

The Doctrine of Public Policy in Canadian Contract Law

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The attitude of the bench in general towards public policy is one of cautious acceptance of it. They have often repeated Mr. Justice Burrough's metaphor about public policy being an unruly horse. . . Some judges appear to have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community.¹

I. INTRODUCTION

The concept of public policy is one of the most ancient, esoteric and pervasive creations in the history of the common law. Its origins have been traced by one author to the fifteenth century,² although it is probable that the doctrine is as old as the concept of the law itself. It is to be found in such diverse fields as contracts, torts, trusts, wills, real and intellectual property, public law and the conflict of laws. It has been referred to as “the one principle rule at the foundation of the whole system of English law,”³ and as indicative of the general judicial tendency “towards a rational system of justice.”⁴ It has also been viewed as a necessary reaction to “conduct which is injurious to the very foundations

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1 Percy Winfield, “Public Policy In The English Common Law” (1928) 42 Harv. L. Rev. 76 at 91 [Winfield].

2 W.S.W. Knight, “Public Policy In English Law” (1922) 38 L.Q.R. 207 at 207 [Knight].

3 *Ibid.* at 219.

4 S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 404 [Waddams].

upon which society exists.”⁵ And yet, despite its seeming veneration and importance, there are few concepts which have given rise to greater confusion and uncertainty.

Academic treatments of the subject are commonly riddled with allusions to the unusual degree of complexity that accompanies this area of the law.⁶ One author plainly states that “[t]his head of the law... has been clouded by much confusion of thought,”⁷ a sentiment which is amply illustrated by the fact that the first paragraph of a recent text devoted entirely to the subject is entitled “complexity.”⁸ Such “confusion” and “complexity” are partially attributable to the fact that public policy, especially as the doctrine exists within contracts jurisprudence, is often invoked in response to a wealth of disparate situations wherein “[t]he underlying conflict between public and private interest is not readily conducive to the formulation of clear rules and principles.”⁹ Yet it must also be acknowledged that the subject has produced an inordinate amount of judicial disagreement,¹⁰ leaving practitioners and commentators alike with little in the way of a consistent organizing principle.¹¹

It is perhaps because of this lack of clarity that the doctrine has been the subject of such trenchant criticism. A famously recurrent expression of the

5 G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto, Carswell, 2006) at 362 [Fridman].

6 See, e.g., H.G. Beale *et al*, eds., *Chitty on Contracts*, 29th ed. (London: Sweet and Maxwell, 2004) Vol. 1, at 938 [Chitty], stating that “[t]he diversity of fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex – a complexity which has been aggravated by lack of systemization and by the confusing terminology which has often been adopted”.

7 Michael Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract*, 14th ed. (London: Butterworths, 2001) at 405 [Cheshire].

8 R.A. Buckley, *Illegality and Public Policy*, (London: Sweet and Maxwell, 2002) at para. 1.01 [Buckley].

9 *Ibid.*

10 A rather striking example of judicial conflict with respect to the meaning of public policy can be found in *Egerton v. Earl of Brownlow* (1853), 4 H.L.C. 1 (U.K. H.L.), where sixteen judges issued widely divergent opinions as to whether a condition in a will offended the doctrine. Winfield, *supra* note 1 at 88, states that “[t]he variety of opinions expressed reminds one of *Jarndyce v. Jarndyce* in *Bleak House*, of which Dickens says that no two lawyers could discuss it for five minutes without flatly contradicting each other.”

11 The lack of a working theory of public policy has always been acknowledged in the literature. Buckley, *supra* note 8, states at para. 6.04 that, “[t]he lack of any clearly defined doctrinal basis for declining to enforce contracts on public policy grounds can give rise to difficult questions...” See also D. Lloyd, *Public Policy: A Comparative Study in English and French law* (London: The Athlone Press, 1953) at 149 [Lloyd] (indicating that “[i]n English Law... public policy is treated as a haphazard rule the basis of which has never really been explored”), and “Note: A Law and Economics Look at Contracts Against Public Policy” (2005-2006) 119 Harv. L. Rev. 1445 at 1445 (referring to “the absence in the existing literature of a comprehensive framework for the void for public policy doctrine”).

judicial attitude towards public policy is found in the observation of Lord Davey in *Janson v. Driefontein Consolidated Mines Ltd.* that “public policy is always an unsafe and treacherous ground for legal decision...”¹² Indeed, some courts have even gone so far as to state that “[a] series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.”¹³

Despite being held in such low regard, it has generally been acknowledged that public policy is a necessary correlate to the rule of law.¹⁴ Although it is beyond the scope of this paper to enter into a detailed discussion of the various justifications for the doctrine,¹⁵ it appears beyond dispute that some concept equivalent to public policy is required to supplement the express restrictions on human activity which have become codified in statute and precedent. As recognized more than a century ago by Holmes, considerations of public policy are “the secret root from which the law draws all the juices of life. . . Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy”.¹⁶

One of the most interesting manifestations of public policy is its status as a doctrine of law that is capable of nullifying the validity of private agreements.¹⁷

12 [1902] A.C. 484 (H.L.) at 500 [*Janson*]. One author writes “[w]hy, then, have the modern rules of public policy developed as they have and, more curious, survived? What is clear is that it is not because of judicial affection. Where applied they are often accompanied by expressions of distaste... Indeed the judges on occasion express a sense of achievement on having avoided the application of the rules of public policy...” (John Shand, “Unblinking The Unruly Horse: Public Policy In The Law of Contract”, [1972] Cambridge L.J. 144 at 158 [Shand]).

13 *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 (H.L.) at 553.

14 See, e.g., *Egerton v. Earl of Brownlow* (1853), 4 H.L.C. 1 (U.K. H.L.) at 197.

15 See, in this connection, Shand, *supra* note 12, in which punitive, deterrent, “purity of the court” and “unclean hand” justifications for the doctrine of public policy are examined.

16 Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown and Co., 1881) at 35. See also *A. v. Hayden* (1984), 156 C.L.R. 532 (H.C.A.) at 558, stating that “the place of public policy in the formulation of the common law has been recognized by the greatest judges from early times.” A comparable concept, known as “public order” is also recognized in the civil law: see, e.g., Articles 1411 and 1413 of the *Civil Code of Quebec*.

17 It is important to appreciate that the role played by public policy in contract (and succession) law is not identical to the role which public policy plays in other areas of the law (such as torts or the conflict of laws). As noted by McHugh and Gummow J.J. for the High Court of Australia in *Cattanach v. Melchior* (2003), 215 C.L.R. 1 at para. 60, “‘public policy’ in relation to the common law of torts is not to be thought of as like that public policy which invalidates contracts and, one might add, certain trusts and conditions attached to voluntary dispositions by will or settlement. In those areas, the starting point has been the favour with which the law has looked upon the right of private contract and the performance of contracts, and upon the freedom of disposition of property, by dispositions *inter vivos* and testamentary.” For a contrary view, see C.R. Symmons, “The Function and Effect of Public Policy in Contemporary Common Law” (1977) 51 Austl. L.J. 185 at 185-186 [Symmons].

The recent proliferation of “payday loan” class actions and other cases involving restitutionary claims for benefits paid under illegal contracts serves to underscore the potency of the doctrine, and illustrates the practical importance of developing an appreciation for its numerous rules and categories.¹⁸ Unfortunately, the lack of any coherent theory of public policy has traditionally made the doctrine inaccessible. It places it in continual danger of collapsing into a general equitable discretion which may be invoked to restrict any form of human activity inimical to the broader “public interest.” This absence of a unitary theory in turn leaves public policy doubly exposed to the criticisms of uncertainty and judicial activism which are traditionally levied against it.¹⁹ It is therefore the admittedly ambitious aim of this paper to articulate a modern theory of public policy which is capable of both explaining its peculiar nature and evolution, and of insulating it from the more fatal criticisms of the doctrine that have become prevalent in the courts and the literature.

The paper will commence with an exegetical overview of public policy in contract law,²⁰ detailing first its history, various categories, and some of the evidentiary and remedial issues to which it can give rise. The focus will then shift to a critical analysis of the dominant theories that have been formulated in response to the foregoing, and conclude with a proposed theory of public policy

18 Several of these cases are listed in *MacKinnon v. National Money Mart Co.*, 2007 BCSC 348 (S.C.) at para. 6.

19 As stated in Sacha Judd, “The Unruly Horse Put Out to Pasture: The Doctrine of Public Policy in the Modern Law of Contract” (1996-1999) 8 *Auckland U.L. Rev.* 686 at 705 [Judd], “[f]or the doctrine of public policy to survive intellectually, the underlying reasoning behind the choice of contracts the courts refus[e] to enforce should be made explicit.”

20 References to the doctrine in other areas of the law, particularly in the field of wills and estates, will be made where relevant to the development of the doctrine in contract law. The affinity between the public policy doctrine in contract and succession law was noted by Hayne J. (dissenting on other grounds) in *Cattanach v. Melchior* (2003), 215 C.L.R. 1 (H.C.A.) at paras. 234-235, where it is stated that “[p]ublic policy considerations have most often been considered in connection with contract and succession to property. In those areas public policy plays a wholly negative role, denoting (as was said in a different context) ‘a justification or excuse for not applying, or recognising the application of, an otherwise applicable rule of law’. . . In both contract and succession the operation of public policy considerations is now well developed. In particular, there is a clear articulation of the need to resolve the tension between competing policies of the law. In the case of contract, it is well accepted that the law will seek to give effect to bargains that are struck between those of full age and capacity. To refuse to enforce a particular bargain on the grounds of public policy trenches upon the general policy favouring the enforceability of bargains. In succession, effect is generally given to the decision a person of full age and capacity makes about the disposition of his or her property on death. . . But in both contract and succession there is a discernible policy of the law which resort to public policy considerations would confine or modify.”

that it is hoped will be capable, at the very least, of stimulating new debate in relation to what has always been a highly disjointed area of the common law.²¹

II. HISTORY OF THE DOCTRINE

It is useful at the outset to distinguish between three types of policy. Firstly, there is “political policy,”²² by which is understood a position adopted by Parliament or a legislature in relation to some facet of the social, economic or general welfare. Common examples would include immigration or fiscal policy. Secondly there is the “policy of the law,” “meaning the object and policy of a particular law,”²³ such as the policy of the *Patent Act*²⁴ to encourage the public disclosure of new technologies, or the policy of the courts to favour settlement agreements in order to facilitate the expeditious resolution of disputes.²⁵ Finally, there is “public policy” itself, which has been famously described as “that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.”²⁶ It is the last concept of policy which shall be examined in this paper.

The idea of public policy is of ancient origin, and although it “has existed from early times. . . it has had several different names, and has on occasion

21 In 1928, Winfield, *supra* note 1 at 1, referred to the literature on the topic as “scanty.” There exists even today a relative dearth of commentary on the theoretical basis of English and Canadian public policy as it is found in contract law, with most contract texts appearing to content themselves with a description of the doctrine’s traditional categories. For Canadian law reform commission commentary on the doctrine, see: Law Reform Commission of British Columbia, *Report on Illegal Transactions* (Vancouver: Law Reform Commission of British Columbia, 1983) at 20-21; and Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ontario Law Reform Commission, 1987) at 215-234.

22 Political policy was recognized as conceptually distinct from public policy in *Egerton v. Earl of Brownlow* (1853), 4 H.L.C. 1 at 196. As there stated by Lord Truro, “[s]ome criticism has been wasted in relation to the language in which the principle has been expressed. Exceptions have been made to the expression of ‘public policy’; and it has been confounded with what may be called ‘political policy,’ such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states, with all which, as applied to the present subject, it has nothing whatever to do.”

23 Knight, *supra* note 2 at 216. The author, at 217-18, states that “[i]t is quite clear...that the conception of public policy is not only now quite distinct from that of the ‘policy of the law’, but has, in fact, always been so, save for some exceptional instances of confusion which have had no substantial effect on the general course of authority.”

24 R.S.C. 1985, c. P-4.

25 See *M. (J.) v. Bradley* (sub nom. *M. (J.) v. B. (W.)*) (2004), 71 O.R. (3d) 171 (C.A.) at para. 65 [QL].

26 *Egerton v. Earl of Brownlow* (1853), 4 H.L.C. 1 at 196.

even taken the veil of anonymity.”²⁷ It is therefore necessary for the purposes of this paper to adopt a distinction formulated by Winfield between:

. . .the unconscious or half-conscious use of it which probably pervaded the whole legal system when law had to be made in some way or other, and. . . the conscious application of public policy to the solution of legal problems, whether it bore the name by which it is now known or was partly concealed under some other designation.²⁸

The first species of public policy has been identified with equity, the natural law, the law of reason, and ultimately the divine law. It is referred to by early legal commentators with wonder, as an animistic spirit dwelling deep within our jurisprudence that is “written in the heart of every man and tells him what to do and what to avoid.”²⁹ Ultimately, it was in the gradual rationalization of this supra-human tendency against which “[n]either statute nor custom can prevail”³⁰ that the modern idea of public policy was first developed and readied for conscious application.

In its origins, this second manifestation of public policy was still a highly intuitive concept, distinguishable only from natural law via the secular nature of its authority. Both Knight and Winfield find its earliest expression in highly general dictums by Littleton and Coke that the law will not permit that which is “inconvenient” to the public good to triumph for the sake of the private good.³¹ At this nascent phase:

[t]he doctrine, concealed under widest generalization, operates, in fact, because of some gap in [the] law, though only where the dominant consideration is the good of the community – the supreme law – with, it may be, some special consideration for the rights or interests of individuals other than those immediately concerned in the matter the subject of suit.³²

Yet although “[t]he present law is the result of a development that stretches back to at least Elizabethan times. . . its foundations were not effectively laid

27 Winfield, *supra* note 1, at 76.

28 *Ibid.* at 77. This distinction is occasionally recognized in the case law: see, e.g., *Fender v. Mildmay* (1937), [1938] A.C. 1 (H.L.) at 38.

29 Winfield, *supra* note 1 at 78, writing in reference to “the dawn of our law” and St. Germain, *Doctor and Student* (1523) bk. I, cc. II.

30 *Ibid.* at 78.

31 Knight, *supra* note 2 at 207-8; Winfield, *supra* note 1, at 80-83. Both authors refer to Coke’s maxim “*nihil quod inconueniens est licitum*” in *Co. Litt.* at s. 138, which Winfield, at 82, states “was perhaps rightly taken by later authorities to lay down the doctrine of public policy, or at least to contain the seeds of formal ideas about it.” This maxim has been translated as “[i]t is better saith the law to suffer a mischief that is peculiar to one than an inconvenience that may prejudice many”: *Deckert v. Prudential Insurance Co.*, [1943] O.R. 448, [1943] O.J. No. 467 (C.A.) at para. 31.

32 Knight, *supra* note 2 at 208.

until the eighteenth century.³³ As English society progressed, and the number of precedents and statutes began to swell, there was increasingly less need for a general, undefined idea of the “common good” to fill in the more glaring “gaps” of the common law.³⁴ It was in part because of this reality that in the eighteenth century the concept of public policy was first recognized as a distinct doctrine in the case of *Mitchel v. Reynolds*.³⁵ To be sure, public policy in the eighteenth century had yet to be refined, and was still “a principle stated in . . . sweeping terms.”³⁶ Yet its acceptance in this period as a conceptually discrete source of legal precedent, whatever its ultimate ambit, entailed that “[i]nstead of sprawling in vaporous fashion across the legal atmosphere like a genie of the *Arabian Nights*, it [was] shrinking to certain departments of the law...”³⁷

In the nineteenth century, the courts sought to confine the reach of the doctrine to the limited number of categories which are discussed below. The general judicial attitude of the period is summarized by the famous statement of Burrough J. in *Richardson v. Mellish*, that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”³⁸ To similar effect were the following sentiments expressed by Jessel M.R. in *Printing & Numerical Registry Co. v. Sampson*:

[i]t must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. *Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.*³⁹ [emphasis added]

33 Cheshire, *supra* note 7, at 405. Although this view is concurred in by Knight, Winfield, *supra* note 1 at 83-84, believes the doctrine was narrowed as early as the 17th century.

34 See Winfield, *supra* note 1 at 84: “[c]ase law and statutes between them were [at this time] rapidly reducing to certainty what had been under the vague control of reason, convenience, and policy.”

35 (1711), 1 P. Wms. 181 (Ch. Div.) [*Mitchel*]. The association of *Mitchel* with the recognition of public policy as a distinct doctrine is made by both Knight, *supra* note 2 at 210, and Winfield, *supra* note 1 at 85.

36 Cheshire, *supra* note 7 at 406.

37 Winfield, *supra* note 1 at 84.

38 (1824), 2 Bing. 229 (Eng. C.P.) at 252. In *Enderby Town Football Club v. Football Assn. Ltd.* (1970), [1971] Ch. 591 (Eng. C.A.) at 606-607, Lord Denning replied to Burrough J. by stating that “[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice. . . It can hold a rule to be invalid even though it is contained in a contract.”

39 (1875), L.R. 19 Eq. 462 (Eng. Rolls Ct.) at 465.

However, despite the fact that the nineteenth century began to witness the emasculation and dissection of public policy into various “heads” and “categories,” its vigour was affirmed by the House of Lords in the watershed decision of *Egerton v. Earl of Brownlow*.⁴⁰ There, the majority of the Law Lords declined to follow the view expressed by 9 of 11 lower judges (who were specially summoned by the House to provide their opinions in this respect) that a condition in a will which made the receipt of a large estate conditional upon the recipient’s ability to obtain an aristocratic title was not contrary to public policy. Parke B., one of the lower judges, drafted a powerful judgment in which he stated that:

[i]t is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.⁴¹ [emphasis added]

Nevertheless, in accepting the dissenting view, the House sided with Lord Pollock, C.B., who held the following:

[i]t may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it.⁴² [emphasis added]

Lord Truro, who authored the leading judgment in the House, was of the opinion that public policy served a vital judicial role. He framed his reasons this way:

[i]t has been said that this rule is too uncertain and vague to be capable of practical application by judges, on account of the various opinions which may be entertained on the subject of public policy. But I think the remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good.

40 (1853) 4 H.L.C. 1 [*Egerton*].

41 *Ibid.* at 123.

42 *Ibid.* at 151.

There will be, no doubt, occasionally a difficulty in deciding whether a particular case is liable to the application of the principle. But there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. *The principle itself seems to me to be necessarily incident to every state governed by law.*⁴³ [emphasis added]

Although the doctrine of public policy thus emerged intact from the nineteenth century, its invocation was (and still is) usually prefaced by a considerable degree of judicial hand-wringing and an excessive dependence on precedent.⁴⁴ In the early twentieth-century case of *Janson*, Lord Halsbury even denied that any new categories of public policy could be adopted.⁴⁵ While this proposition was subsequently questioned by Lord Atkin in *Fender v. Mildmay*⁴⁶ (which is in many respects now the leading English judgment respecting the role of public policy in contract law), the Law Lords in that decision still affirmed the necessity of approaching the doctrine with caution, and rejected the more liberal attitude evidenced in *Egerton*. At issue in *Fender* was whether an agreement by a married man to marry a third party, which was made after a decree *nisi* for the dissolution of his original marriage had been obtained by his wife but before the decree became absolute, was enforceable in an action for damages brought by the third party. The majority of the Law Lords upheld the contract, notwithstanding that agreements to wed a married person had historically been set aside on account of public policy. The two leading judgments were delivered by Lord Atkin and Lord Wright, with the former stating as follows:

... I propose in the first instance to say something upon the doctrine of public policy generally. My Lords, from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The 'unruly horse' of Hobart C.J. is common-

43 *Ibid.* at 197.

44 Waddams, *supra* note 4 at 393, writes that "[a]s in other branches of contract law an earlier flexibility was superseded in the 19th and early 20th centuries by a period of rigidity. The various 'heads' of public policy that are listed in the modern textbooks as sufficient to justify setting aside contracts arose one by one. . ."

45 *Janson*, *supra* note 12 at 491-92. See also *Wadgery v. Fall*, [1926] 2 W.W.R. 657, 1926 CarswellSask 52 (Sask. C.A.) at para. 4, stating that "[t]o assert merely that a contract is against public policy is not enough. It must be shown to belong to a class of contracts that the law recognizes as within that category. Thus a contract may be against public policy because it is in restraint of trade, or is in restraint of marriage, or is founded upon an immoral consideration, or is intended to assist the King's enemies, or is of some other class of transactions that the common law condemns or that the statute law prohibits. The Court cannot invent a new head of public policy".

46 (1937), [1938] A.C. 1 (H.L.) at 11 [*Fender*]. See also *Rodriguez v. Speyer Brothers*, [1919] A.C. 59 (H.L.) at 79, stating that Lord Halsbury's "observation must be taken with the qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time."

place. . . [I]n *Janson v. Driefontein Consolidated Mines*. . . Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning that. . . the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.⁴⁷ [emphasis added]

Lord Wright went further than Lord Atkin, and endorsed the more restrictive approach associated with Lord Halsbury. He held that:

[i]n one sense every rule of law, either common law or equity, which has been laid down by the Courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy. In that sense Sir George Jessel M.R. referred to the paramount public policy that people should fulfil their contracts. But public policy in the narrower sense means that there are considerations of public interest which require the Courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. *Public policy in this sense is disabling*. It is important to determine first of all on what principles a judge should exercise this peculiar and exceptional jurisdiction when a question of public policy is raised. *What is, I think, now clear is that public policy is not a branch of law to be extended. . . Public policy, like any other branch of the common law, is governed by the judicial use of precedents. . . It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world: but that is true of the principles of common law generally. I find it difficult to conceive that in these days any new head of public policy could be discovered. . .*⁴⁸ [emphasis added]

The conservative view of public policy evidenced in *Janson* and *Fender* greatly influenced the leading Canadian judgment on the doctrine, *Re Millar Estate*.⁴⁹ The principal question in *Millar* was whether a provision in a will,

47 *Ibid.* at 10-12.

48 *Ibid.* at 38-40.

49 (1937), [1938] 1 S.C.R. 1, 1937 CarswellOnt 108 [*Millar*]. It also influenced the Australian courts. See *Wilkinson v. Osborne* (1915), 21 C.L.R. 89 (H.C.A.) at 96-97, stating that “a Court has not a roving commission to declare contracts bad as being against public policy according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State. . . In my opinion the “public policy” which a Court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognize and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists.”

which required that the residue be gifted to the mother who in the 10 years following the testator's death had given birth to the greatest number of children in Toronto, should be declared void for violating public policy. Duff C.J., who delivered judgment for the majority of the Supreme Court of Canada, held that the provision was not invalid. He prefaced his reasons by describing the doctrine in the following terms:

[i]t is convenient to notice first of all the manner in which the principle of law operates, by force of which a contract or disposition of property is held to be invalidated as being obnoxious to the public good on some ground or principle comprehended within the general phrase 'against public policy' . . . *It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.* It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates.⁵⁰ [emphasis added]

Duff C.J. then referred to the seeming dispute between Lords Atkin and Wright in *Fender* regarding the degree to which new categories of public policy could be recognized by the courts, and indicated that, although he was not expressing a final opinion upon the subject, he inclined to the view of Lord Wright that public policy should not be extended beyond its recognized categories.⁵¹ However, Duff C.J. then proceeded to state that:

. . . taking the most liberal view of the jurisdiction of the courts, *there are at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. First. . . 'it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.'* *Secondly. . . 'the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. . .'*⁵² [emphasis added]

50 *Ibid.* at paras. 4-5.

51 *Ibid.* at para. 14.

52 *Ibid.* at para. 15.

Duff C.J. concluded by finding that the provision in the will failed to satisfy the second of these two conditions, since there was nothing to suggest that the tendency of the provision to produce conduct injurious to the state or the citizenry as a whole represented anything more than a speculative possibility.⁵³

Subsequent Canadian decisions have largely followed *Fender* and *Millar* in approaching public policy with caution, and have often declined to apply the doctrine in relation to situations not falling within one of its traditional categories. In *Noble v. Alley*,⁵⁴ for instance, the Ontario Court of Appeal held that a restrictive covenant contained in a deed of land located at a summer resort which prohibited the land's subsequent transfer to a person of "Jewish, Hebrew, Semitic, Negro or coloured race or blood" was valid having regard to public policy. Hope J.A. found that there was not an "atom of reason" why the covenant should be construed as contrary to public policy,⁵⁵ and Hogg J.A., while noting the change in judicial attitudes towards public policy since the decision in *Egerton*, held that "[t]his is not a case in which, to use the words of Lord Atkin in *Fender*. . . 'the harm to the public is substantially incontestable.'"⁵⁶ Robertson C.J.O. stated:

[t]here is nothing criminal or immoral involved; the public interest is in no way concerned. These people have simply agreed among themselves upon a matter of their own personal concern that affects property of their own in which no one else has an interest. If the law sanctions the restricting by covenant or condition of their individual freedom of alienation of that property by limiting their right of alienation to persons of a particular class, as I think it does, then I know of no principle of public policy against which this is an offence.⁵⁷

Nevertheless, the attitude of the Canadian courts to the invocation of public policy does appear to be changing. Although the tendency is by no means

53 *Ibid.* at paras. 20-24.

54 [1949] 4 D.L.R. 375, 1949 CarswellOnt 47 (Ont. C.A.) [*Noble*], reversed on other grounds (1950), [1951] S.C.R. 64. See also *Foncière Cie d'Assurance v. Perras*, [1943] S.C.R. 165 at 174.

55 *Ibid.* at para. 43.

56 *Ibid.* at paras. 58 and 64.

57 *Ibid.* at paras. 28-29. Another refusal to extend the ambit of the public policy doctrine may be found in *Stern v. Sheps* (1966), 58 W.W.R. 612, 1966 CarswellMan 69 (Man. C.A.), affirmed [1968] S.C.R. 834 at para. 15 [WLeC], where Monnin J.A. stated that "[t]o extend the principle of invalidity to this. . . agreement on the ground that it is contrary to public policy would mean that under the circumstances I decide what is contrary to public policy. I am not inclined to do so unless the guidelines are very specific, and such have not been indicated. What may be contrary to public policy today may not be so tomorrow as indeed ideas change even in the matter of public policy." Monnin J.A.'s observations on this point were specifically affirmed by the Supreme Court of Canada.

uniform,⁵⁸ there is now an increasing recognition of the need for a fluid, vibrant public policy doctrine to supplement the more barbarous interstices of the common law.⁵⁹ To a certain extent, such a development is inevitable in light of the obligation to now develop common law principles in accordance with the *Canadian Charter of Rights and Freedoms*.⁶⁰ This more recent approach is captured in *Canada Trust Co. v. Ontario (Human Rights Commission)*,⁶¹ where the Ontario Court of Appeal found that an ostensibly charitable education trust which excluded from its ambit all non-white, British, Christian protestants was invalid by reason of public policy. In striking contrast to the approach taken 40 years earlier in *Noble*, Robins J.A., while acknowledging the conservatism inherent in *Fender and Millar*, held that:

[n]onetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. This, in my opinion, is manifestly such a case. . . . To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any

58 See, e.g., *Beals v. Saldanha*, 2003 SCC 72 at paras. 71-77, adopting a narrow approach to the doctrine as it applies to the enforcement of foreign judgments. See also *Bursey v. Bursey* (1999), 174 Nfld. & P.E.I.R. 291, [1999] N.J. No. 149 (C.A.) at para. 24; and *K. (E.) v. K. (D.)*, 2005 BCCA 425 (C.A.) at para. 23.

59 The Supreme Court of Canada has, for instance, recognized that public policy can play an important role in determining the validity of consent to criminal behaviour. In *R. v. Jobidon*, [1991] 2 S.C.R. 714, [1991] S.C.J. No. 65, the Court found that public policy vitiated consent to the intentional infliction of serious bodily harm, stating (at para. 43): “[j]ust as the common law has built up a rich jurisprudence around the concepts of agreement in contract law, and *volenti non fit injuria* in the law of negligence, it has also generated a body of law to illuminate the meaning of consent and to place certain limitations on its legal effectiveness in the criminal law. It has done this in respect of assault. In the same way that the common law established principles of public policy negating the legal effectiveness of certain types of contracts—contracts in restraint of trade for example—it has also set limits on the types of harmful actions to which one can validly consent, and shelter an assailant from the sanctions of our criminal law.” For an interesting recent decision which considered whether parties could agree by contract to exclude liability for negligence resulting in death, see *Hobbs v. Robertson*, 2004 BCSC 1088 (S.C.), additional reasons at 2004 BCSC 1508 (S.C.), reversed 2006 BCCA 65 (C.A.) at paras. 74-75 [BCSC 1088].

60 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. This obligation has been recognized on several occasions. See, e.g., *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, [1997] S.C.J. No. 13 at para. 23; and *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*) 2002 SCC 8 at paras. 18-20. The confluence between the Charter and the public policy doctrine in the context of discriminatory conditions has been the subject of occasional academic commentary: see Sheena Grattan and Heather Conway, “Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective” (2005) 50 McGill L.J. 511 at 529-536 and 548-550 [Grattan].

61 (1990), 74 O.R. (2d) 481, 1990 CarswellOnt 486 (C.A.) [*Canada Trust*].

other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.⁶² [emphasis added]

The doctrine of public policy today plays an extremely important, although often subtle, role in Canadian contract law. It operates at the horizons of our contract jurisprudence, while defining the residue of the courts' discretion to refuse the enforcement of private agreements. This feature of the doctrine not only makes it interesting, but of great practical significance to the modern litigant. Indeed, there are several recurring contractual settings, such as fundamental breach,⁶³ governing law clauses,⁶⁴ forum selection clauses,⁶⁵ arbitration agreements,⁶⁶ assignments,⁶⁷ implied terms,⁶⁸ restrictive covenants,⁶⁹ municipal contracts,⁷⁰ settlement agreements⁷¹ and contingency fee arrangements,⁷² where public policy assumes a visible and significant presence. In view of the ubiquity and versatility of the doctrine, it is necessary to carefully consider the various categories of agreements to which it has traditionally been applied before attempting to discern from these any unifying theme or focus.

62 *Ibid.* at paras. 36 and 39.

63 *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60 at paras. 52 and 64-65.

64 *United Nations v. Atlantic Seaways Corp.*, [1979] 2 F.C. 541, 1979 CarswellNat 62 (C.A.) at para. 27.

65 *Volkswagen Canada Inc. v. Auto Haus Frolich Ltd.* (1985), 65 A.R. 271, [1985] A.J. No. 719 (C.A.) at para. 5.

66 *Burns & Roe of Canada Ltd. v. Deuterium of Canada Ltd.* (1974), (sub nom. *Deuterium of Canada Ltd. v. Burns & Roe of Canada Ltd.*), [1975] 2 S.C.R. 124, 1974 CarswellNS 63 at paras. 15-16.

67 *Frederickson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145, 1986 CarswellBC 131 (C.A.), affirmed [1988] 1 S.C.R. 1089 at para. 49 [WLeC].

68 *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, reconsideration refused (2001), 2001 CarswellBC 523 (S.C.C.) at paras. 30 and 59-74 [SCC].

69 *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916, 1978 CarswellOnt 1235 at paras. 13-14.

70 *Finney v. McKellar (Township)* (1982), 36 O.R. (2d) 47, 1982 CarswellOnt 576 (C.A.) at para. 27.

71 *Northland Bank v. Willson* (1994), 157 A.R. 172, [1994] A.J. No. 729 (C.A.), leave to appeal refused (1995), 174 A.R. 400 (note) (S.C.C.) at paras. 2-3 [QL].

72 *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).

III. THE CATEGORIES OF PUBLIC POLICY

1. Statutory Illegality, Common Law Illegality and Public Policy

Certain courts and commentators are in the habit of treating “illegality” and public policy as a single concept, and will often include the former within the various categories of the latter.⁷³ Other authorities, while acknowledging a distinction between “statutory” and “common law” illegality, assert that contracts which are contrary to public policy comprise a class of agreements that are “illegal” at common law (in the same way that, e.g., a contract to commit a tort upon a third party is “illegal”).⁷⁴ Nevertheless, it is submitted that the most accurate taxonomy is a tripartite division consisting of the following: (1) statutory illegality; (2) common law illegality; and (3) public policy.⁷⁵

Contracts can fall under the heading of statutory illegality in various ways.⁷⁶ They may be expressly or impliedly prohibited by statute, or be entered into with the object of committing an act prohibited by statute, or require the incidental performance of an act contrary to statute, or have the capacity to confer benefits through the violation of a statute.⁷⁷ Contracts which fall under the heading of common law illegality also involve the contravention of a legal obligation, although the obligations in question are those imposed by tortious

73 See, in this connection, Chitty, *supra* note 6 at para. 16-005. This practice was criticized in *Nepean Hydro-Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347, 1982 CarswellOnt 116 at para. 39, where the Court accepted the view that: “[u]nlawful” and “illegal” are generally used as synonymous terms, but a distinction is occasionally drawn between them; ‘unlawful,’ as applied to promises, agreements, considerations and the like, is sometimes used to denote that they are ineffectual in law because they involve acts which, although not illegal (that is to say, positively forbidden), are disapproved of by the law, and are therefore not recognised as a ground of legal rights, either because they are immoral, or because they are against public policy... It is on this ground that contracts in restraint of marriage or of trade are generally void.” For a semantically opposite position, where the Court linked public policy to “illegality” rather than “unlawfulness”, see *Continental Bank of Canada v. R.*, (sub nom. *Continental Bank Leasing Corp. v. Canada*), [1998] 2 S.C.R. 298, [1998] S.C.J. No. 63 at paras. 114-117.

74 This is the approach taken by Fridman, *supra* note 5, and Waddams, *supra* note 4.

75 This division appears to be the one contemplated in *Halsbury's Laws of England*, 4th ed. (Reissue), Vol. 9(1) (London: Butterworths, 1998) at para. 836 [*Halsbury's*].

76 For a comprehensive discussion of the various ways in which contracts may result in an illegality or a contravention of public policy, see M.P. Furmston, “The Analysis of Illegal Contracts” (1965-66) 16 U. Tor. L.J. 267.

77 See generally: *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1957] 1 Q.B. 267 (Eng. Q.B.); *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.); and *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22. A contract may also be invalid on the ground that it involves the contravention of a judicial order: see *Hadfield v. Hadfield* (1996), 1996 CarswellBC 2819, [1996] B.C.J. No. 2583 (B.C. S.C.) at para. 11, holding void an agreement which contemplated the contravention of a bail order.

and other common law principles.⁷⁸ While considerations of public policy may be relevant to the question of whether such contracts are enforceable,⁷⁹ or to the consequences that should follow where a finding of illegality has been made,⁸⁰ they do not here assume a truly independent legal force.

In contrast to cases of statutory and common law illegality, a contract that violates public policy is one which contravenes a value deemed so fundamental that it necessitates the intervention of the courts *in spite of the fact that* there has been no contravention of a legal obligation.⁸¹ This distinction is significant. Indeed, it is only in the case of the latter that the court is given the power to strike down an otherwise perfectly valid contract, which was freely entered into for sufficient consideration between parties of equal bargaining power and information, owing to motivations extraneous to the *positive law* – and it is precisely this feature of public policy which makes the doctrine important.⁸² Of

78 See, e.g., *Wanderers' Hockey Club v. Johnson* (1913), 14 D.L.R. 42 (B.C. S.C.). Interestingly, in *Peace Hills Trust Co. v. Saulteaux First Nation*, 2005 SKCA 32 (C.A.), leave to appeal refused (2005), 2005 CarswellSask 569, [2005] S.C.C.A. No. 171 (S.C.C.) at paras. 10-15 [SKCA], the Court indicated that a breach of fiduciary duty or breach of trust would not prove sufficient to invalidate an agreement on the basis of common law illegality. The Canadian courts occasionally refer to agreements which involve the commission of (or benefiting from) criminal activities as engaging the “common law” illegality doctrine. However, it is submitted that such agreements are now better understood as instances of statutory illegality given the eradication of common law criminal offences in 1954. This point is noted by Waddams, *supra* note 4 at 398, n22.

79 Public policy may, for instance, serve as a rationale for refusing to recognize consent where an agreement contemplates an illegal act or the pre-emption or contracting out of a given statutory regime: see, in this respect, *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 1982 CarswellOnt 730 at para. 19; *R. v. Jobidon*, [1991] 2 S.C.R. 714, [1991] S.C.J. No. 65 at para. 43; and *Canadian Imperial Bank of Commerce v. Bramlea Inc.* (1995), 33 O.R. (3d) 692 (Gen. Div.).

80 See *Still v. Minister of National Revenue*, [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.) at paras 10 and 49.

81 A similar distinction is drawn by Buckley, *supra* note 8 at para. 1.01, who states: “[i]n a broad sense, any refusal to enforce a contract for reasons not related primarily to the merits of the parties to it may be said to be a decision derived from ‘public policy’. Nevertheless, situations in which that decision is based upon criminal or tortious behaviour by the parties may legitimately be regarded as conceptually distinct from those involving issues such as ‘morality’, or restraint of trade...” See also *Halsbury’s*, *supra* note 75 at para. 841 (stating that “[q]uite apart from the general principle which invalidates contracts involving a legal wrong, the courts have developed a number of heads of public policy under which contracts may be illegal or void”), and P.B. Carter, “The Role of Public Policy in English Private International Law” (1993) 42 I.C.L.Q. 1 at 1 [Carter] (stating that “[e]very rule of law. . . should. . . be based upon, and reflect, policy considerations. The concept of public policy is, however, different: it denotes a justification or excuse for not applying, or recognising the application of, an otherwise applicable rule of law”).

82 Waddams, *supra* note 4 at 395 (cited in *Brazier v. Columbia Fishing Resort Group Corp.* (1997), 33 B.C.L.R. (3d) 293, [1997] B.C.J. No. 1006 (S.C.), leave to appeal refused (1997), 1997 CarswellBC 1431, [1997] B.C.J. No. 1641 (B.C. C.A. [In Chambers]) at para. 15 [QL]) distinguishes between public policy and statutory illegality by stating that,

course, public policy still renders a contract which violates it “unlawful” in the sense that it will not be enforced, but this unlawfulness is the result of, rather than the reason for, the court’s logic. If contracts in violation of public policy were to be deemed “illegal” merely because the doctrine afforded a basis for invalidity, then there would be nothing to prevent agreements falling within any ground of contractual invalidity, such as mistake or incapacity, from also being so construed.

Many contracts that have been held by commentators to be contrary to “public policy” have in truth simply contravened an enforceable legal obligation (whether through a crime, tort or breach of an equitable obligation).⁸³ This is perhaps owing to the fact that illegality and public policy are often difficult to distinguish. Indeed, it is not hard to imagine activities that are offensive to a fundamental public value and which at the same time are in violation of a common law obligation.⁸⁴ Nevertheless, the distinction is vital. It is submitted that only a contract whose invalidation has been primarily motivated by its incongruity with a fundamental value should be held contrary to “public policy.” It is to the nature of such values, concealed as they are within the various “categories” of public policy (i.e., contracts injurious to the state and the administration of justice, contracts involving immorality, contracts affecting marriage and contracts in restraint of trade) that we now turn.⁸⁵

“[i]n the former group of cases... [t]he court itself makes the judgment as to what is public policy... In the case of an agreement that is contrary to a statute, though of course public policy remains the root reason for intervention, the court does not itself make the judgment of what is public policy”. It is submitted that this distinction is applicable to all contracts which are “illegal” owing to either statute or common law – in both cases, the interest at stake (i.e., the legal obligation offended) is worthy of protection owing to its *source*, regardless of its normative importance. However, in the case of public policy, the interest at stake (i.e., the value or social obligation offended) is deemed worthy of protection because of its normative importance.

83 An excellent example of this is *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 2001 CarswellOnt 1971, [2001] O.J. No. 2170 (Ont. S.C.J.), where the Court found contrary to “public policy” an agreement between a charity and its agent, whereby the former agreed to pay the latter 70 per cent of the monies which the agent obtained from the public on the charity’s behalf, in circumstances where the public were not informed that virtually no money would be applied to the charitable purpose. This finding is clearly attributable to the misrepresentations made to the public (which, indeed, formed an alternative basis for the Court’s conclusions). See also *Neville v. Dominion of Canada News Co. Ltd.*, [1915] 3 K.B. 556 (C.A.) and the explanation given for this decision by Buckley, *supra* note 8 at para. 7.27.

84 In certain cases, such as contracts involving maintenance and champerty, the common law obligation is indistinguishable from public policy.

85 These “categories” of public policy involve cases where “public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded” (*Rodriguez v. Speyer Brothers*, [1919] A.C. 59 (H.L.) at 81). They may accordingly be distinguished from cases which have crystallized into a positive rule of law (such as the rule against perpetuities or restraints on alienation), and

2. Contracts Injurious to the State

There have traditionally been two heads of public policy included within the category of contracts injurious to the state: (1) contracts which are prejudicial to its foreign affairs; and (2) contracts which are prejudicial to its domestic affairs.

The recognition that contracts injurious (although not treasonous) to the foreign affairs of the state form a distinct head of public policy can be traced to 1799, when it was held that contracts with the enemy during a period of war were unenforceable.⁸⁶ There have since been several English judgments⁸⁷ (and

those where no principle has ever been distilled into a common set of propositions (such as the rule against gaming contracts). Much as the line between “illegality” and public policy is not easy to draw, there is significant overlap between the traditional public policy categories. As noted by Chitty, *supra* note 6, at 940, “[c]ertain cases do not fit clearly into any of these...categories.” In this, as in virtually every area related to public policy, commentators are divided over how best to characterize the doctrine. The authors of Chitty, *supra* note 6, list five categories, while Fridman, *supra* note 5, lists six. Waddams seems to have nine, although he never expresses an actual number. Curiously, although there exists substantial disagreement as to the proper *classification* of the heads of public policy, the commentators are in general harmony with respect to what is to be treated as a “head” (i.e., as an *instance* of the application of the doctrine of public policy itself). For the purposes of the present work, we have adopted the general organization of categories suggested by Fridman, absent his first category (which is concerned with “illegal” contracts) for reasons noted above. Given the scope of this paper, only the most cursory exegesis and analysis of the categories may be here undertaken, and the reader is urged to consult standard contract texts should he or she desire to gain a more mature understanding of the cases in which public policy has been applied by the courts. The exhaustive depiction of the categories undertaken by Buckley, *supra* note 8, extends to approximately one hundred and fifty pages. Indeed, the sheer breadth of the topic has led Waddams, *supra* note 4, at 397, to reject “[a] detailed account of each area of common law and statutory illegality [as] out of place in a general study of contract law. The law of restraint of trade, for example, fills whole books.”

⁸⁶ *The Hoop* (1799), 1 C. Rob. 196. This principle is of course tied to larger concerns relating to national security. For a decision which recognized that national security could justify a court in prohibiting the disclosure of confidential information on public policy grounds, see *The Lord Advocate v. The Scotsman Publications Ltd.*, [1989] 1 F.S.R. 310 (Ct. Sess.), affirmed [1990] 1 A.C. 812 (H.L.) at 319 [F.S.R.]. Another aspect of the rule which prohibits contracts injurious to the foreign affairs of the state is the comity doctrine that forbids the enforcement of contracts where this would result in an activity that breaches the law of a friendly foreign country (see: *De Wutz v. Hendricks* (1824), 2 Bing. 314; *Ralli Brothers v. Companion Naviera Sota y Aznar*, [1920] 2 K.B. 287 (Eng. K.B.); *Foster v. Driscoll*, [1929] 1 K.B. 470 (Eng. K.B.); *Shiesel v. Kirsch*, [1931] O.R. 41 (C.A.); and *Regazzoni v. K.C. Sethia*, [1958] A.C. 301 (H.L.)), even if the contract is governed by domestic law (*Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.*, [1988] Q.B. 448 (Q.B.D.)). However, this rule may not apply where the contract, while illegal under the laws of a foreign country, is legal both in the place where it is to be

a handful by the Canadian courts⁸⁸) which consider the principles applicable to contracts with alien enemies. Since conflicts equal in scope to the two World Wars and declarations of war currently appear unlikely, this public policy principle could be tested anew in cases where contracts are with citizens or entities of countries alleged to have contravened significant human right issues, assisted terrorism either directly or indirectly, or improperly annexed another state's lands or resources.⁸⁹

The second head of public policy included within this category – contracts prejudicial to a state's domestic affairs – encompasses agreements which fetter the discretion of public officials.⁹⁰ Thus, courts have held that the wages of certain types of public employees may not be garnished, attached or assigned for fear that this would inhibit the exercise of their discretion.⁹¹ Similarly, contracts may violate public policy where they inhibit the freedom of a governmental body or municipality to act.⁹² In *Pacific National Investments Ltd. v.*

performed and under the laws by which it is governed (*JSC Zestafoni G Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd.*, [2004] EWHC 245 at para. 75).

87 See *inter alia*: *Janson*, *supra* note 12; *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260 (H.L.); *Rodriguez v. Speyer Brothers*, [1919] A.C. 59 (H.L.); and *NV Gerb Van Udens Scheepvaart en Agentuur Maatschappij v V/O Sovfracht*, [1943] A.C. 203 (H.L.).

88 See *Lampel v. Berger* (1917), 40 O.L.R. 165 (H.C.).

89 One interesting question which arises out of the nature of modern armed conflict is when two countries will be found in a state of sufficient "war" for the principle of public policy to be engaged. This issue was recently dealt with in *Sadiqa Ahmed Amin v. Irving Brown*, [2005] EWHC 1670 (Ch. D.). There, the claimant was an Iraqi citizen resident in Iraq who attempted to enforce her rights as the owner of a residence in London against the defendant. The latter objected on the basis that, *inter alia*, the United Kingdom was at war with Iraq, and the plaintiff was therefore an alien enemy with no standing to prosecute an action in the U.K. courts. Following a detailed examination of when two countries were considered to be "at war," the court concluded that, although United Nations Security Council resolutions had allowed for the use of force in Iraq to restore international peace and security, there was not a state of war between the U.K. and Iraq. In the result, the plaintiff was found to have standing to bring her action against the defendant.

90 It would appear that this principle may extend to any entity which has been conferred a power that is required to be exercised in the public interest. See *Montreal Park & Island Railway v. Chateauguay & Northern Railway* (1904), 35 S.C.R. 48, where the Supreme Court of Canada held that an agreement between two chartered railway companies not to construct their franchises on each other's land, which power was given them by the government for the general public convenience, was contrary to public policy.

91 These cases are reviewed in *Royal Bank v. Scott*, [1971] 4 W.W.R., 1971 CarswellNWT 2 (N.W.T. Terr. Ct.) at paras. 67-79. See also *Frederickson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145, 1986 CarswellBC 131 (C.A.), affirmed [1988] 1 S.C.R. 1089 at para. 49 [WLeC].

92 See, e.g., *Finney v. McKellar (Township)* (1982), 36 O.R. (2d) 47, 1982 CarswellOnt 576 (C.A.) at para. 27. This principle may also be justified on the basis of the administrative law doctrine which prohibits the fettering of statutory discretion: see *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104, 1994 CarswellOnt 1021 (C.A.) at para. 14.

Victoria (City),⁹³ the Supreme Court of Canada held that it is immaterial whether such fettering takes the form of a direct constraint upon a municipality's power to act, or an indirect constraint (such as an agreement to compensate the municipality if it exercises its powers a certain way). Nevertheless, the Court also indicated that this principle, while applying to the fettering of legislative and adjudicative powers, does not apply to the fettering of a municipality's business and proprietary powers.⁹⁴

In addition to contracts which fetter public discretion, it was held as early as 1799 that contracts involving the sale or transfer of public offices represent a distinct class of agreements which are forbidden by the doctrine.⁹⁵ Similarly, in *Ryan v. Willoughby*,⁹⁶ it was decided that a contract which led to the resignation of public office for money fell within its ambit. In *Parkinson v. College of Ambulance Ltd. and Harrison*,⁹⁷ the Court found that a contract where money was offered as the consideration for an honorary title was contrary to public policy. A closely analogous type of contract is one which involves the bribery of public officials or the use of public office or connections for the purposes of influence peddling.⁹⁸ Contracts which contemplate the deception of Crown servants are also considered to be contrary to public policy.⁹⁹

3. Contracts Injurious to the Justice System

The category of public policy concerned with contracts injurious to the justice system is traditionally comprised of three main heads: (1) contracts prejudicial to the administration of justice; (2) contracts to oust the jurisdiction of the court; and (3) contracts involving maintenance and champerty.

Contracts prejudicial to the administration of justice have been held to include such varied arrangements as an agreement not to disclose information for use in a criminal investigation,¹⁰⁰ an agreement not to testify at a criminal trial,¹⁰¹ an agreement to procure evidence for use against a party at a criminal trial (where the entitlement to consideration varied depending upon the outcome

93 2000 SCC 64, reconsideration refused (2001), 2001 CarswellBC 523 (S.C.C.) at para. 65 [SCC].

94 *Ibid.*

95 See *Blachford v. Preston* (1799), 8 T.R. 89 at 94.

96 (1900), 27 O.A.R. 135 (C.A.), affirmed (1900), 31 S.C.R. 33.

97 [1925] 2 K.B. 1 (K.B.D.).

98 *Wilkinson v. Osborne* (1915), 21 C.L.R. 89 (H.C.A.); *Carr-Harris v. Canadian General Electric Co.* (1921), 49 O.L.R. 351 (C.A.). Contracts of this nature would also be invalid on the basis of statutory illegality given ss. 119-125 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("Criminal Code"); see *Harvey v. Newfoundland & Labrador*, 2005 NLTD 198 (T.D.).

99 *Win Win Solutions Inc. v. C.G. Consulting Group*, [1995] O.J. No. 2393 (Ont. Gen. Div.) at paras. 5-6.

100 *A. v. Hayden* (1984), 156 C.L.R. 532 (H.C.A.).

101 See *Collins v. Blantern* (1767), 2 Wils. K. B. 347.

of the proceedings),¹⁰² an agreement to procure evidence for use at a civil trial,¹⁰³ and an agreement which prevented a witness from giving evidence at future civil actions.¹⁰⁴ A contract which seeks to conceal a statutory offence has also been deemed to fall within this head of public policy.¹⁰⁵ However, the principal type of contract which has been found invalid on this ground is an agreement which involves as consideration the promise to “stifle” or suppress the prosecution of an offence.¹⁰⁶

The second head of the category of contracts which are injurious to the judiciary involves agreements that seek to oust the jurisdiction of the court.¹⁰⁷

102 *Symington v. Vancouver Breweries Ltd.*, [1931] 1 D.L.R. 935 (B.C. C.A.).

103 *Pay v. Kaboly-Zadeh*, 2006 BCSC 925 at paras. 139-145.

104 *Flexi-Coil Ltd. v. Smith Roles Ltd.* (1980), 50 C.P.R. (2d) 29 (Fed. T.D.), affirmed (1981), [1982] 1 F.C. 533 (C.A.). An agreement whereby one defendant refuses to voluntarily co-operate with another defendant in the plaintiff’s action against the latter is not contrary to public policy where it does not require the first defendant to suppress evidence: *Northland Bank v. Willson* (1994), 157 A.R. 172, [1994] A.J. No. 729 (C.A.), leave to appeal refused (1994), 26 Alta. L.R. (3d) 1 (note) (S.C.C.) at paras. 2-3 [QL]. Similarly, an agreement not to discuss evidence with another party prior to trial will not violate public policy where the agreement provides that the contracting party will respond truthfully to a subpoena if called upon to do so: *Bains v. Bhandar*, 2000 BCCA 466 (C.A.), leave to appeal refused (2001), 269 N.R. 206 (note), [2000] S.C.C.A. No. 528 (S.C.C.) at paras. 41-43.

105 See *Initial Services v. Putterill* (1967), [1968] 1 Q.B. 396 (Eng. C.A.).

106 Although the offence for which the prosecution has been suppressed need not be criminal, it must be of a sufficiently “public” character to fall within the scope of the principle: see *Johnson v. Musselman* (1917), 37 D.L.R. 162 (Alta. S.C. (App. Div.)). There is a comparatively large body of jurisprudence which considers when an offence will be “public” in this sense. In *People’s Bank of Halifax v. Johnson* (1892), 20 S.C.R. 541, 1982 CarswellNS 77, the Supreme Court of Canada relied upon this branch of the public policy doctrine in declaring void a bond which was provided to a bank in consideration for its agreement not to prosecute one of its former agents, who had embezzled bank funds and subsequently married the daughter of the surety. Ritchie C.J., who delivered the leading judgment, stated (at para. 9) that: “[t]he allowance of such an objection as this is not for the sake of the party who raises it but is grounded on general principles of policy. Where the fact comes to the knowledge of a party, as this most assuredly did, that a felony has been committed, if it is not his duty to prosecute it certainly is contrary to his duty to compromise or compound the felony. . .” A recent example of an agreement being held invalid on similar facts can be found in *Newell v. Royal Bank* (1997), 147 D.L.R. (4th) 268, [1997] N.S.J. No. 13 (N.S. C.A.) at para. 20.

107 There is also an interesting strain of public policy which may be interpreted as addressing contracts that oust the jurisdiction of the legislature (although some authors, such as Fridman, *supra* note 5 at 349, treat this as an instance of statutory illegality, albeit one infused with public policy considerations). This involves cases in which the courts have declared invalid contracts which purport to preclude the application of a specific statutory regime. In order for this principle to be engaged, it would appear that the statutory regime in question must possess a sufficiently “public” character and apply to circumstances involving an asymmetry of bargaining power. The contract should also give one party a lesser right than it would otherwise be entitled to. See generally: *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 1982 CarswellOnt 730 at

The general rule has historically been that no contract may prevent a party from having recourse to the courts with respect to an error of law,¹⁰⁸ and there is a clear analogy here to the principle of constitutional law which prohibits the legislature from absolutely foreclosing the judicial review of decisions reached by administrative tribunals.¹⁰⁹ Despite the foregoing proposition, Federal and provincial arbitration legislation now enables parties to submit disputes regarding many questions of fact or law to the exclusive jurisdiction of an arbitrator. Additionally, even prior to this legislation, the courts had held that a contract may make arbitration on a question of fact or law a condition precedent to litigation,¹¹⁰ and may state that any rulings of fact arrived at by the arbitrator or tribunal in question are to be final.¹¹¹ Similarly, parties may agree to confer upon one another certain remedial rights (such as a creditor taking into possession the property of a debtor) without the necessity of first obtaining judicial authorization.¹¹² In light of the legislative developments noted above, and the current emphasis upon increasing access to justice, the courts also appear to be

para. 19; *Potash v. Royal Trust Co.*, [1986] 2 S.C.R. 351, [1986] S.C.J. No. 58 at paras. 39-41; and *N.A.P.E. v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, [1996] S.C.J. No. 54 at paras. 15-26. In *Syndicat des employés de l'Hôpital général de Montréal c. Sexton*, (sub nom. *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hopital general de Montreal*) 2007 SCC 4 at para. 21, the principle was summarized as consisting in the proposition that: "the parties to a contract cannot agree to limit a person's fundamental rights" (although, curiously, the degree to which parties may limit rights arising under the *Charter* would appear to remain an open question: *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 92). An interesting manifestation of this principle may be observed where parties seek to oust the application of a given statutory regime through governing or "choice of law" provisions: see *United Nations v. Atlantic Seaways Corp.*, [1979] 2 F.C. 541, 1979 CarswellNat 62 (C.A.) at para. 27, stating that "the proper law must not have been chosen to evade a mandatory provision of the law with which the contract has its closest and most real connection." These types of agreements are discussed in William Tetley, "Evasion/Fraude a la loi and Avoidance of the Law" (1994) 39 McGill L.J. 303.

108 *Thompson v. Charnock* (1799), 8 T.R. 139. See also *Jack Bradley (Maritimes) Ltd. v. Modern Construction Ltd.* (1966), 59 D.L.R. (2d) 519 (N.B. C.A.) at 524; and *Enderby Town Football Club v. Football Assn. Ltd.* (1970), [1971] Ch. 591 (Eng. C.A.) at 607.

109 See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

110 The *locus classicus* of this principle is *Scott v. Avery* (1855), 5 H.L.C. 811 (U.K. H.L.). See also *Burns & Roe of Canada Ltd. v. Deuterium of Canada Ltd.* (1974), (sub nom. *Deuterium of Canada Ltd. v. Burns & Roe of Canada Ltd.*) [1975] 2 S.C.R. 124.

111 *Baker v. Jones*, [1954] 1 W.L.R. 1005 (Q.B.D.). This point was qualified in *Nikko Hotels (U.K.) Ltd. v. M.E.P.C. plc*, [1991] 2 E.G.L.R. 103 (Ch. D.), such that a contract cannot prevent a party from making an application to a court with respect to a matter of fact where the decision of the arbitrator in relation to it issued from an analysis of the wrong question.

112 *Banque nationale du Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059, [1991] S.C.J. No. 38, reconsideration refused at para. 46 [QL].

taking a more lenient approach to alternative dispute resolution agreements which are alleged to be inconsistent with public policy.¹¹³

The final head of public policy traditionally included within this category is concerned with contracts that involve maintenance or champerty.¹¹⁴ Although maintenance and champerty were at one time criminal, their status in this respect was ended when Parliament abolished common law crimes in 1954. Nevertheless, both maintenance and champerty remain torts at common law,¹¹⁵ and champerty is still expressly forbidden under provincial legislation in Ontario¹¹⁶ (although this has been held merely to codify the common law).¹¹⁷ In light of their status as torts, the invalidation of contracts which stipulate maintenance or champerty is *prima facie* attributable to common law illegality rather than the doctrine of public policy as described earlier in this paper. Nevertheless, “[t]he fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse.”¹¹⁸ It is therefore submitted that the rationale for proscribing such conduct is predominantly attributable to public policy. The spectre of maintenance and champerty may arise in several different contractual settings, including the assignment of tortious causes of action,¹¹⁹ and contingency fee arrangements. With respect to the latter, the Ontario Court of Appeal in *McIntyre Estate v. Ontario (A.G.)*¹²⁰

113 See, e.g., *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd.*, 2005 ABCA 103 (C.A.) at paras. 31-37, holding that a mediation agreement whereby the parties agreed to participate in a judicial dispute resolution process (pursuant to which the judge would impose a resolution of all outstanding issues if a settlement was not reached) was not prohibited on policy grounds, in part because of the benefits which “JDR” had for the justice system.

114 Maintenance and champerty have been defined as follows: “[m]aintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty. . . . The courts have made clear that a person’s motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive which motive may include, but is not limited to, “officious intermeddling” or “stirring up strife,” that a person will be found to be a maintainer”: *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) at paras. 26-27.

115 See, e.g., *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) at para. 25.

116 See, in Ontario, the *Champerty Act*, R.S.O., 1897, c. 327.

117 *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) at para. 46.

118 *Ibid.* at para. 32.

119 *Frederickson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145 (C.A.), affirmed [1988] 1 S.C.R. 1089.

120 (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) [*McIntyre*].

recently rejected the traditional common law position that contingency fee agreements were champertous,¹²¹ noting that public policy considerations relating to the administration of justice had evolved to place a greater emphasis upon access to the courts than in the past. The Court stated that:

*[I]here can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. . . I am persuaded that the historic rationale for the absolute prohibition is no longer justified.*¹²² [emphasis added]

McIntyre thus represents an example of the courts reformulating the public policy doctrine to respond to the impact of changing social conditions upon one of the doctrine's underlying concerns.¹²³

4. Contracts Involving Immorality

The category of public policy that is concerned with contracts involving immorality is perhaps the most dynamic and theoretically interesting area of the doctrine's application.¹²⁴ Although one writer has noted that "[a] perusal of

121 As noted in *McIntyre*, *supra* note 120 at para. 56, every other Canadian province and territory has enacted legislation or rules of court which alter this position and permitted the use of contingency fees. The Ontario legislature followed suit subsequent to *McIntyre* by amending the *Solicitors Act*, R.S.O. 1990, c. S.15.

122 *McIntyre*, *supra* note 120 at paras. 55 and 70.

123 The Court in *McIntyre*, *supra* note 120 at paras. 71-73, was also careful to note that its decision was partly based upon the existence of a regulatory framework which it believed was sufficient to prevent abuses of process through lawyer-client contingency fee agreements. The absence of such a framework in the case of paralegals led the Court in *Tri Level Claims Consultant Ltd. v. Koliniotis* (2005), (sub nom. *Koliniotis v. Tri Level Claims Consultant Ltd.*) 201 O.A.C. 282, [2005] O.J. No. 3381 (C.A.) at paras. 23-33 to hold that paralegal-client contingency fee agreements should remain barred on the basis of the public policy doctrine.

124 The general proposition that a contract which is contrary to morality may be unenforceable was recognized in *Jones v. Randall* (1774), 1 Cowp. 17 at 37 (Eng. K. B.). The idea that immoral behaviour is contrary to public policy has also been recognized in conflict of laws jurisprudence, where the doctrine is often invoked as a defence to the recognition and enforcement of foreign judgments: see *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.), additional reasons at (1992), 6 O.R. (3d) 737 at 758 (C.A.); and *Beals v. Saldanha*, 2003 SCC 72 at paras. 71-77. However, it is unclear to what extent public policy in this context is distinct from the doctrine of public policy in contract law. The Canadian conflict of laws conception of public policy appears to be increasingly fixated upon morality, often to the detriment of other categories of public policy (such as restraint of trade or prejudice to the administration of justice)

the standard text books on the Law of Contract indicates that there is a received doctrine as to immoral contracts. . . [i]t is that contracts promoting sexual immorality are illegal..."¹²⁵ the law regarding such contracts has changed dramatically in recent years. In consequence, it is submitted that contracts involving discrimination should also be held to fall within the ambit of this category.

With respect to sexual immorality, the first type of contract that has traditionally been deemed to violate public policy on this ground is a cohabitation agreement between unmarried parties.¹²⁶ However, in recent years there has been an increasing recognition that this head of public policy is founded upon a culturally irrelevant, Victorian ideal of morality, and it has since been abandoned in Canada¹²⁷ and the United Kingdom.¹²⁸ A classic example of the decision to ignore this class of public policy can be found in the following statement of Stable J., in the Australian case of *Andrews v. Parker*:

[b]ut in any event, are the actions of people today to be judged in the light of the standards of last century? As counsel for the plaintiff said, cases discussing what was then by community standards sexual immorality appear to have been decided in the days when for the sake of decency the legs of tables wore drapes, and women (if they simply had to do it) never referred to men's legs as such, but

which have informed its development in contract law. See, for instance, *Oakwell Engineering Ltd. v. Enernorth Industries Inc.* (2006), 81 O.R. (3d) 288, [2006] O.J. No. 2289 (C.A.) at para. 21, leave to appeal refused (2007), 2007 CarswellOnt 266, [2006] S.C.C.A. No. 343 (S.C.C.), holding that the public policy defence could not be invoked to defend against the enforcement of a foreign judgment on the ground that it was the "product of a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law" since the law under which it was issued was not "contrary to the fundamental morality of the Canadian legal system." The different considerations operative in the application of the public policy doctrine in the contract and conflict of laws context are identified in Carter, *supra* note 81 at 2, where the author states that "[p]ublic policy should not be invoked in private international law merely because it could, or would, be invoked in the forum if the same facts had been presented in a purely domestic context. . . The automatic injection of standards applicable in a domestic situation into a transactional situation may be seen, at best as an exercise in mechanical jurisprudence, and at worst as blatant judicial chauvinism." See further David A. Crerar, "A Proposal For a Principled Public Policy Doctrine Post-Tolofson" (1998), 8 W.R.L.S.I. 23.

125 John E. Dwyer, "Immoral Contracts" (1977) 93 L.Q.R. 386 at 386 [Dwyer].

126 The case most often cited in connection with this rule is *Upfill v. Wright*, [1911] 1 K.B. 506 (K.B.D.), where a landlord who knowingly rented an apartment to the mistress of a married man was denied the ability to recover on his unpaid rent given the immoral purpose for which the contract was entered into.

127 See *Chrispen v. Topham* (1986), 28 D.L.R. (4th) 754 (Sask. Q.B.), affirmed (1987), 39 D.L.R. (4th) 637 (Sask. C.A.).

128 See *Barclays Bank plc v. O'Brien* (1993), [1994] 1 A.C. 180 (H.L.) at 198. Note, however, the decision in *Ennis v. Butterly*, [1996] 1 I.R. 426, discussed in John Mee, "Contract Law – Public Policy for the New Millenium" (1997) 19 Dublin U.L.J. 150. The American position is explored in Harry G. Prince, "Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?" (1985) 70 Minn. L. Rev. 163 at 165-66 [Prince].

called them their 'understandings'... *Surely what is immoral may be judged by the current standards of morality of the community.*¹²⁹ [emphasis added]

Another type of contract which falls within the head of "sexual immorality" is one involving the provision of assistance to a prostitute. It has been held that an agreement to tender products or services to a prostitute or brothel which are intended to be used in the pursuit of an immoral purpose is contrary to public policy,¹³⁰ although where the innocent party has no knowledge that such products will be used for prostitution, the contract is still enforceable. Contracts involving the sale or bailment of necessities to a prostitute are also enforceable,¹³¹ provided there is no "evidence specifically to connect the contract with the prostitution."¹³² Despite such caveats, it would appear that the courts will still refuse to enforce contracts which promote prostitution.¹³³

Although, as noted above, the general academic consensus with respect to immoral contracts is that "the law in this connection appears to concern itself only with what is sexually reprehensible,"¹³⁴ it seems appropriate to treat the recent emergence of discrimination as a head of public policy that falls within the general category of immorality. As late as 1948, in the case of *Noble*, it was held by the Ontario Court of Appeal that a restrictive covenant accompanying the sale of land in a summer resort which prohibited its subsequent transfer to a person of "Jewish, Hebrew, Semitic, Negro or coloured race or blood" was valid having regard to public policy.¹³⁵ However, this position seems to have reversed itself, as the Ontario Court of Appeal held in the 1990 decision of *Canada Trust* that a condition in a scholarship trust which excluded applicants who were not "Christians of the White Race" was, in fact, contrary to public policy. Similar decisions may be found in England (where it was held that the actions of a trade association in refusing membership to a woman were contrary

129 [1973] Qd.R. 93 (S.C.) at 102 and 104. Similar reasoning was applied in *Armhouse Lee Ltd. v. Chappell*, *The Times* (7 August 1996) (Eng. C.A.), where the Court declined to find that a contract which bound the respondent to pay for certain telephone sex advertisements was so immoral that it should be declared contrary to public policy. Note, however, that such agreements may still potentially infringe the obscenity provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and thus be invalidated on the basis of statutory illegality.

130 *Pearce v. Brooks* (1866), L.R. 1 Ex. 213 (Eng. Exch.). See also *Dominion Fire Insurance v. Nakata* (1915), 52 S.C.R. 294.

131 *Bowry v. Bennet* (1808), 1 Camp. 348.

132 Chitty, *supra* note 6, at 977.

133 *Armhouse Lee Ltd. v. Chappell*, *The Times* (7 August 1996) (Eng. C.A.). For a contrary view, see Judd, *supra* note 19 at 691-692. Such contracts may also be invalid on the basis of statutory illegality given s. 213 of the *Criminal Code*.

134 Cheshire, *supra* note 7 at 413.

135 See also *Clayton v. Ramsden*, [1943] A.C. 320 (H.L.). An early decision to the contrary may be found in *Wren, Re*, [1945] O.R. 778, 1945 CarswellOnt 62 (H.C.J.) at paras. 20-23.

to public policy).¹³⁶ Nevertheless, there would appear even today to remain some judicial debate concerning the extent to which conditions that discriminate against persons on the basis of *religious* beliefs are in violation of public policy.¹³⁷ In light of the judicial obligation to develop the common law in accordance with the values contained in the *Charter*, it is likely that the prohibition upon discriminatory contracts will gather increasing force in the future.¹³⁸

5. Contracts Affecting Marriage

The category of public policy which seeks to preserve the institution of marriage is currently undergoing a significant evolution, and it is submitted that of its three heads, two will eventually be abandoned by the judiciary in response to changing social conditions.

The first such head is concerned with contracts to “broker,” or procure a marriage.¹³⁹ Although the rule against marriage brokerage has yet to be overturned, it must be acknowledged that “[t]here is now a substantial and profitable industry devoted to the finding of spouses or other life-partners and those who take advantage of its services.”¹⁴⁰ Further, the old jurisprudence is based on a theory of marriage as a “holy union” which should not be “defiled” by secular considerations. It is therefore grounded upon religious and ethical precepts that run counter to the current legal interpretation of marriage as a civil institution.¹⁴¹ Were the question to arise before a modern court, it would probably be found that this head of public policy is no longer controlling.¹⁴²

The other class of contracts affecting marriage whose continued authority is questionable concerns an agreement by a married individual to wed a person

136 See *Nagle v. Feilden*, [1966] 2 Q.B. 633 (Eng. C.A.).

137 Compare *Blawthwayt v. Baron Cawley*, [1976] A.C. 397 (H.L.) and *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 (C.A.) leave to appeal to S.C.C. refused, [1996] S.C.C.A. 241. For an interesting commentary on the validity of such conditions, see Grattan, *supra* note 60.

138 Some authors have suggested that this trend is already discernable in the case law: see Grattan, *supra* note 60 at 529-536. Other commentators have suggested that human rights in general should be deemed to fall within the protective ambit of the doctrine: see Mark Freeman and Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 214.

139 The leading decision is *Hermann v. Charlesworth*, [1905] 2 K.B. 123 (Eng. C.A.). See also *Campbell v. Campbell*, [1936] 4 D.L.R. 52 (N.S. C.A.).

140 Buckley, *supra* note 8 at para. 6.19.

141 See *Reference re Same-Sex Marriage Act*, 2004 SCC 79 at para. 22. Indeed, based upon a March 16, 2004 CBC article reporting on online dating data, an average of 40 million Americans and 7 million Canadians visit an online dating service every month and U.S. consumers had spent approximately \$214 million on internet dating sites in the first half of 2003: see CBC, “Online Dating Facts and Figures” March 16, 2004; online: CBC Website <<http://www.cbc.ca/consumers/market/files/services/onlinedating/facts.html>>.

142 Buckley, *supra* note 8 at para. 6.19.

who knows that his proposed partner is already within a state of matrimony.¹⁴³ However, as noted earlier in the paper, the House of Lords held in *Fender* that this principle does not apply where the married individual has already received a decree *nisi* dissolving the marriage. Further, as several commentators have suggested, the legislative annulment in England and in several Canadian provinces of litigation respecting a breach of contract to marry entails that this line of jurisprudence is now largely irrelevant.¹⁴⁴ Ultimately, “even if such an action is still possible, the changed social attitudes...would seem to make any such agreements to marry binding, no matter when made. . . .”¹⁴⁵

The final head of public policy usually treated within this category has arisen in relation to contracts in restraint of marriage. The rule that such contracts are invalid has a long and venerable history, and was stated as early as 1768 in the English case of *Lowe v. Peers*.¹⁴⁶ Nevertheless, the courts have since held that a contract which merely provides a disincentive to marry will not fall within the ambit of the rule.¹⁴⁷

6. Contracts in Restraint of Trade

While the category of contracts in restraint of trade has been described by one commentator as “perhaps the most significant head” of public policy,¹⁴⁸ it is also the most voluminous. In recent years, it seems to have graduated to an entirely independent doctrine of contract law, and is possessed of a surfeit of rules and precedents which are far beyond the scope of this paper to address. The present work shall therefore refrain from examining the history and nature of its various heads, and restrict itself to an outline of the most rudimentary

143 Such contracts were deemed contrary to public policy in *Sheehan v. Mercantile Trust Co.* (1920), 52 D.L.R. 538 (Ont. C.A.). See also *Pope v. Pope*, [1940] 3 D.L.R. 454, [1940] B.C.J. No. 29 (C.A.) at para. 8, where the Court indicated that a contract pursuant to which one woman agreed to pay another for obtaining divorce from her husband, in order that the former could marry him, would also be in violation of the rule.

144 See, e.g., Buckley, *supra* note 8 at para. 6.14, and Fridman, *supra* note 5 at 378.

145 Fridman, *supra* note 5 at 378. Another commentator has noted that “[t]he doctrine would appear. . . to demand...fundamental revision”: Dwyer, *supra* note 125 at 388. This proposition is borne out by the jurisprudence. See, for instance, *Brooks v. Alker* (1975), 9 O.R. (2d) 409 (H.C.J.), holding that a contract for the sale of land, which was entered into by a husband and wife with a third party in order to provide them with the proceeds necessary to effect their separation, was not invalid by reason of public policy.

146 (1768) 4 Burr. 2225 (Eng. K.B.). See also *Bradley v. Bradley* (1909), 19 O.L.R. 525 (Div. Ct.).

147 *Caron v. Caron*, [1987] 1 S.C.R. 892, [1987] S.C.J. No. 32 at para. 13.

148 Waddams, *supra* note 4 at 400.

principles that are necessary to explore its relationship with the larger doctrine of public policy.¹⁴⁹

Although contracts in restraint of trade have been regarded as invalid for nearly six hundred years,¹⁵⁰ the modern doctrine is generally considered to have originated with the following statement of Parker C.J. in *Mitchel*:

[t]o conclude, in all restraints of trade where nothing more appears, the law presumes them bad; but if the circumstances are set forth that presumption is excluded and the court is to judge of those circumstances, and determine accordingly. If on them, it appears to be a just and honest contract, it ought to be maintained.¹⁵¹

Prior to this decision, “all restraints of trade, whether general or partial, were regarded as totally void because of their tendency to create monopolies.”¹⁵² The decision of Parker C.J. had the effect of curtailing this logic by recognizing that certain instances of restraint of trade were permissible. It brought to the fore the contemporary rationale behind invalidating contracts in restraint of trade, i.e., that “where the restraint is general not to exercise a trade throughout the kingdom...[it] must be void, being of no benefit to either party and only being oppressive.”¹⁵³

Subsequent to *Mitchel*, the ideology which compelled the invalidation of contracts in restraint of trade gradually became more focused upon the individual liberty interest involved than upon the fact that such agreements prejudiced the economic welfare of society.¹⁵⁴ As famously formulated in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*,¹⁵⁵ the modern test for when a restraint should be valid is dependant upon whether the restriction is reasonable “in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.”¹⁵⁶ However, the actual basis of the principle was therein stated to be as follows:

149 For a recent discussion of the restraint of trade doctrine in Canada, see Rosemary Scott, “Post-Employment Restraints: A Trail of Broken Promises” in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2006* (Toronto: Carswell/Thomson, 2007) 93 at 94.

150 The principle is sometimes traced to *Dyer’s Case* (1413) *Anon.*, Y.B. Hen. V. Pasc. No. 2.

151 *Mitchel*, *supra* note 35 at 197.

152 Cheshire, *supra* note 7 at 449-450.

153 *Mitchel*, *supra* note 35 at 182.

154 This is partially reflected in the more stringent treatment of restrictive covenants between employers and departing employees, where there may exist an inequality of bargaining power, than restrictive covenants arising out of the sale of a business: see *Elsley v. J.G. Collin s Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, 1978 CarswellOnt 1235 at paras. 15-16.

155 [1894] A.C. 535 (H.L.) [*Nordenfelt*].

156 *Ibid.* at 565.

[t]he true view at the present time I think, is this: *The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.*¹⁵⁷ [emphasis added]

So expressed, the general rule became that any contract in restraint of trade was *prima facie* invalid as restricting the liberty interest of the covenantee, although the contract or clause could still be preserved if it was reasonable and in the interests of the parties and the public. This rule was definitively accepted into the law of Canada by Dickson J. in *J.G. Collins Insurance Agencies v. Elsley*,¹⁵⁸ and affirmed by the Court in *Doerner v. Bliss & Laughlin Industries Inc.*¹⁵⁹

Prior to the judgments in *Elsley* and *Doerner*, a relative watershed occurred with the decision of the House of Lords in *Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd*.¹⁶⁰ There, Lord Pearce held that “[a]lthough the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public policy that the court will decline to enforce a restraint as being unreasonable between the parties.”¹⁶¹ He accordingly reformulated the test for determining the enforceability of a contract *prima facie* in restraint of trade, stating that “[t]here is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?”¹⁶² While the views expressed by Lord Pearce were not commented upon in *Elsley* or *Doerner*, they were rejected by the Ontario Court of Appeal in *Tank Lining Corp. v. Dunlop Industries Ltd.*¹⁶³ In that case, Blair J.A. held that the “reasonableness in relation to the parties” and “reasonableness in relation to the public interests” tests were distinct parts of a larger inquiry.¹⁶⁴ He characterized the former as involving an examination into whether the restrictive covenant is more than adequate to protect the cov-

¹⁵⁷ *Ibid.*

¹⁵⁸ [1978] 2 S.C.R. 916, 1978 CarswellOnt 1235 at para. 13 [*Elsley*].

¹⁵⁹ [1980] 2 S.C.R. 865, 1980 CarswellOnt 116 at para. 13 [*Doerner*]. It should be noted, however, that in *Tank Lining Corp. v. Dunlop Industries Ltd.* (1983), 40 O.R. (2d) 219, 1982 CarswellOnt 780 (C.A.) at para. 13, the Court noted that there were certain limited exceptions to the rule that a contract in restraint of trade would be *prima facie* void as against public policy, such as where the restraint is contained in a mortgage or lease of real property. More recent Canadian appellate cases which consider and apply the *Nordenfelt* test include: *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419 (C.A.), additional reasons at 2006 ABCA 277 (C.A.); *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, 2005 BCCA 605 (C.A.); and *IT/NET Inc. v. Cameron* (2006), 2006 CarswellOnt 201, [2006] O.J. No. 156 (Ont. C.A.).

¹⁶⁰ (1967), [1968] A.C. 269 (H.L.).

¹⁶¹ *Ibid.* at 324.

¹⁶² *Ibid.*

¹⁶³ (1983), 40 O.R. (2d) 219, 1982 CarswellOnt 780 (C.A.) [*Tank*].

¹⁶⁴ *Ibid.* at para. 36.

enantee's interest,¹⁶⁵ and the latter as involving an open-textured examination of various criteria such as the social and economic effects of the covenant upon the public at large.¹⁶⁶ Blair J.A. also clarified the relationship between the "public interest" test for reasonableness, and the "public policy" test for *prima facie* unenforceability, in stating that "the broad issues of public policy which determine whether a restraint is *prima facie* void are not to be confused with the more detailed considerations of the public interest which might justify it."¹⁶⁷ In light of these comments, it is submitted that the primary reason why a contract in restraint of trade violates public policy, as opposed to the "public interest", is the individual liberty right which it violates rather than the socio-economic concerns implicated by the latter concept.

Another head of public policy which may be grouped under the restraint of trade category relates to agreements which impose serious restrictions upon personal liberty.¹⁶⁸ The most famous example of such a contract is to be found in the case of *Horwood v. Millar's Timber & Trading Co. Ltd.*,¹⁶⁹ in which a debtor covenanted with his creditor that he would, for the duration of a loan, assign to the latter nearly all of his current and future wages, and neither sell nor pledge any of his property as security, borrow any money, seek to be granted any credit, nor move from his current residence, without the lender's express consent to any of the foregoing. The Court concluded that this contract was contrary to public policy. A similar sentiment was expressed in *Archer v. Society of Sacred Heart of Jesus*,¹⁷⁰ where a contract between a nun and a religious organization for the maintenance of the former, provided in consideration for the religious vows of poverty, chastity and obedience made by her to the latter, was deemed contrary to public policy.

165 *Ibid.* at para. 20.

166 *Ibid.* at paras. 41-46.

167 *Ibid.* at paras. 33-34.

168 An interesting recent case in this area can be found in *Johnstone v. Bloomsbury Health Authority*, [1991] 2 All E.R. 293 (C.A.), where the Court held that a contract requiring a junior doctor to work excessively long hours was not contrary to public policy. Certain commentators have suggested that this head of public policy should not be unduly extended, since "it is possible to contend that all contracts represent restraints on future freedom, because they are promises to act, or not to act, in a certain way relative to the other party. . . [O]n a spectrum of enforceability, a distinction must be made between contracts that are autonomy-endangering and those that are merely autonomy-consuming" (Judd, *supra* note 19 at 699).

169 [1917] 1 K.B. 305 (Eng. K.B.).

170 (1903), 9 O.L.R. 474 (C.A.). See, however, *Hofer v. Hofer*, [1970] S.C.R. 958, 1970 CarswellMan 51, in which the Supreme Court of Canada held that the articles of association of a religious colony, that provided for the expulsion of members who did not adhere to the tenets of the faith, were not contrary to public policy as being an unlawful constraint upon the members' freedom of religion.

IV. PUBLIC POLICY IN PRACTICE

While the doctrine of public policy is by its very nature a concept that is mired in theory and legal principle, it has, like all common law concepts, developed through the crucible of litigation. Indeed, as noted previously in this paper, the doctrine remains of great practical importance to parties embroiled in contractual disputes. It will therefore be useful to briefly explore some of the evidentiary and remedial issues which arise in connection with the doctrine, before turning to consider its normative rationales.¹⁷¹

1. Evidentiary Issues

There are two primary contexts in which evidentiary issues may arise in relation to the doctrine of public policy: (1) where a party seeks to prove that the content of public policy embraces a specific proposition; and (2) where a party seeks to prove that a specific contract is in violation of the doctrine. Because the courts have traditionally regarded public policy as a question of law, they have often held that no evidence is admissible to “show what public policy is or to show the effect of a contract or disposition alleged to infringe public policy.”¹⁷² Nevertheless, this principle has occasionally been lamented by the judiciary. In *Mogul Steamship Co. v. McGregor, Gow & Co.*, for instance, Lord Bramwell stated that:

[n]o evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. *How can the judge do that without any evidence as to its effect and consequences?*¹⁷³ [emphasis added]

The prohibition upon the receipt of evidence for the purposes of identifying the content of public policy does not preclude the courts from taking

¹⁷¹ There are of course additional practical issues that can arise in relation to the doctrine of public policy, but they are unfortunately beyond the ambit of the current paper. One such issue concerns the proper law of public policy; if a contract governed by the law of one state is sought to be enforced in another, which jurisdiction’s public policy doctrine should be applicable? Arguably, the supra-legal nature of the doctrine entails that the enforcing jurisdiction should apply its own public policy rules regardless of the governing law. However, there is authority to suggest that the enforcing jurisdiction will only apply the domestic doctrine of public policy which has developed in connection with conflict of laws principles rather than contract law principles: see *K. (E.) v. K. (D.)*, 2005 BCCA 425 (C.A.) at paras. 22-24; and the discussion at footnote 124 above.

¹⁷² *Deckert v. Prudential Insurance Co.*, [1943] O.R. 448, [1943] O.J. No. 467 (C.A.) at para. 34.

¹⁷³ (1891), [1892] A.C. 25 (H.L.) at 45.

judicial notice of changing social circumstances.¹⁷⁴ In view of the ability to take judicial notice of “legislative” and “social” facts (i.e., facts which do not concern the immediate parties),¹⁷⁵ the traditional evidentiary difficulties involved in identifying the content of a given head of public policy may now be diminishing.¹⁷⁶

The rule that evidence is not admissible to show whether a specific contract is in violation of public policy would also appear to be in decline. Indeed, the Newfoundland Court of Appeal recently admitted extrinsic evidence to determine whether a seemingly innocuous contractual provision was tainted by a purpose which would render its enforcement contrary to public policy.¹⁷⁷ In addition, the question of whether a given contract is contrary to the doctrine may be partly resolved through reliance on interpretive presumptions. Although the courts will not generally interpret a contract in order to further the goals of the public policy doctrine,¹⁷⁸ there exists a principle that “[i]n construing a contract, parties are taken to have intended to produce results that are legal, rather than illegal and the construction yielding the lawful result is preferable.”¹⁷⁹ This rule has been applied to contracts which are alleged to violate public policy.¹⁸⁰

2. Remedies

The general effect of contracts contrary¹⁸¹ to public policy is that they are void and unenforceable,¹⁸² and that money and property paid under them cannot

174 *Rodriguez v. Speyer Brothers*, [1919] A.C. 59 (H.L.) at 79. The courts have also considered statutes, international norms, speeches of public figures and other legal precepts as evidence of public policy: see *Re Wren*, [1945] O.R. 778, 1945 CarswellOnt 62 (H.C.) at paras. 13-29.

175 See generally *R. v. Spence*, 2005 SCC 71 at paras. 56-67.

176 There will of course remain some difficulties. One interesting question that may merit closer attention is what particular social groups should be deemed to constitute the “public” for the purposes of the inquiry: see Symmons, *supra* note 17 at 190-193.

177 *Burse v. Bursey* (1999), 174 Nfld. & P.E.I.R. 291, [1999] N.J. No. 149 at para. 27.

178 *Lancashire County Council v. Municipal Mutual Insurance Ltd.*, [1996] 3 All E.R. 545 (C.A.) at 910.

179 *Lust v. Foundations for Future Charter Academy*, 2007 ABCA 165 (C.A.) at para. 18.

180 See: *Lancashire County Council v. Municipal Mutual Insurance Ltd.*, [1996] 3 All E.R. 545 (C.A.) at 906 and 910; and *Barnett v. Universal Island Records Ltd.*, [2006] EWHC 1009 (Ch.D.) at paras. 171-173.

181 A contract may be “contrary” to public policy in several senses. In addition to the traditional sense of having as its object the commission of an activity that is contrary to public policy, a contract may violate the doctrine where *inter alia* it involves the provision of consideration that is contrary to public policy (see *Fender*, *supra* note 46 at 12), or where it has a mere “tendency” to facilitate activities which are contrary to public policy (see *Brazier Columbia Fishing-Resort Group Corp.* (1997), 33 B.C.L.R. (3d) 293, [1997] B.C.J. No. 1006 (S.C.) at para. 17, leave to appeal refused (1997), 1997 CarswellBC 1431, [1997] B.C.J. No. 1641 (B.C. C.A. [In Chambers])). In *Fender*, *supra* note 46 at

be recovered.¹⁸³ Despite the beguiling simplicity of this principle, an arcane network of rules and exceptions has developed with respect to the effects of statutory illegality upon contracts.¹⁸⁴ The position regarding such illegality was recently clarified by the Supreme Court of Canada in *Transport North American Express Inc. v. New Solutions Financial Corp.*¹⁸⁵ There, Arbour J.A., for the majority, held that a court confronted with a contract in violation of s. 347 of the *Criminal Code* could apply a “spectrum” of remedies, ranging from (1) a declaration that the entire agreement is void *ab initio* and thus unenforceable; (2) severance of the illegal provision from the remainder of the enforceable contract via the “blue pencil” approach (wherein the offending provisions are deleted); and (3) “notional severance” of the illegal provision from the remain-

13, Lord Atkin described this “tendency” concept as follows: “. . . what is meant by tendency? It can only mean, I venture to think, that taking that class of contract as a whole the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful, i.e., contrary to public policy; and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, e.g., benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract it is not enough that it affords a motive to do wrong: it must surely be shown that such a contract generally affords a motive and that it is likely to be effective.”

182 With the possible exception of contracts to commit an illegal or immoral act, most agreements which contravene public policy, while void and unenforceable, are not “illegal” or “unlawful”: see *Bennett v. Bennett*, [1952] 1 K.B. 249 (Eng. C.A.) at 260; and *Continental Bank of Canada v. R.*, (sub nom. *Continental Bank Leasing Corp. v. R.*) [1998] 2 S.C.R. 298, [1998] S.C.J. No. 63 at paras. 114-117.

183 *Foncière Cie d’assurance v. Perras*, [1943] S.C.R. 165 at 178; *Nepean Hydro-Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347, 1982 CarswellOnt 116 at para. 39. This rule, which is known as *ex turpi causa non oritur actio* and is often traced to the decision of Lord Mansfield in *Holman v. Jonson* (1775), 98 E.R. 1120 at 1121 (K.B.), may be invoked by the court *sua sponte*, and thus applies regardless of whether a violation of public policy has been plead by either of the parties. As stated in *Menard v. Genereux* (1982), 39 O.R. (2d) 55, [1982] O.J. No. 3489 (H.C.) at para. 14, “[i]t is . . . well established that whether or not they are pleaded, if facts are shown in the course of a trial which may render an agreement unenforceable by reason of illegality or public policy a court must take these facts into consideration and, depending on the circumstances, act upon them if necessary by refusing to lend its assistance to a party seeking to enforce his or her rights by relying on the agreement.” See also *David Cooper Investments Ltd. v. Bermuda Tavern Ltd.* (2001), 56 O.R. (3d) 243, [2001] O.J. No. 4185 (C.A.) at para. 44 [QL]. However, while illegality may have a preclusive effect upon the enforceability of an agreement, it appears that illegality (and the contravention of public policy) cannot, when standing alone in the absence of any contractual breach, ground a cause of action for damages: see *Brooks v. Canadian Pacific Railway Ltd.*, 2007 SKQB 247 at paras. 112-125.

184 See generally *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.) at paras. 16-24

185 2004 SCC 7 [*Transport*].

der of the enforceable contract (wherein the offending provisions are judicially re-written).¹⁸⁶

Although the “spectrum” approach from *Transport* serves as a useful methodology for determining the effects of a contract that is tainted by statutory illegality,¹⁸⁷ it is uncertain whether the principles articulated by Arbour J.A. apply to contracts which are tainted by “common law” illegality (or which violate public policy in the more narrow sense identified earlier in the paper). While there is authority that the courts may sever, via the “blue pencil” approach, a provision in a contract which is contrary to public policy in order to preserve the enforceability of the contract as a whole,¹⁸⁸ there currently exists a disagreement between the Alberta and British Columbia appellate courts regarding whether the “notional severance” remedy should also be applicable to such provisions.

In *Globex Foreign Exchange Corp. v. Kelcher*,¹⁸⁹ the Alberta Court of Appeal (in the context of an appeal from an interlocutory injunction application brought to enforce the respondents’ compliance with a restrictive covenant by their former employer) held that notional severance was inapplicable to restrictive covenants generally. Conversely, in *ACS Public Service Sector Solutions Ltd. v. Courthouse Technologies Ltd.*, the British Columbia Court of Appeal (without referring to *Globex*) held that the *Transport* spectrum approach was applicable to “any illegal contract provision, whether by common law or statute.”¹⁹⁰ More recently, in *KRG Insurance Brokers (Western) Inc. v. Shafron*,¹⁹¹ the British Columbia Court of Appeal (again without referring to *Globex*)

186 *Ibid.* at para. 40. In considering which of these remedies is the most appropriate, Arbour J.A. (at para. 42) directed that courts should have regard to the following factors: “1) whether the purpose or policy of s. 347 would be subverted by severance; 2) whether the parties entered into the agreement for an illegal purpose or with an evil intention; 3) the relative bargaining positions of the parties and their conduct in reaching the agreement; and 4) the potential for the debtor to enjoy an unjustified windfall.”

187 It is worth noting that there exists some uncertainty regarding the extent to which the *Transport* methodology applies to contracts which are not formed in violation of a statute, but which merely contemplate performance in an illegal manner. On the consequences of illegal performance generally, see *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.) at paras. 22-23 and 31-33. See also *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22 at paras. 57-59.

188 See, e.g., *K. (E.) v. K. (D.)*, 2005 BCCA 425 (C.A.) at para. 4, holding that a contractual provision which involved the stifling of a prosecution should be severed from the remainder of the agreement. However, some courts and commentators have suggested that no severance remedies should be applicable to contracts contrary to public policy other than contracts in restraint of trade, contracts affecting marriage, or contracts which oust the jurisdiction of the court: see *Bennett v. Bennett*, [1952] 1 K.B. 249 (Eng. C.A.) at 260; *Goodinson v. Goodinson*, [1954] 2 Q.B. 118 (Eng. C.A.) at 120-121; and *Cheshire*, *supra* note 7 at 407-408.

189 2005 ABCA 419 (C.A.) at paras. 44-46 [*Globex*].

190 2005 BCCA 605 at para. 59 [ACS].

191 2007 BCCA 79 (C.A.), leave to appeal filed [2007] S.C.C.A. No. 199 [KRG].

actually applied the notional severance remedy in order to preserve the validity of an employee restrictive covenant which was deemed overly broad by reason of its application to the “Metropolitan City of Vancouver.”¹⁹² In light of *ACS* and *KRG*, there is now a legitimate argument that the *Transport* spectrum approach to the consequences of statutory illegality applies to all contracts which are presumptively void for having contravened public policy.¹⁹³

Where a court finds that a contract is unenforceable in its entirety, a party who has transferred benefits under the agreement has traditionally been required to establish an exception to the *ex turpi causa* doctrine in order to obtain restitution. Such exceptions include:

... (1) where the party claiming for return of property is less at fault; (2) where the claimant ‘repents’ before the illegal contract is performed; and (3) where the claimant has an independent right to recover (for example, a situation where recovery in tort might be possible despite an illegal contract). . . .¹⁹⁴

192 At paras. 57-62 of *KRG*, Chiasson J.A. stated that “[i]n this case, the real difficulty arises from the parties’ agreement to the geographic reach of the restrictive covenant as the ‘Metropolitan City of Vancouver’. To strike the word ‘metropolitan’ would not reflect the obvious intention of the parties. They clearly intended a geographic reach that included the City of Vancouver and something more. The ‘blue pencil’ approach would distort that intention. . . . There is no fixed, recognized meaning for the phrase ‘Metropolitan City of Vancouver’. . . . The task at hand is to construe that word to attempt to give effect to the intentions of the parties and, if necessary, to proceed by way of notional severance. . . . In view of the clear direction of the Supreme Court of Canada that it is permissible to use notional severance to attempt to give effect to the substance of an agreement and to avoid having that substance subverted by an unfortunate choice of language, I would construe ‘Metropolitan City of Vancouver’ to prevent Mr. Shafron from competing in the City of Vancouver and municipalities directly contiguous to it. Geographically, I would include the City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby. . . . By reading down the phrase ‘Metropolitan City of Vancouver’ to an area consistent with the need to protect *KRG Western’s* business, an area that likely was in the reasonable contemplation of the parties when they made their agreement, the substance of their bargain is respected and enforced”.

193 This approach appears to have some academic support, at least with respect to contracts in restraint of trade: see Jacob S. Ziegel, “Is Notional Severance the Right Solution for Section 347’s Ills” (2005) 42 *Can. Bus. L. J.* 282 at 287-288. A flexible approach to the consequences of public policy violations may also be found in s. 178 of the *Restatement of the Law, Second, Contracts* (St. Paul, Minn.: American Law Institute, 1981), and ss. 7 and 8 of the *New Zealand Illegal Contracts Act, 1970* (N.Z.), 1970/129.

194 *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549, [1997] F.C.J. No. 1622 (C.A.) at para. 24. There are additional exceptions to the *ex turpi causa* rule, including: (a) where the contract is made illegal by statute in the interests of a class of persons which includes the plaintiff; (b) where the plaintiff was induced to enter into the contract by fraud or duress; and (c) mistake: see *Lapointe v. Messier* (1914), 49 S.C.R. 271, 1914 CarswellQue 5 at paras. 48-50; and *Vandekerhove v. Litchfield* (1993), 84 B.C.L.R. (2d) 252, [1993] B.C.J. No. 1355 (S.C.), reversed on other grounds (1995), 1 B.C.L.R. (3d) 70 (C.A.), leave to appeal refused (1995), 126 D.L.R. (4th) vii (note), [1995] S.C.C.A. No. 131 (S.C.C.) at para. 59 [QL].

However, as with severance, judicial approaches to the availability of restitution in the case of contracts contrary to public policy would appear to be changing.¹⁹⁵ In *Tri Level Claims Consultant Ltd. v. Koliniotis*,¹⁹⁶ the Ontario Court of Appeal permitted the respondent paralegal business, which had provided services under a contingency fee agreement that was declared unenforceable on the basis of champerty, to recover the cost of those services through a *quantum meruit* claim. In doing so, the Court criticized the rigour of the traditional rule which absolutely prohibited the recovery of benefits conferred under an illegal contract.¹⁹⁷

V. RETHINKING THE DOCTRINE

Although there are many different theories which seek to explain the nature of the public policy doctrine, nearly all may be described as falling into one of three main lines of thought.¹⁹⁸ The most primitive, which we shall refer to as the positivist theory, is a response to the twin criticisms that public policy

195 This change is also reflected in the approach to restitution in the context of contracts which are invalid by reason of statutory illegality: see, e.g., *Kilroy v. A OK Payday Loans Inc.*, 2007 BCCA 231 (C.A.) at paras. 22-23, where the Court held that the *Transport* factors relating to the spectrum approach also applied to the question of whether an illegal contract could serve as a juristic reason in an unjust enrichment claim.

196 (sub nom. *Koliniotis v. Tri Level Claims Consultant Ltd.*) (2005), 201 O.A.C. 282, [2005] O.J. No. 3381 (C.A.) [*Koliniotis*].

197 *Ibid.* at paras. 36-39. At para. 40, the Court stated that “several factors demonstrate that an absolute bar on *quantum meruit* recovery creates an injustice that is unacceptable when considered in light of the public policy informing the statutory prohibition against champertous agreements. As noted, that policy is to protect the administration of justice from abuse. In the case before us, the contingency fee agreement was created in fair circumstances, as both parties were fully aware of what they bargained for. Any imbalance of power was remedied by giving the potentially vulnerable party time to consult with others. There is no evidence to suggest that the respondent engaged in sharp or dishonest practice in advancing the appellant’s claim, nor that the respondent was in a conflict of interest with the appellant. . . [T]here is not sufficient ‘moral turpitude’ to justify denying the respondent any payment whatsoever for the work that was performed. In this regard, it is significant that it is not suggested that the respondent knew that a paralegal contingency fee agreement was illegal. To the contrary, it seems that contingency fee agreements were an accepted practice. We therefore conclude that the principle of *quantum meruit* can be applied in the circumstances.” For a recent case in which the court denied the plaintiff an ability to recover benefits paid under a contract contrary to public policy on the basis of factors similar to those considered in *Koliniotis* (namely, that the plaintiff insisted on the inclusion of the objectionable term in the contract, and was not coerced into executing the same via duress or unconscionable conduct), see *Pay v. Kaboly-Zadeh*, 2006 BCSC 925 at paras. 145 and 153.

198 The reader should note that the within discussion of the various models of public policy is at best an outline. Those in search of a more robust exegesis should consult Lloyd, *supra* note 11, and John Bell, *Policy Arguments in Judicial Decisions* (Oxford: The Clarendon Press, 1983) [Bell].

is overly dependent upon judicial discretion¹⁹⁹ and tends to erode the distinction between the legislature and the courts.²⁰⁰ This theory would characterize public policy as little more than a body of antiquarian rules whose application should be reserved for the most clearly pre-determined of occasions. One author describes its thinking as follows:

[p]ublic policy it may be said is a part of the common law like any other topic, such as the law of tort, and is to be developed by the systematic extension of binding precedents according to the ordinary common law pattern... The applicable rule of public policy or morality can then only be found in the body of law itself so far as previous reported decisions (or statutes) may afford a precedent or a guide.²⁰¹

Such a concept is popular with those who believe that the courts have no authority to create a new head of public policy.²⁰² According to this view, the

199 This criticism is constantly repeated in the courts and the literature. One of its most forceful expositions is found in the statement of Lord Wright in *Fender*, *supra* note 46 at 40-41 that “. . . it has been at least suggested, if not overtly argued, that a judge has peculiar powers in a question of public policy in acting upon his individual views or predilection and can on these grounds refuse to enforce a contract or disposition of property *ex facie* valid. That was the view expressed. . . by Pollock C.B. in the same case of *Egerton v. Earl of Brownlow*. He said: ‘It may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question and declining to decide upon it.’ While it is true that a judge is entitled to have and even state on proper occasions his personal opinions on questions of public interest, it is a different matter if he claims to base his judicial decisions on his personal opinions.” See also Prince, *supra* note 128 at 165-66.

200 The *locus classicus* of this criticism is the judgment of Parke B. in *Egerton*, cited above at note 41. See also Buckley, *supra* note 8 at para. 6.01, referring to this as the “most fundamental” issue that arises in connection with the legitimacy of the doctrine. An interesting element of this criticism is the charge that courts, unlike the legislature, lack the empirical resources which are necessary to identify a given head of public policy. This criticism is developed in Walter Gellhorn, “Contracts and Public Policy” (1935) 35 Colum. L. Rev. 679 at 695, where the author states that “[i]f ‘public policy’ should be defined as something having no relationship to the judgments formulated by Constitutions, statutes, and prior judicial and non judicial investigations, but as being ascertainable only by an unassisted judicial discovery of ‘what is naturally and inherently just and right between man and man,’ there would be much to be said in favour of the criticism. But if a determination of the relevant public policy rests upon authoritative legislative pronouncement and upon intelligent effort to procure informative data, the criticism loses force.”

201 Lloyd, *supra* note 11 at 121-22. Among the theory’s adherents is Fridman, *supra* note 5 at 363-364.

202 See the judgment of Lord Halsbury in *Janson*, *supra* note 12 at 491-492, stating that “I deny that any court can invent a new head of public policy. A contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King’s enemies, all are undoubtedly unlawful things, and you may say that it is because they are contrary to

proper judicial function in relation to public policy is “not to create but to expound the law.”²⁰³ However, legal positivism, at least when it is advanced as an epistemology of the judicial function in relation to public policy, appears hopelessly facile.²⁰⁴ The problem lies in the fact that the judiciary has seen fit to create new heads of public policy and to abandon those which have become socially irrelevant. Further, even admitting that positivism may be able to “explain” the creation of a new class of public policy (such as discrimination) via the simple extension of a pre-existing one,²⁰⁵ the theory is still incapable of telling us why certain heads, as, for example, the rule against cohabitation contracts, have been abandoned. Inasmuch as the positivist theory of public policy is unable to account for the doctrine’s continued evolution and responsiveness, it is irrelevant whether it is capable of responding to the two above-mentioned criticisms.²⁰⁶ While an acceptance of positivism would lessen some of the difficulties currently associated with the doctrine, the result would be a concept of public policy that has no practical ability to humanize the common law. Although the positivist may succeed in defending the doctrine against its critics, he or she does so ultimately by destroying it.

The second theory of public policy may be referred to as the “consensus” model.²⁰⁷ This view arises in response to positivism, and is often linked to the observation that certain heads of public policy have changed in connection with

public policy that they are unlawful, but it is because these things have either been enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. . . . [I]n the application of the principles here insisted on. . . a judge. . . must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe – that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe.”

203 Lloyd, *supra* note 11 at 145.

204 As Lloyd *supra* note 11 at 113-14 and 116 notes “[i]n so far as the narrow view insists on a number of heads of policy it is difficult to see how such an approach is really tenable at all. . . . [A]ny particular decision on public policy is no more than a decision of fact as to what the courts at the period regarded as contrary to or in accordance with current policy, and affords merely a guide to future judges who may be free to decide that with the passing of the then existing conditions the applicable policy has also undergone a change.”

205 See, e.g., Chitty, *supra* note 6, at 940.

206 As Winfield, *supra* note 1 at 95 notes “[the] variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it.”

207 This term is derived from Bell, *supra* note 198, and applied by Buckley, *supra* note 8 at para. 6.25. As described by Lloyd, *supra* note 11 at 125, “. . . the judge is expected to preserve here as elsewhere a high degree of impartiality and to seek, as best he can, to apply, not his individual moral conception, but that which his training, background and knowledge lead him to believe to be what accords with customary morality and the general conscience of the community.”

prevailing social conditions.²⁰⁸ According to the consensus theory, the courts are indeed permitted to embrace new heads of public policy, as its very content is to be determined by a set of majoritarian preferences which are constantly in flux.²⁰⁹ One of the leading proponents of the consensus model is Waddams, who states that “[the] categories reflect the values of the era. An evolving society must... have changing values, and the law fails in its service to society if it cannot also evolve”.²¹⁰

The third traditional theory of public policy is intimately concerned with the individual moral conception of the judge. This is a view sometimes referred to as the “interstitial legislator” model,²¹¹ and is the most popular theory among the doctrine’s various commentators.²¹² Simply put, the idea is that public policy is formulated in accordance with the subjective beliefs of the court regarding which values are ultimately of the most importance to society. Although the actual criteria for such a judicial determination is never truly defined in the

208 As Cheshire, *supra* note 7 at 408 notes: “[s]ince public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era.” See also Symmons, *supra* note 17 at 189, stating that “[t]he essential function. . . of public policy in the common law is to bring into judicial consideration the broader social interest of the public at large.” A judicial affirmation of the consensus model may be found in *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219, 1982 CarswellOnt 780 (C.A.) at para. 10, citing *Vancouver Breweries Ltd. v. Vancouver Malt & Sake Brewing Co.*, [1934] A.C. 181 (British Columbia P.C.) at 189. The consensus model addresses the constitutional question of whether the courts have any jurisdiction to ground their decisions on something other than the positive law on the basis that, “. . .there is a qualitative, rather than simply a quantitative, difference between the work of the courts, and that of the legislature... the judge acts in a ‘neutral’ way in making rules, whereas the legislators and the executive are more partisan... and he can do that only if his views are not idiosyncratic, and his whole demeanour commands the respect of the whole community” (Bell, *supra* note 198 at 11).

209 An important qualification of the model is made by Bell, *supra* note 198 at 12, who notes that “‘consensus’ in this context does not so much mean public opinion as the fundamental values and purposes of society. . .”

210 Waddams, *supra* note 4 at 395. A famous example of this principle may be found in *Bowman v. Secular Society Ltd.*, [1917] A.C. 406 (H.L.) at 447-452, where the Law Lords departed with prior jurisprudence in holding that a gift to a company with an anti-Christian memorandum of association was not invalid by reason of public policy.

211 This term is also taken from Bell, *supra* note 198.

212 Among its adherents are Winfield, Knight, and Shand. The belief that public policy is indicative of a general legislative tendency within the judicial function is obviously at odds with the criticism of the doctrine as a constitutionally illegitimate intrusion by the courts into the province of the legislature. The theory’s response to such a claim is conditioned by the adjective “interstitial,” which indicates that the proper role of the courts is to supplement the laws handed down by Parliament rather than to create their own. Thus, “[w]hile the value-judgments to be made by judges... are essentially of the same kind as those confronting other branches of government, judicial creativity operates within narrower confines, and this feature accounts for the differences between them” (Bell, *supra* note 198 at 226).

literature, it appears to be taken for granted that judges engage in a distributive balancing of social interests in an effort to arrive at those most “important” or of the greatest practical utility to the general community. This theory has long been criticized by the judiciary.²¹³

Unlike positivism, both the consensus and interstitial legislator theories are capable of accounting for the dynamism of public policy noted above. However, each model fails to respond to the first fundamental criticism of the doctrine as a discretionary and uncertain basis for judicial decision-making. Although the consensus theory is not directly predicated upon the belief that public policy is an exercise in judicial relativism, its dependence upon social preference leaves the doctrine with the same ambiguity and lack of consistency as if it were.²¹⁴ For its part, the interstitial legislator model of public policy is expressly conditioned upon a subjective exercise of judicial discretion and appears at base to offer little more than utilitarian justification for the doctrine’s content. What is ultimately required is therefore a theory of public policy that not only explains the doctrine’s variable nature, but also does so in a way which links that variability to a broader set of objective principles.

In seeking to arrive at this theory, we begin with the observation that, although certain heads of public policy have gradually been abandoned (i.e., cohabitation contracts), and others eventually adopted (i.e., discriminatory behaviour), the general classification of its categories has remained remarkably constant.²¹⁵ Indeed, it appears that the essential categories of public policy have been recognized as such for more than two hundred years. The rule against restraint of trade has existed since at least the fifteenth century,²¹⁶ contracts injurious to the justice system since at least 1767,²¹⁷ contracts affecting marriage since at least 1768,²¹⁸ contracts involving immorality since at least 1774,²¹⁹ and

213 See, e.g., *Walkerville Brewing Co. v. Mayrand* (1929), 63 O.L.R. 573, [1929] O.J. No. 125 (C.A.) at para. 32, stating that “I do not agree that public policy can be based upon the views of a judicial officer founded upon his individual conception of ‘justice, morality, and convenience,’ nor unless the same comes within some established principle of law or follows directly from principles recognised in the courts and by the State as part of its public law.”

214 As Buckley, *supra* note 8 at para. 6.29 states, “[i]n truth, the notion of ‘consensus’, although valuable as a loose presumption, raises as many questions as it answers when it is invoked to rationalise the working of the public policy doctrine. . .”

215 As noted in Prince, *supra* note 128 at 208-209: “[t]he popular perception has been that because society is dynamic it follows that markedly new areas of public policy interests are emerging. However, a review of recent decisions and related writings yields no evidence of drastically new judicially-recognized public policy. There are situations posing novel applications of pre-existing public policy and there are also some public policy areas with a growing infrequency of cases, but the courts have not proliferated any new public policy interests or related rules.”

216 *Dyer’s Case* (1413), *Anon.*, Y.B. Hen. V. Pasc. No. 2.

217 *Collins v. Blantern* (1762), 2 Wils. K.B. 342.

218 *Lowe v. Peers* (1768), 4 Burr. 2225 (Eng. K.B.).

219 *Jones v. Randall* (1774), 1 Cowp. 17 at 37 (Eng. K.B.).

contracts injurious to the state since at least 1799.²²⁰ Plainly, therefore, all of these categories, each of which is still alive today, are inextricably bound to the very idea of public policy. To acknowledge this is not to side with the positivist and claim that the various heads are immutable, but it is to note that the historical limitation of the doctrine to these specific categories is quite incomprehensible when witnessed from within the arbitrary model of public policy native to the consensus and interstitial legislator theories canvassed above.

It is instructive in this respect to return to Waddams, who explains the categories on the basis that “this miscellaneous collection amounts to a series of instances in which the courts have weighed public policy against freedom of contract and preferred the former.”²²¹ Such a statement is of course partly accurate, for each of the categories has indeed somehow been taken to reflect a value more fundamental than the freedom to contract. Yet it is, in fact, possible to conceive of many different “fundamental values” such as the protection of the environment, the need for education, the advancement of science, the promotion of the arts, the desire for affordable food, housing and medicine, etc., that have never been crystallized into a category of public policy, and yet which, according to either the social consensus or the interstitial legislator, may be more important than the freedom to contract – indeed, perhaps even more important than those values which *have* been elevated into a category. It is therefore legitimate to question whether there exists some feature of each category that imbues it with a degree of common importance.

Perhaps the most compelling explanation of this feature of the public policy categories is offered by the New Zealand commentator Sacha Judd. According to Judd’s view:

[s]ociety is . . . founded on the balancing that takes place at a macro level between . . . different institutions, allowing for individualism at a micro level. . . Contracts that restrain future freedom endanger the necessary autonomy of individuals within the market. Contracts to commit a legal wrong represent an affront to the system of legal sanctions, which is vital to the maintenance of a social order necessary to the enjoyment of individual rights. Similarly, contracts that oust the jurisdiction of the courts are attempting to circumvent the judicial process. If we turn to the categories of contract that offend public policy, we can see how many of them threaten this ideological base, through representing direct conflict at a macro level between the law of contract and a competing social institution. . . *The only way the legal system has legitimacy within the liberal state is if all individuals are subject to the rule of law, and therefore parties must be able to turn to the courts for relief. . . These agreements represent the potential to undermine ideas that form the foundation of the social structure in the liberal state.* Enforcement of such agreements eventually becomes self-defeating, or potentially destructive of the competing institutions. Critical to this theory is understanding the nature

220 *The Hoop* (1799), 1 C. Rob. 196.

221 Waddams, *supra* note 4 at 404.

of contract law as being interconnected with the other valued institutions in society. . . If the courts were required to enforce agreements that undermine contract law the social order would conceivably disintegrate. . . *To preserve the rule of law, and by implication the law of contract, some freedom to contract will necessarily have to be abrogated.* . . Rather than pronouncing such agreements to be ‘offensive’, ‘injurious’ or ‘immoral’, *judges should make it clear that some agreements are not permitted enforcement because they jeopardise the very freedom that allows them to be made in the first place.* . . The problem with the doctrine of public policy is that it is equated with the ‘public conscience’. *At its core, however, the doctrine is concerned with the structures in which the law operates. The doctrine of public policy still has a valid role to play, not as a unified set of rules for when contracts will be declared illegal or void, but as a label for the reasoning judges must undertake to preserve our society.*²²² [emphasis added]

Judd’s thesis is persuasive. It represents a far more sophisticated view of the public policy doctrine than that found in the consensus or interstitial legislator models. However, while there is much to be said for the position that the categories of public policy are designed to preserve the essential institutions, ideas and structures of the liberal state and the rule of law,²²³ it is submitted that a more compelling (or perhaps a simply more developed) explanation is that the categories of public policy reflect the preconditions of a just society. In a modern liberal democracy such as Canada, a just society is, among other things, a society in which the relative worth of values may be adjudicated fairly, and one in which the pursuit of a given value to the detriment of any other is only undertaken in a manner that is fair (thus providing, to the extent possible, for their mutual co-existence).²²⁴ If this argument is correct, we should expect to find in the categories of public policy a series of values that are necessary for these characteristics to exist.

222 Judd, *supra* note 19 at 708-709 and 711.

223 One benefit of Judd’s view (and of the theory adopted in this paper) is that it allows for a harmonization of the broad, distributive concerns involved in the public policy doctrine with the private, corrective nature of contract law. If the purpose of the public policy doctrine is to preserve the rule of law (or, even more broadly, the preconditions of a just society), the principles of public policy form part of the “rules of the game” which must be acceded to by private contracting parties (perhaps as implied terms) in order for their arrangements to have any legal force.

224 This working definition of a “just society” has been influenced by John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001) at 27 [Rawls], who states that: “[a]n essential feature of a well-ordered society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just.” See further Rawls, at 45, describing the function of the basic rights and liberties. It is also reflected in the judicial approach to s. 1 of the *Charter*, which requires that any restriction imposed upon a *Charter* value for the purpose of pursuing another value be “rational” and “minimally impair” the former.

Turning to the categories themselves, it becomes readily apparent that the values which they reflect are indeed those which may be associated with the foregoing concepts. In the category of contracts injurious to the state, we find the need for an effective, democratic government that is capable of insulating its citizens from corruption and foreign conquest. In the category of contracts injurious to the justice system, we find the need for an effective, orderly judiciary that is governed by the rule of law and is accessible to the general citizenry. In the category of restraint of trade, we see the desire to protect the freedom of the individual, a value also expressed in relation to contracts in restraint of marriage, the remaining non-controversial head falling within the category of contracts affecting this ancient institution. Finally, in the category of immoral contracts, we may observe a focus upon the dignity (as witnessed in the rule against prostitution agreements) and the equality of individuals. Public policy as it currently exists in Canadian contract law is therefore a doctrine which is devoted to the protection of the state, the judiciary, and the individual as a free, dignified and equal agent.

The foregoing values are not merely incident to the liberal state or the rule of law;²²⁵ rather, they are incident in a way that is necessary to permit the fair adjudication and pursuit of values having regard to the conditions of modern democracy.²²⁶ If individuals were not free, equal and dignified when they came to debate about and pursue such values, the debate would be unfair, as would be the pursuit. Similarly, without a state able to guarantee that its individuals possess such qualities, and a judiciary capable of interpreting and enforcing their common meaning, such individuals, and thus the possibility of such fairness, could not exist. This is not to claim that these conditions guarantee the realization of a just society, but only to claim that without them, a just society (at least in the context of a liberal democracy) would not be possible.²²⁷ Indeed, these values are precisely those which have been repeatedly recognized by the

225 While the rule of law is itself a precondition of a just society, it does not exhaust the latter concept. See *British Columbia (A.G.) v. Christie*, 2007 SCC 21 at para. 20, stating that: “[t]he rule of law embraces at least three principles. The first principle is that the ‘law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power’. . . The second principle ‘requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order’. . . The third principle requires that ‘the relationship between the state and the individual ... be regulated by law’ . . .”

226 As Rawls, *supra* note 224 at 3-4, notes “. . . a democratic society is not and cannot be a community, where by a community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine. The fact of reasonable pluralism which characterizes a society with free institutions makes this impossible. This is the fact of profound and irreconcilable differences in citizens’ reasonable comprehensive religious and political conceptions of the world, and in their views of the moral and aesthetic values to be sought in human life. . . This condition is permanent as it persists indefinitely under free democratic institutions.”

227 See Rawls, *supra* note 224 at 79.

Supreme Court of Canada to underlie the *Charter*.²²⁸ In seeking to give effect to these values through the doctrine of public policy, the courts may therefore be seen as securing the possibility of justice in contract law itself.

The reader will note that the preceding account does not address those heads of public policy, such as cohabitation contracts, contracts to broker a marriage, or maintenance and champerty agreements, which have already been (or are on the way towards being) abandoned. This is so because the theory that public policy reflects the preconditions of a just society need not also assume that the concept of the just society is itself immutable. Indeed, if it did, it would be unable to explain why public policy has been limited to its specific categories (and thus meet the criticism of uncertainty), while at the same time acknowledging the variance of the doctrine throughout history (and thus preserve its vitality). Rather, the theory of public policy advanced herein takes as its further premise the hermeneutical fact that any vision of a just society is conditioned by the historical reality and socio-political institutions from which it is projected.²²⁹ Thus, in response to Winfield's claim that "public policy is emphatically no ideal standard to which law ought to conform,"²³⁰ we would state that although public policy does reflect an ideal standard, it is an idealism which is itself fundamentally historical.

228 In *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 at para. 64, Dickson C.J. stated that "[a] second contextual element of interpretation of s. 1 is provided by the words 'free and democratic society'. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. *The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.* The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified" [emphasis added]. See also *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 81, stating that "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*." The connection between *Charter* values and the categories of public policy has not been lost upon commentators. In Grattan, *supra* note 60 at 534, the authors state plainly that public policy is "shaped by, among other things, *Charter* values. The doctrine acts as a vessel for channelling constitutional protections into private law."

229 For instance, the existence of a common religious and moral system such as Christianity (and its attendant institutions, such as marriage) may have at one time been understood to constitute a precondition of a just society, but is antithetical to such a society in the context of a modern liberal democracy that is characterized by the fact of reasonable pluralism. See further Rawls, *supra* note 224 at 14-15. The impact of changing social conditions in this sense may be observed in *McIntyre*, *supra* note 120.

230 Winfield, *supra* note 1 at 99.

The foregoing theory is also able to defend the doctrine from the criticism that public policy results in a constitutionally illegitimate blurring of the legislative and judicial functions. In declining to enforce a contract which is contrary to a value of public policy, the courts are not engaged in a balancing of distributive interests or social preferences that requires empirical study, or is by rights the domain of Parliament. Rather, they are attempting to preserve values which are necessary preconditions of justice in a modern liberal democracy. It therefore follows that the courts are merely seeking to enforce values which are necessary for the meaningful exercise of their own jurisdiction, and the discovery and application of such values is manifestly premised upon a legitimately *judicial*, rather than legislative, function.²³¹ Indeed, our courts must be permitted to base their decisions upon considerations external to the positive law when an unthinking adherence to it would be inimical to the very possibility of an effective judiciary (i.e., that its adjudications occur within a just society). To state otherwise would entail that the courts have no obligation to preserve their own practical utility and, it follows, that of the positive law itself.

VI. CONCLUSION

It is hoped that the preceding discussion of the nature and meaning of the public policy doctrine has proved interesting to the reader. Certainly public policy is a highly fascinating topic for both the legal practitioner and the theorist alike. Indeed, that which is implicated by the doctrine is nothing less than the ability of any society to reconcile its body of laws with its ideal of justice.

While public policy in Anglo-Canadian contract law has never re-attained the level of judicial flexibility envisioned in *Egerton*, it is now evident, particularly with the advent of the *Charter*, that the doctrine is poised to enter a period of renewed growth and significance. In developing the doctrine, courts must ensure that they do not unduly extend the reach of public policy, and in so doing undermine the continued march of the positive law. Nevertheless, they must also be free to put aside the constraints of the nineteenth and early twentieth centuries, and adopt instead a theory of public policy which recognizes the dynamic and evolving nature of modern social life. It is the fundamental thesis of this paper that such a balance is best struck by restricting the application of the doctrine to contractual behaviour which threatens the possibility of a just society, and therefore the ultimate goal of the common law itself. As stated by Cardozo:

231 This is not to suggest that the promotion of such values lies within the exclusive preserve of the judiciary. It is rather to state that such activity may reasonably be expected of the judiciary in addition to the legislature.

[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . Logic and history and custom have their place. We will shape the law to conform to them when we may, but only within bounds. The end which the law serves will dominate them all.²³²

²³² Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921) at 66.