doctrine of Economic Duress – Part 1”, 1996 *ABR*

cited here, where the House of Lords set aside an “extort[ive]”³⁰⁹ mortgage that the plaintiff gave to a group of bankers in order to prevent them from initiating a prosecution against his son for giving the bankers forged promissory notes.

A frequent theme among these commentators is that the test for illegitimacy in cases of lawful act duress, as in other wrong-based contractual formation doctrines, depends upon the deliberate “exploitation” of the promisor’s vulnerability by the promisee.³¹⁰ The most extensive analysis of this is by Bigwood, who reviews the case law and literature relating to lawful act pressure,³¹¹ and concludes that where such claims have been successful (whether

LEXIS 2 at *23-26; R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 221-222; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012) at 72.

³⁰⁹ Williams, *ibid.* at 214, 216 and 221.

³¹⁰ R. Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress” (1996) 46 U. Toronto L.J. 201 at 217, 237 and 245. See also: R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649 at 659; G. McMeel, “Threatened Breach of Contract and Refusal to Supply as Grounds for Duress” (1996) 5 Nottingham L.J. 120 at 121 and 130-132; P. Koh, “Economic Duress and a Drop of Fairness: A Singapore Perspective” [2003] J.B.L. 572 at 578 and 581-583; J.D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 395 and 400. R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 489, defines exploitation as follows:

Interpersonal exploitation is taking unjust (unfair, wrongful) advantage of another person for one’s own advantage or benefit. Legal contractual exploitation – interpersonal exploitation that occurs in particular in connection with the formation of jural contracts under the liberal conception of contract – involves one contracting party (D) taking advantage of his known strategic position of special advantage relative to the other contracting party (P), with the intention and for the purpose of, or in reckless disregard of the substantial likelihood of, influencing, actively or passively, P’s decision to enter into a particular contract (or to agree to a particular contractual term or set of terms) with D (or with a third party at D’s direction), regardless of D’s (additional) motives for so influencing P’s behaviour, and regardless of whether P benefits materially as a result. The taking of such strategic advantage, under such conditions, accompanied by such a quality of mind, is *ex necessitate* ‘taking unjust, unfair or wrongful advantage’ of P for D’s own contractual advantage or benefit.

³¹¹ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 60 classifies the lawful act duress cases into two groups:

. . . Virtually all of the reported cases have involved [1] ‘blackmail’-type pressure levered against the victim’s personal, psychological, or emotional interests — for example, threats to reveal to a third party non-defamatory information that would discredit, embarrass, or incriminate the victim, or [2] threats to prosecute a person in affinity with the victim in respect of conduct that is entirely unassociated with the transaction between coercer and victim — rather than against her physical, proprietary, or purely economic interests. . . .

Similar observations are made by A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford: Oxford University Press, 2011) at 278 (“That some types of threatened lawful action can constitute duress is plainly shown by . . . threats to prosecute, sue or publish information”). For a review of these cases, see Burrows, *ibid.* at 280-282; and G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 216-219.

under the rubric of “duress”, or other legal theories such as actual undue influence), they have all involved an element of exploitation or opportunism, insofar as there existed a “*seriously disjunctive relationship* between the *end* that was being sought (the demand) and the *means* that was being employed to achieve it (the application of ‘lawful’ pressure)”.³¹² As Bigwood explains, the promisee “‘coerces’ his victim by exercising, or proposing to exercise, his rights, privileges, or powers in a manner calculated to ‘exploit’ his victim’s peculiar vulnerability to being pressed” while having “no significant interest in the matter beyond simply desiring the private advantage demanded”.³¹³ In the language of *Bhasin*, the promisee applies pressure for an “arbitrary” or “capricious” purpose.

Bigwood likens this to notions of unconscionability and the civilian law concept of abuse of rights, which he finds operative under the test for lawful act economic duress in American law as well.³¹⁴ He suggests recasting the second branch of Lord Scarman’s illegitimacy test as follows:

It is not illegitimate for D to apply pressure to P, in support of a specific demand, if D merely does or proposes to do that which D has an independent legal right, liberty, or power to do, provided that such right, privilege, or power is not being exercised for a purpose that the law regards as improper (e.g., beyond or in excess of the right, privilege, or power in question), or to extract an advantage that is otherwise ‘unconscionable’, or ‘exploitative’ of P, in the circumstances.³¹⁵

³¹² R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 60, *emphasis in original*. The notion of discouraging “opportunism” as a unifying feature of duress is also discussed by R. Halson, “Opportunism, Economic Duress and Contractual Modifications” (1991) 107 L.Q.R. 649.

³¹³ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 61.

³¹⁴ *Ibid.* at 62, citing the *Restatement (Second) of Contracts*, §176(2), which provides:

[176](2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and *would not significantly benefit the party making the threat*,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by *prior unfair dealing by the party making the threat*, or

(c) what is threatened is otherwise *a use of power for illegitimate ends*.

³¹⁵ Bigwood, *ibid.* at 65-66. See also 70. In his earlier publication, R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 306-307, Bigwood provided an expanded definition of this concept:

. . . [T]he threatened action may be considered ‘illegitimate’ for the purposes of the duress inquiry if: (a) the end sought to be achieved by D in his demand bears no (or an insufficient) relationship to the intrinsic purposes of the right or power used in seeking to obtain it; or (b) although the end sought by D is sufficiently germane to the purposes of the power or right used in seeking to achieve it, the exorbitance of the claim or manifest unfairness in the resultant transaction tends to demonstrate that the demand was nevertheless *in excess* of that right or power; or (c) whether apart from or in combination with the phenomena described in (a) or (b), D’s exercise of the right or power is unconscientiously ‘exploitative’ of P’s peculiar susceptibilities to being pressed (distress, need, natural affection, and the like).

There is a clear relationship here with the organizing principle of good faith. Indeed Bigwood himself likens exploitation to bad faith,³¹⁶ noting that both concepts involve “the restraint of improper exercises of otherwise legitimate uses of one’s strict legal rights or powers where, owing to exceptional relational circumstances, one must have sufficient regard for, or give proper weight to, the reasonable expectations of those subject to the exercise of those rights or powers”.³¹⁷ Similarly, Peter Birks — who was also a proponent of using good faith as a test for illegitimacy in cases of lawful act duress — identifies bad faith in this context as pressure “intended to exploit the plaintiff’s weakness rather than to solve financial or other problems of the defendant”.³¹⁸ The parallels here with the *Bhasin* concept of failing to pay appropriate regard to the counterparty’s legitimate interests, and its related notion of pursuing something other than one’s own legitimate interests, are obvious.³¹⁹

Finally, the courts themselves have looked to such considerations in assessing whether lawful pressure is illegitimate. The jurisprudence suggests that threats of lawful acts are unlikely to engage the illegitimacy requirement where the promisee acts in good faith,³²⁰ such as where the demand is backed by a *bona fide* assertion of its intention to invoke some legal right (e.g., instituting civil proceedings or exercising rights conferred under a security interest).³²¹ Canadian courts have thus considered whether a demand was made in “bad faith” or was “*bona fide*”, “reasonable” or “unconscionable” in assessing whether lawful act duress is illegitimate,³²² and foreign courts have done the same.³²³

³¹⁶ R. Bigwood, “Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales” (2008) 27 U.Q. Law J. 41 at 65-66.

³¹⁷ R. Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 328-329.

³¹⁸ P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 183.

³¹⁹ See also D. O’Sullivan *et al*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 151 (“[A] lawful threat of economic harm coupled with a demand to enter into a transaction which has no other legitimate purpose than to enrich the defendant might in appropriate circumstances be characterized as unjustified or unreasonable, and hence involve illegitimate pressure”).

³²⁰ *Anoriza Pty Ltd. v. Hunt*, [2002] ACTCA 10 at para. 30.

³²¹ *McKay v. National Australia Bank Ltd.*, [1998] VSC 269 (C.A.), per Tagdell J.A.; *Beerens v. Bluescope Distribution Pty Ltd.*, [2012] VSCA 209 at paras. 43, 46-48 and 151-153.

³²² *Gordon v. Roebuck* (1992), 92 D.L.R. (4th) 670 (Ont. C.A.) at 674-675; *Unique Tool & Gauge Inc. v. Impact Tool & Mould Inc.*, [2002] O.J. No. 681 (S.C.J.) at para. 185, varied on other grounds, [2003] O.J. No. 855 (C.A.); *Ro-Am Holdings Ltd. v. Cianfarani*, 2008 CarswellOnt 8083, [2008] O.J. No. 5409 (S.C.J.) at paras. 44-45; *Lemoine v. Griffith* (2012), 73 Alta. L.R. (5th) 276 (Q.B.) at para. 127, *aff’d* (2014), 569 A.R. 85 (C.A.).

³²³ *Crescendo Management Pty Ltd. v. Westpac Banking Corp.* (1988), 19 N.S.W.L.R. 40 (C.A.) at 46; *A.-G. for England and Wales v. R.*, [2002] 4 L.R.C. 347 (N.Z. C.A.) at para. 65, *affirmed*, [2004] 1 L.R.C. 132 (New Zealand P.C.).

An interesting example of this is found in *Progress Bulk Carriers Ltd. v. Tube City IMS LLC (The Cenk Kaptanoglu)*.³²⁴ In that case, the plaintiff ship owners repudiated a charter party by chartering the vessel to a third party, and then gave the defendant charterers assurances that they would provide a substitute vessel in exchange for a waiver of their rights to claim for breach of contract. However, the ship owners later threatened to refrain from substituting the vessel unless the charterers agreed to a reduced rate. Even though the ship owners' threat did not involve an unlawful act — there being no threatened breach of contract since no new contract to substitute the vessel had been entered into based on the ship owners' assurances — Cooke J. found the threat amounted to illegitimate pressure when viewed in light of the ship owners' prior repudiation of the charter party. In reaching this conclusion, he emphasized that duress could arise from lawful threats, and noted the ship owners' "deliberate" refusal to perform their assurances in order to "manoeuvre" the charterers into a position of weakness:

. . . Whilst the arbitrators did not expressly find that the owners were in bad faith in what they did thereafter, it is clear that the arbitrators took the view that *the owners had manoeuvred the charterers into the position they were in, following the breach, in order to drive a hard bargain*

. . .

. . . [O]nce it is accepted that there is scope for the doctrine to operate where the threatened act is lawful, each case will be fact-sensitive. It will always be a matter of applying the relevant criteria to the facts found by the relevant arbiter of fact, although, self-evidently, *the more serious the impropriety and the greater the moral obloquy which attaches to the conduct, the more likely the pressure is to be seen as illegitimate*. . .

As I have already said, *the pressure created by the owners in their demand for a waiver of rights by the charterers has to be seen both in the light of their repudiatory breach and in the light of their subsequent conduct, including their deliberate refusal to comply with the assurances they had previously given about providing a substitute vessel and paying full compensation in respect of that breach*. Their refusal to supply the substitute vessel to meet the charterers' needs, in circumstances which they had created by their breach and their subsequent misleading activity, unless the charterers waived their rights, could readily be found by the arbitrators to amount to 'illegitimate pressure'.³²⁵

Third, reliance on good faith in determining the illegitimacy of lawful act duress would accord due weight to the importance of private ordering and certainty in commercial affairs. Given the existing cases discussed above which rely on good faith in assessing the presence of illegitimacy, parties can reasonably expect that their contracts may be avoided where they act in bad

³²⁴ [2012] 2 All E.R. (Comm.) 855 (Eng. Q.B.D.).

³²⁵ *Ibid.* at paras. 40 and 43-44, [emphasis added].

faith even if they do so through threats of lawful conduct. Further, while the notion of “good faith” is a broad one, the context-specific nature of the doctrine suggests that, as in other contractual formation doctrines, bad faith should be given a narrow meaning that is restricted to the deliberate exploitation of the promisor where the issue is the illegitimacy of a promisee’s otherwise lawful threats. Simply acting in an “unreasonable” manner should not suffice. There is no reason to believe that such a doctrine would create any greater uncertainty than other wrong-based contractual formation doctrines, like unconscionability or undue influence, that also proscribe the exploitation or “taking undue advantage”³²⁶ of vulnerable parties.

That good faith may function as an organizing principle for lawful act duress without compromising the values of commercial certainty and freedom of contract was recognized in the leading judgment of the English Court of Appeal in *CTN Cash & Carry Ltd. v. Gallaher Ltd.*³²⁷ The plaintiff in *CTN* sold cigarettes from several warehouses in England, and purchased them on consignment from the defendant. While the defendant provided credit facilities to the plaintiff to enable the purchases, it had the absolute discretion to withdraw those facilities, and was under no contractual obligation to sell the plaintiff cigarettes (each sale amounting to a separate transaction under the defendant’s standard terms). Owing to a mistake, the defendant delivered cigarettes to the plaintiff at an incorrect warehouse. The parties agreed the defendant would relocate them to another warehouse, but before it could do so, the cigarettes were stolen. The defendant, acting in the *bona fide* belief that the cigarettes were being held at the plaintiff’s risk at the time of the theft, invoiced the plaintiff for the stolen cigarettes, and threatened to withdraw the plaintiff’s credit facilities when the plaintiff objected. The plaintiffs thereupon paid the invoice, but later sought to recover the amount on the basis of duress given the defendant’s threat.

The Court of Appeal rejected the plaintiff’s plea of duress. The leading judgment was given by Steyn L.J. (as he then was), who accepted that, in some cases, a claim of duress can be based upon threats of lawful acts. Nevertheless, consistent with the contextual nature of the organizing principle of good faith in *Bhasin*, Steyn L.J. made it very clear that the issue of illegitimacy had to be considered in light of the specific facts before the Court. Those facts included not only the commercial nature of the parties’ relationship and the absence of unlawful threats, but also the “critically important” fact that the defendant had acted in the “good faith” and “*bona fide*” belief that it was entitled to payment for the stolen cigarettes. In other words, the defendant in *CTN* was engaged in

³²⁶ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 43.

³²⁷ [1994] 4 All E.R. 714 (Eng. C.A.).

the legitimate pursuit of its economic self-interest, notwithstanding the intentional injury this caused to the plaintiff:

. . . *The supplier acted in the bona fide belief that the sum was owing.* . . .

. . .

. . . Although property in the goods had not passed to the plaintiffs, the deputy judge found that *the defendants thought in good faith that the goods were at that time at the plaintiffs' risk.* The deputy judge's finding is not challenged on this appeal. . .

. . .

. . . I was reminded of the famous aphorism of Oliver Wendell Holmes that *general propositions do not solve concrete cases.* It may only be a half-truth, but in my view the true part applies to this case. *It is necessary to focus on the distinctive features of this case, and then to ask whether it amounts to a case of duress.*

The present dispute does not concern a protected relationship. It also does not arise in the context of dealings between a supplier and a consumer. The dispute arises out of arm's length commercial dealings between two trading companies. It is true that the defendants were the sole distributors of the popular brands of cigarettes. In a sense the defendants were in a monopoly position. The control of monopolies is, however, a matter for Parliament. Moreover, *the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings* . . . The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress.

A second characteristic of the case is that . . . *it was lawful for the defendants, for any reason or for no reason, to insist that they would no longer grant credit to the plaintiffs.* The defendants' demand for payment of the invoice, coupled with the threat to withdraw credit, was neither a breach of contract nor a tort.

*A third, and critically important, characteristic of the case is the fact that the defendants bona fide thought that the goods were at the risk of the plaintiffs and that the plaintiffs owed the defendants the sum in question. The defendants exerted commercial pressure on the plaintiffs in order to obtain payment of a sum which they bona fide considered due to them. The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them.*³²⁸

In deciding on the basis of these contextual factors that the pressure did not amount to duress, Steyn L.J. emphasized the importance of commercial

³²⁸ *Ibid.* at 716-718, [emphasis added]. A similar emphasis on the defendant's good faith is evident in the concurring reasons of Sir Nicholls V.-C. at 719:

. . . *When the defendant company insisted on payment, it did so in good faith.* It believed the risk in the goods had passed to the plaintiff company, so it considered it was entitled to be paid for them. The defendant company took a tough line. It used its commercial muscle. But the feature underlying and dictating this attitude *was a genuine belief on its part that it was owed the sum in question.* . . . [emphasis added].

certainty in deciding whether to extend the illegitimacy concept to lawful act duress:

We are being asked to extend the categories of duress of which the law will take cognisance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving 'lawful act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bona fide settled accounts to be reopened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. That is the inquiry in which we are engaged. In my view there are policy considerations which militate against ruling that the defendants obtained payment of the disputed invoice by duress.

Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress.³²⁹

It is striking how closely Steyn L.J.'s reasoning parallels that of the Supreme Court in *Bhasin*. Indeed, Steyn L.J.'s judgment is in many respects a model for how economic duress should be approached under the organizing principle of good faith. While the Court recognizes that lawful act duress may in exceptional cases qualify as illegitimate, it also emphasizes that such a finding will generally be inappropriate given its potential to undermine commercial uncertainty. It is only where a promisee acts in bad faith that concerns about commercial uncertainty are sufficiently displaced to permit the extension of the duress doctrine to lawful threats. Moreover, consistent with the contextual nature of the organizing principle in *Bhasin*, bad faith involves a higher threshold where the parties stand in a commercial rather than consumer relationship with one another. It cannot be met simply because the promisee is acting in the *bona fide* pursuit of its economic self-interests.

As in *CTN*, Canadian courts have recognized that it is not "illegitimate for a commercial party to 'bargain hard', and advance its own interests".³³⁰ In fact, the Ontario Court of Appeal relied on *CTN* for this point in *Techform Products Ltd. v. Wolda*,³³¹ where the plaintiff employer pressured the defendant employee

³²⁹ *Ibid.* at 719, [emphasis added].

³³⁰ *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.* (2014), 569 A.R. 308 (C.A.) at para. 22. See also D. O'Sullivan *et al.*, *The Law of Rescission* (Oxford: Oxford University Press, 2008) at 149.

³³¹ (2001), 56 O.R. (3d) 1 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 603.

into signing an agreement that assigned it all his rights to any inventions he produced while under its employment. In finding the agreement enforceable despite the existence of the pressure (which consisted of implicit threats to terminate the defendant with notice if he failed to execute it), the Court noted that the plaintiff's *bona fide* belief in its entitlement to the inventions supported the legitimacy of the pressure:

In *Stott* at p. 564, Finlayson J.A. referred with approval to *Universe Tankships Inc. of Monrovia v. Int'l Transport Workers' Federation*, [1982] 2 All E.R. 67 (H.L.) where it was held that in determining what is legitimate two matters may have to be considered. The first is the nature of the pressure and the second is the nature of the demand that the pressure is applied to support. . . .

. . .

. . . [I]t seems apparent that the company genuinely believed that it was entitled to ownership of inventions by its employees and consultants. . . In fact, the trial judge found that when Techform specifically assigned to the respondent the task of inventing a new product, Techform was entitled to claim ownership of that product. The trial judge found that this was an implied term when the respondent was an employee and was implied in the 1989 consultancy agreement.

As the trial judge noted, the law would appear to be that absent an express or implied agreement to the contrary, an employee or independent contractor owns inventions. In my view, that does not mean that Techform's request or demand that the respondent execute such an agreement was illegitimate. Techform was paying the respondent for his work on the various inventions. While the trial judge held that Techform did not expressly assign the concept of the 3D Hinge to the respondent, he was generally assigned to work on hinges. In my view, *Techform's bona fide belief that it was the owner of the inventions tells strongly in favour of finding that the pressure was not illegitimate: CTN Cash and Carry Ltd v. Gallaher Ltd*, [1994] 4 All E.R. 714 (C.A.) at 718.³³²

As a final point, it is noteworthy that good faith also forms part of the American law of economic duress,³³³ particularly given the *Bhasin* Court's decision to "take comfort" from the U.S. experience with good faith in response to concerns that its ruling would "create uncertainty or impede freedom of contract".³³⁴ The *Restatement (Second) of Contracts* provides in §176(1) that a threat will be "improper", regardless of the fairness of the resulting exchange, in the following cases:

176(1) A threat is improper if

³³² *Ibid.* at paras. 34 and 36-37, [emphasis added].

³³³ See R. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress" (1996) 46 U. Toronto L.J. 201 at 237, footnote 170.

³³⁴ *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at para. 82. See also paras. 41 and 84-85.

- (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
- (b) what is threatened is a criminal prosecution,
- (c) what is threatened is the use of civil process and the threat is made in *bad faith*,
or
- (d) the threat is *a breach of the duty of good faith and fair dealing* under a contract with the recipient. [emphasis added]

There thus appears to exist a broad consensus that good faith has an important role to play in assessing the illegitimacy of lawful threats. While it is unlikely that the concerns about commercial uncertainty can ever be fully mitigated here given the inherently ambiguous nature of lawful act duress, a framework that is built upon the organizing principle of good faith would allow the doctrine to evolve in a rational way while giving courts the discretion to address hard cases. As the Supreme Court said of the organizing principle itself, it would “strick[e] the correct balance between predictability and flexibility”.³³⁵

V. CONCLUSION

The doctrine of economic duress is still in a state of development. Serious questions exist concerning the rationale for the doctrine, its relationship to broader equitable concepts such as unconscionability and undue influence, and the circumstances in which courts should avoid agreements based on commercial pressure. Until a satisfactory framework for the doctrine can be found, economic duress will remain the contract law equivalent of a Gordian knot.³³⁶

And yet, the doctrine is very much at the centre of current debates about the role of fairness in contracts. As Ogilvie observed in 2000, “whatever may be the essential nature of economic duress, it is somehow concerned with the theoretical foundations of modern contract law, whose elucidation tempts yet eludes contract law scholars”.³³⁷ The historical evolution of duress — from a rigid common law rule concerned solely with the vitiation of the will, to a quasi-equitable jurisdiction focused upon illegitimacy — mirrors the broader developments that have taken place in contract law over the last 150 years, in which freedom of contract, once such an important pillar of our jurisprudence, has gradually ceded its position to the wrong-based doctrines that *Bhasin* consolidated together under the organizing principle of good faith.

In light of this history, the birth of the organizing principle offers an excellent opportunity to re-examine economic duress from a fresh perspective. It is now

³³⁵ *Ibid.* at para. 71.

³³⁶ We are indebted to the Hon. Justice Todd L. Archibald for suggesting this metaphor.

³³⁷ M.H. Ogilvie, “Economic Duress in Contract: Departure, Detour or Dead-End?” (2000) 34 Can. Bus. L.J. 194 at 194.

possible to view the doctrine as a manifestation of good faith without subordinating the essential features of duress to an overriding rule such as inequality of bargaining power of community standards of commercial morality. Good faith as conceived in *Bhasin* is not an imperialist principle. It does not seek to conquer other contractual doctrines and impose a martial hegemony upon them. Rather, the *Bhasin* revolution is in recognizing that the highest and best use of good faith is as an explanatory tool, through which existing contract law doctrines can be developed on their own terms and — occasionally — extended to new situations.

In our view, the organizing principle of good faith offers the best chance of a coherent framework for understanding economic duress. The principle's focus upon legitimacy, both in permitting the legitimate pursuit of one's economic self-interests, and in requiring appropriate regard to the counterparty's legitimate interests, suggests a new rationale for the illegitimacy element in *Universe Tankships*. This in turn provides a firmer basis for Lord Scarman's two-pronged test for duress, which has proven itself to be the most enduring and workable framework for the doctrine. In the end, by taking a contextual approach to the illegitimacy criterion, which is anchored in the *Bhasin* conceptions of good faith and fidelity to existing categories of precedent, it is possible to apply economic duress to both lawful and unlawful threats in a principled manner that balances concerns about unfairness with the countervailing values of commercial certainty and freedom of contract.

The search for this balance lies at the heart of all mature systems of private law. And the extent to which the organizing principle contributes to it will be the ultimate measure of its utility. While it is intolerable that we have a system of law in which "one holds the rod, and the other bows to it",³³⁸ it is equally the case that "recovery cannot be predicated on the bare assertion that fairness so requires".³³⁹ Rather, "[a] general congruence with accepted principle must be demonstrated as well".³⁴⁰ The comments of McLachlin J. (as she then was) in the unjust enrichment case of *Peel (Regional Municipality) v. Canada* are equally applicable here:

The courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy. . . .³³⁹

³³⁸ *Smith v. Cuff* (1817), 6 M. & S. 160, 105 E.R. 1203 (K.B.), per Lord Ellenborough C.J.

³³⁹ *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 802-803.

³⁴⁰ *Ibid.* at 803.

³³⁹ *Ibid.* at 802.