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Developments in Contract Law: The 2020-2021 Term – Appeals to Fairness

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This article analyzes important developments in Contract Law stemming from consideration by the Supreme Court of Canada in 2020-2021. Due to the large number of Contracts cases during this period, the article focuses on prominent appeals occupied with issues of fairness in Canadian Contract Law. Fairness in contracts emerges as an important concern of the SCC at this juncture. This appropriately reflects the constellation of some long-unsolved problems (e.g., control of unfair terms in standard form contracts), confusion around key concepts associated with protection of contractual fairness (e.g., unconscionability and good faith), and judicial disagreement over the merits of general versus context-specific approaches to policing fairness in contracts (e.g., unconscionability versus public policy, and whether to consolidate or differentiate how the concepts of unconscionability and good faith apply to different contexts falling within each's overall jurisdiction).

Developments in Contract Law: The 2020-2021 Term – Appeals to Fairness

Marcus Moore*

I. Introduction

This paper analyzes important developments in Contract Law stemming from consideration by the Supreme Court of Canada ("SCC") during the 2020-2021 term. Due to the large number of cases during this period, I focus here on prominent appeals occupied with issues of fairness in Contract Law. Fairness in contracts emerges — appropriately — as an important concern of the SCC at this juncture. This reflects in part some longstanding problems of unfairness in the market, notably unfair terms in standard form contracts. As well, it reflects continuing confusion around the parameters of some judicial heads of fairness supervision, in particular unconscionability and good faith. And it reflects in part judicial policy choices around how to approach the regulation of fairness in contracts. These are inherent, for example, in whether to use unconscionability or public policy, and in whether to differentiate or consolidate how unconscionability and good faith each deal with quite different contexts of contractual unfairness falling within their respective jurisdictions. I will review noteworthy recent developments in Contract Law relating to other matters in next year's volume.

II. Fairness in the Making of Contracts

I begin by looking at developments relating to laws governing fairness in the making of contracts. These developments arise from the Supreme Court's judgment in *Uber Technologies v. Heller*.[1] The underlying dispute in that case concerned the enforceability of an arbitration clause in a standard form contract between gig economy colossus Uber and its drivers in Ontario, which included the plaintiff Heller. The clause was not enforced. Justices Abella and Rowe, writing for a majority of seven justices, invalidated the clause as unconscionable. Justice Brown, concurring, relied instead on public policy to find it unenforceable. Justice Côté, dissenting, would have enforced the clause (with some judicial winnowing). In the following sections, I discuss the significance of developments relating to control of unfair terms in standard form contracts, unconscionability, and public policy, all of which concern fairness in the making of contracts.

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

1. Control of Unfair Terms in Standard Form Contracts

One of the most intractable problems of Contract Law has been unfair terms in standard form contracts.[2] The sharply contrasting roles of form-drafter and form-recipient that crystallize in the form-contracting process allow the drafting party to decide, beyond the few "core" terms actually discussed and agreed, the remaining terms. And they have often abused this power to include among these form terms some which are "clauses of oppression and outrage".[3] Courts have found it necessary to enforce these contracts, recognizing that they are "a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate . . . the terms of many of the transactions entered into in the course of daily life."[4]

Historically, common law judges sometimes tried to deal with unfair standard form terms by manipulating processes like interpretation, implication or incorporation to cut the unfair term down or out of the form.[5] However this could only be done occasionally and thus inconsistently without discrediting those processes and thereby detracting from their ordinary functions.[6] As a result, many jurisdictions in the common law and beyond, including civilian Quebec and Europe, moved to legislate controls of substantively unfair standard form terms.[7] There is some variation by jurisdiction in whether controls cover only consumer forms, or also include small-business, commercial forms, or all forms.[8] The United States has a

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[2] I use the phrase "standard form contract" throughout this publication in its narrow/precise sense (a.k.a. "contract of adhesion"). Some writings use "standard form contract" to refer to a broader array of standard contracts. But the word *form* was added by Karl Llewellyn to distinguish those standard contracts which are preformulated and simply agreed to by the recipient. For an expanded discussion of the issues in this section, see Marcus Moore, "Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?" (2022) 55:2 U.B.C. L. Rev. (forthcoming).

[3] Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston; Toronto: Little, Brown, 1960), at 366.

[4] John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at 185.

[5] *Uniform Commercial Code*, § 2-302 Cmt 1.

[6] Karl Llewellyn, "Book Review" (1939) 52 Harv. L. Rev. 700, at 702-703.

[7] See, *e.g.*, *Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L095/29* [hereinafter "UCTD"]; *Consumer Rights Act 2015* Part 2 (U.K.); *Unfair Contract Terms Act 1977* (U.K.); *Fair Trading Act 1986 No. 121*, ss. 26A, 46H-M (New Zealand); *Australian Consumer Law*, ss. 23-28; *Civil Code of Québec*, CCQ-1991, arts. 1437-1438.

[8] *Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L095/29*; *Consumer Rights Act 2015* Part 2 (U.K.); *Unfair Contract Terms Act 1977* (U.K.); *Fair Trading Act 1986 No. 121*, ss. 26A, 46H-M (New Zealand); *Australian Consumer Law*, ss. 23-28; *Civil Code of Québec*, CCQ-1991, arts. 1437-1438. Australia covers small business. Quebec covers all forms. Germany, the Netherlands and France cover

judicial control, inspired by the unconscionability section of the Uniform Commercial Code chapter on Sale, which American courts drew upon "either by analogy or as an expression of a general doctrine" to fashion a judicial control applicable to any form.[9] All of the above control regimes assess unfairness based essentially on notions of considerable imbalance in favour of the form-drafter at the expense of the form-recipient.[10]

With this as context, the absence of a control of somewhat general scope in Canadian common law has been both notable and regrettable. Some specialized controls exist, but general controls of the types found elsewhere have been a glaring omission as far as protecting fairness in contracts in common law Canada.[11] After all, belied by the continued focus of Contracts treatises and law school courses on the classical negotiated contract, standard form contracts overwhelmingly dominate contracting practice.[12] The scale across which this unfairness projects is thus immense. And it has been amplified in recent years by factors such as globalization, privatization and digitization assigning more and more of the governance of formal social activity to standard form contracts.[13] In short, unfair terms in standard form contracts are a major systemic contributor to the unprecedented inequalities of wealth in contemporary society, and thus to the wide-ranging and increasingly worrisome social consequences that flow from such disparities.

In my view, the most welcome development in Canadian Contract Law in the term reviewed by this paper was the Supreme Court's assertion, supported by a seven-justice majority in *Uber Technologies Inc. v. Heller*, that judges in Canadian common law are justified in exercising control of unfair terms in standard form contracts.[14]

The method by which the *Uber* judgment pursued control, and the parameters around this potentiality, were more uneven in their impact on realizing the desired aim, as I will explain.

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all commercial forms per the UCTD, under which consumer forms are just the minimum that states are directed to include.

[9] E. Allan Farnsworth, *Contracts*, 4th ed. (New York: Aspen, 2004) § 4.28, at 298-99; *Uniform Commercial Code*, § 2-302; *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

[10] Text to note 6.

[11] For a partial inventory of specialized controls in Canadian provinces, see Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017), at para. 545.

[12] Friedrich Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract" (1943) 43:5 Colum. L. Rev. 629; W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84(3) Harv. L. Rev. 529.

[13] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury, forthcoming 2022).

[14] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 56-59, 85, 87, 89-91 (S.C.C.).

Following the case's handling in the lower courts, the majority relied on the unconscionability doctrine of English origin as a basis for interrogating the fairness of the arbitration clause at issue.[15] Traditionally, that doctrine had *not* been used to deal with standard form terms; rather, it had been concerned with unusual situations of bargains entered into through the exploitation of a party under a special disability.[16] But in *Uber*, Abella and Rowe JJ. counted the form-contracting process towards the required procedural element of the doctrine.[17] This was significant in that, if the procedural element is met, what remains is the inquiry into substantive fairness — thus establishing control.[18]

However, the judgment left it unclear whether form-contracting *by itself* does suffice. Also cited were factors particular to the circumstances of the case, such as the plaintiff driver's lack of sophistication, limited financial means, and deception in the sense that unexpected implications of the arbitration agreement were effectively concealed.[19] If these factors were necessary parts of establishing the doctrine's procedural condition, then it will not apply absent similar *particularized* sources of disparate bargaining power, and thus will not provide a general fairness control of standard form contract terms. Also, the majority expressed the reservation that "we do not mean to suggest that a standard form contract, by itself, establishes" the doctrine's procedural condition.[20] Examples given of cases where it was suggested that control would not apply included where "sufficient explanations or advice . . . offset uncertainty about the terms" or where the drafting party "clearly and effectively communicate[s] the meaning of clauses with unusual or onerous

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[15] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 55 (S.C.C.); *Heller v. Uber Technologies Inc.*, [2019] O.J. No. 1, 2019 ONCA 1, at paras. 60-62 (Ont. C.A.); *Heller v. Uber Technologies Inc.*, [2018] O.J. No. 502, 2018 ONSC 718, at paras. 68, 75 (Ont. S.C.J.). On the genealogy of the doctrine, see Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014), at 520*ff*.

[16] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 54-55, 173 (S.C.C.); Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014), at 520*ff*; Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171; Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford, 2004), s. 6.4.

[17] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 87-93 (S.C.C.).

[18] On the depiction of the doctrine as divided into procedural and substantive elements, see, *e.g.*, Stephen Smith, *Contract Theory* (Oxford: Oxford, 2004), at 343.

[19] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 93-94 (S.C.C.).

[20] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 88 (S.C.C.).

effects".[21] Thus, control does not apply where enhanced information is provided. This reflects the thesis that with that, the form-recipient could better protect itself in the bargaining process. But this thesis has been thoroughly discredited in the standard form context.[22] It ignores the fact that whether or not the recipient is informed, the contract is take-it-or-leave-it in a context where leaving it likely just means having to take a similar form from a rival firm. This is because there is insufficient competition over form terms in modern society, where contracting is a near-constant activity and parties have no time to negotiate every term.[23] Also, the warning-based exception above resembles long-existent "red-hand" rules requiring special notice for incorporation of onerous terms, which drafting parties often manage to satisfy in continuing to include such terms.[24] Of note, unfair terms regulations — including legislated regimes and the American judicial control — apply even if the adherent is well informed. Generally, they only make exceptions for the "core" terms (typically subject matter and price) actually negotiated.[25]

Another way in which *Uber* sought to shift the doctrine towards providing a control of fairness in standard form contracts was its term-specific invalidation of just the impugned arbitration clause.[26] Traditionally, the doctrine's effect was to rescind a transaction as a whole.[27] A term-specific effect, leaving the rest of the

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[21] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 88 (S.C.C.).

[22] Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014), ch 2; Yannis Bakos, Florencia Marotta-Wurgler & David Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43:1 J.L.S. 1; American Law Institute, *Restatement on Consumer Contracts - Tentative Draft* (ALI, 2019), at 35.

[23] Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014), ch 2; Yannis Bakos, Florencia Marotta-Wurgler & David Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43:1 J.L.S. 1; American Law Institute, *Restatement on Consumer Contracts - Tentative Draft* (ALI, 2019), at 35; Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury, forthcoming 2022).

[24] *Thornton v. Shoe Lane Parking*, [1971] 2 Q.B. 163; *Tilden Rent-a-Car Co v. Clendenning*, [1978] O.J. No. 3260, 18 O.R. (2d) 601 (Ont. C.A.).

[25] See notes 7 and 9.

[26] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 96-99 (S.C.C.).

[27] S.M. Waddams, "Unconscionability in Canadian Contract Law" (1992) 14 Loy. LA Int'l & Comp. L. Rev. 541, at 543; John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at 440; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014), at 523; *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710, at 713 (B.C.C.A.); *Downer v. Pitcher*, [2017] N.J. No. 64, [2017] NLCA 13, at para. 21 (N.L.C.A.); *Uber Technologies Inc. v. Heller*, [2020] S.C.J.

contract intact, is typical of controls elsewhere.[28] This is seen as necessary, because in an economy where many goods are only available via standard form, rescinding the transaction over an unfair term would deprive people of their exchange needs — or at the risk of that, induce them not to take action over the unfair term.[29] Left unclear is whether the term-specific application in *Uber* is generalizable to other cases of complaints of an unfair standard form term. Notably, the majority cast the arbitration clause as "a self-contained contract collateral or ancillary to the [main] agreement", which brings the application in *Uber* in line with the doctrine's normal application to whole agreements.[30]

But elsewhere, the majority said that unfair standard form choice of law, forum selection and arbitration clauses were "precisely the kind of situation in which the unconscionability doctrine is meant to apply".[31] And Abella and Rowe JJ. added that "a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it".[32] The latter claim is momentous, in that if it does represent the state of the law, it significantly increases the doctrine's utility as a control of unfair standard form terms. However, remarkably, the claim appears only in a footnote, and the citations are to a different usage of the equitable concept of "unconscionability", suggesting possible conflation of the different uses of that concept.[33] As well, not all terms are severable, and the Supreme Court's approach to severability is strict.[34] Thus, in any case, this stops short of the unencumbered term-specific application of unfair terms regulations.

Furthermore, the uncertainty of the effect is itself problematic. For example, if the court finds the term not severable, the result then of avoiding the whole transaction will often be contrary to the interests of the complainant for the reasons explained above. As the footnoted claim was about what a *finding* of unconscionability may be directed at, this suggests it is up to the court, not the complainant. Given the uncertainty of the remedy, and the possibility of a "remedy" that does more harm

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No. 16, [2020] SCC 16, at para. 172 (S.C.C.).

[28] See notes 6 and 8.

[29] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury, forthcoming 2022).

[30] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 96 (S.C.C.).

[31] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 89 (S.C.C.).

[32] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, fn 8 (S.C.C.).

[33] Discussed in the next section. Justice Brown indeed reads this as a product of conflation: *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 173 (S.C.C.).

[34] *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6, 2009 SCC 6, at para. 32 (S.C.C.).

than good to the overall interests of a complainant, form-recipients may be reluctant to bring claims.

Even in cases where an unfair term had a severe impact on a particular form-recipient such that *ex post* it is willing to pursue a claim despite the risk of the whole contract being rescinded, arguably in going beyond what is necessary to redress the unfairness to the form-recipient, the remedy itself becomes unfair to the drafting party. Findings of substantive unfairness, of the remedy being to avoid the whole contract, and perhaps also of the satisfaction of the doctrine's procedural condition (discussed above), are precedents applicable to other instances of the standard form contract's use on the market. Hence, whether via a class action or otherwise, this could mean retroactive cancellation of mass transactions, with the resultant market disruption. Foreseeing this risk, Abella and Rowe JJ. submitted that it will *help*, as it will encourage firms to draft fair terms. No expert testimony was cited in support of this as the calculated effect. If the doctrine's uncertain effect deters form-recipients from bringing claims for the reasons noted earlier, then firms will rather be encouraged to do nothing. But if form-recipients *do* bring forth claims, firms face a problem that is more difficult to solve: assessments of substantive fairness are often subjective, and elsewhere the majority lowered the threshold of unfairness to be controlled from the high bar typically found in regimes controlling unfair standard form terms to a standard of unfairness *simpliciter*.[35] As a result, to avert the whole transaction-type being jeopardized, a firm would have to draft every term in the form so obviously fair as to be free from the risk of any subjective opinion finding it unfair. Because firms invest in drafting forms where the transaction-type is especially important to their interests, this is a fraught business proposition. Where it is not possible for a firm to draft every form term as obviously fair, this may alternately encourage an increased number of negotiated terms (with the added burdens in cost, time and convenience mostly borne by form-recipients). In other cases, it could result in firms' abandonment of the Canadian market as problematic in regard to use of standard forms.

In sum, *Uber* brought common law Canada closer to a long-needed control of unfair terms in standard form contracts, but the way it pursued this aim came with significant complications and drawbacks. A judicial control on the American model (whose core features are shared with the legislated regimes elsewhere, including in Quebec) would avoid all these problems.[36] Rather than deforming the traditional doctrine of unconscionability into something somewhat "relevant" to standard form contracts,[37] it would be vastly preferable to follow the well-trodden path of

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[35] See text to note 9. *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 80-82 (S.C.C.).

[36] See notes 7 and 9.

[37] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16 at paras. 85, 87 (S.C.C.).

dedicated controls widely found elsewhere.[38]

2. Unconscionability

As mentioned in the prior section, the way in which the majority in *Uber* sought to pursue a control of unfair terms in standard form contracts was through unconscionability. Unconscionability is a topic of importance in discussions of fairness in Contract Law. And the developments in *Uber* with regard to it are certainly worthy of separate but related consideration under that rubric, as I pursue in this section.

The starting point for any useful discussion of unconscionability in Canada must be a recognition that it has been a subject of considerable confusion in Canadian contract law for some time. In order to avoid perpetuating that confusion, some preliminary remarks are apposite, before surveying the developments in regard to unconscionability that took place in *Uber*.

Unconscionability refers, primarily, to a concept. Most writers understand the concept to refer to an unconscientious abuse of power in private law. Some envision it more broadly. Notably, Stephen Waddams, whose influence on Canadian Contract Law may be unsurpassed, has long espoused a very broad view of unconscionability.[39] Indeed, he has used the term "as a synonym for . . . unfairness".[40] It truly is *vital* that lawyers working in the area of Contract Law be aware when differing uses of this term are being made. But on any view of its breadth, what I refer to in this paragraph is the *idea or concept* of unconscionability.

There are, secondarily, *rules and doctrines* which are said to give effect to the idea of unconscionability. Reflecting his broad conception, Waddams places very many items in this category, including the rules on forfeitures, penalties, deposits, judicial and legislative controls on limitation clauses, red-hand rules of incorporation, covert use of interpretation or implication or consideration to control fairness, good faith, duress, inequality of bargaining power, undue influence, fiduciary relationships, the withholding of discretionary remedies, restraint of trade, and legislative provisions

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[38] See notes 7 and 9. For an expanded discussion of issues in the section below, see Marcus Moore, "The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts" (2022) 45:2 Dalhousie L.J. (forthcoming).

[39] S.M. Waddams, "Unconscionability in Contracts" (1976) 39:4 M.L.R. 369; Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017), c. 14; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257, at 267-69.

[40] Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017), at ¶ 550.

aiming at fairness.[41] On anyone's list would also be doctrines referred to using the underlying concept's very name of "unconscionability". These include the unconscionability doctrines of English descent, mentioned earlier, which provide for the rescission of transactions whose formation was defective, due to the bargaining process being tainted by exploitation of a party under a special disability.[42] As well, they include the American doctrine of unconscionability, referenced in the prior section, which is distinct from those of English origin,[43] and notably was crafted with an eye to judicial control of unfair terms in standard form contracts.[44]

Prior to *Uber*, unconscionability doctrines of both of these general types existed in Canada. A doctrine of the English type had long been used in Canada,[45] its leading cases including *Morrison v. Coast Finance Ltd.*, *Cain v. Clarica Life Insurance Co.*, *Titus v. William F. Cooke Enterprises Inc.* and *Downer v. Pitcher*.[46] The SCC's judgment in *Norberg v. Wynrib* (itself not a Contracts case) recognized this doctrine, quoting *Morrison v. Coast Finance Ltd.* as authority on it.[47] Meanwhile, an unconscionability doctrine sharing several defining features with the American doctrine was invoked in Canada in a line of cases headlined by the SCC's decisions in *Hunter Engineering Co. v. Syncrude Canada Ltd.* and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*.[48] There were questions whether it applied only to exclusion clauses, which would distinguish it from the American doctrine, or whether like the American doctrine it applied also

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[41] Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017), c. 14.

[42] Text to notes 15-16.

[43] David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 L.Q.R. 403.

[44] Text to note 9.

[45] *Waters v. Donnelly*, [1884] O.J. No. 294, 9 O.R. 391 (Ont. H.C.J.).

[46] *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710 (B.C.C.A.); *Cain v. Clarica Life Insurance Co.*, [2005] A.J. No. 1743, 2005 ABCA 437 (Alta. C.A.); *Titus v. William F. Cooke Enterprises Inc.*, [2007] O.J. No. 3148, 2007 ONCA 573 (Ont. C.A.); *Downer v. Pitcher*, [2017] N.J. No. 64, 2017 NLCA 13 (N.L.C.A.).

[47] *Norberg v. Wynrib*, [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226, at 248 (S.C.C.).

[48] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 (S.C.C.); see also *ABB Inc. v. Domtar Inc.*, [2007] S.C.J. No. 50, [2007] 3 S.C.R. 461 (S.C.C.); *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. No. 60, [1999] 3 S.C.R. 423 (S.C.C.); *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, [2004] A.J. No. 1098, [2004] ABCA 309 (Alta. C.A.); *Douez v. Facebook Inc.*, [2017] S.C.J. No. 33, [2017] 1 S.C.R. 751 (S.C.C.) (Abella J.); *TELUS Communications Inc. v. Wellman*, [2019] S.C.J. No. 19, [2019] 2 S.C.R. 144 (S.C.C.).

to other types of unfair terms.[49] But Chief Justice Dickson was explicit in *Hunter Engineering Co. v. Syncrude Canada Ltd.:* "exclusion clauses are not the only contractual provisions which may lead to unfairness. There appears to be no sound reason for applying special rules in the case of clauses excluding liability than for other clauses producing harsh results."[50] That the doctrine from this line of cases could apply to an unfair clause of any type was also the conclusion of some leading Contracts scholars, including Waddams, who wrote that "the implication of" the SCC using the term unconscionability is "that other kinds of unfair clauses may be disallowed if they are unconscionable",[51] as well as John McCamus, who saw that it could thus provide "a common law device long awaited by some, to ameliorate the harsh impact of unfair terms in boilerplate" (a statement quoted with approval in *Douez v. Facebook Inc.*).[52] The initial cases' focus on exclusion clauses likely just reflected that those cases simultaneously retired the doctrine of fundamental breach.[53] The unconscionability doctrine from this case-line has since been held to apply for instance to standard form limitation clauses (not just exclusion), forum selection clauses and arbitration clauses.[54]

Unfortunately, as a result of the confusion over whether it applied only to exclusion clauses, and the elusive discussion in those cases more generally, this doctrine had not yet developed into an established judicial control of unfair terms by the time of *Uber*. With two doctrines sharing the name unconscionability and perhaps lack of awareness that this simply reflected a broad equitable concept said to animate them (and in the view of some authors, many other doctrines and rules known under other names, as noted), the lower courts in *Uber* conflated the two doctrines.[55] This contaminated the case record, so that either the conflation continued, or the SCC was induced to try to fuse or harmonize the two doctrines to

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[49] See, *e.g.*, John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at 440 *ff.*

[50] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23, [1989] 1 S.C.R. 426, at 461 (S.C.C.).

[51] S.M. Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49 Can. Bus. L.J. 378, at 391.

[52] John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at 444. *Douez v. Facebook Inc.*, [2017] S.C.J. No. 33, [2017] 1 S.C.R. 751, at paras. 113-114 (S.C.C.) (Abella J.).

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

[54] *ABB Inc. v. Domtar Inc.*, [2007] S.C.J. No. 50, [2007] 3 S.C.R. 461, at para. 82 (S.C.C.); *Douez v. Facebook Inc.*, [2017] S.C.J. No. 33, [2017] 1 S.C.R. 751, at para. 112 (S.C.C.) (Abella J.); *TELUS Communications Inc. v. Wellman*, [2019] S.C.J. No. 19, [2019] 2 S.C.R. 144, at para. 85 (S.C.C.).

[55] *Heller v. Uber Technologies Inc.*, [2019] O.J. No. 1, [2019] ONCA 1, at paras. 60-62 (Ont. C.A.); *Heller v. Uber Technologies Inc.*, [2018] O.J. No. 502, 2018 ONSC 718, at paras. 68, 75 (Ont. S.C.J.).

prevent ongoing similar confusion in future cases. The troubles overviewed in the last section regarding *the means* by which the Court sought to establish judicial control of standard form terms all stem from this conflation.

The surest way to rectify this, and achieve the desired standard form term control, would be to simply disambiguate the two doctrines, and use as the control the one from the *Hunter Engineering Co. v. Syncrude Canada Ltd.* and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* case-line designed for that purpose on the model of controls elsewhere, including the judicial control in the U.S. and the legislated control in Quebec.[56] It could be distinguished as the doctrine of "unconscionable clauses",[57] from the English-type doctrine of "unconscionable bargains".[58] The latter is still needed to deal with the different sorts of situations it has traditionally been occupied with: enabling in exceptional circumstances for the avoidance of transactions entered into through exploitation of a party under a special disability.[59]

With this in mind, it might be expected that the conflation of the two unconscionability doctrines in *Uber* could result also in significant changes to how the conglomerate doctrine applies to situations *other than* unfair terms in standard form contracts. Several elements of the judgment support that hypothesis.

Prior to *Uber*, the unconscionable bargains doctrine required that the complainant suffered from a special disability such as "ignorance, need or distress", "blindness, deafness, illness, senility, or similar disability".[60] *Uber* generalized and liberalized the procedural condition to require only inequality of bargaining power.[61] This change vastly expands the circumstances in which the doctrine can apply — as was clearly intended.[62] The doctrine might then become of central significance in practice, supervising substantive unfairness where freedom of contract otherwise invites unfairness in cases where there is inequality of bargaining power.

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[56] See notes 7 and 9.

[57] From the title of UCC § 2-302, which inspired it: see note 9.

[58] A name commonly used for it in England and other common law jurisdictions.

[59] See note 16.

[60] *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710, at 713 (B.C.C.A.); *Cain v. Clarica Life Insurance Co.*, [2005] A.J. No. 1743, [2005] ABCA 437, at para. 32 (Alta. C.A.).

[61] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 62-68, 72 (S.C.C.). This was said to follow *Norberg v. Wynrib*, [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.); however, *Norberg* used this merely to label the procedural condition, on whose requirements it quoted *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710, at 713 (B.C.C.A.), which said the inequality had to "aris[e] out of" the special disabilities quoted.

[62] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 60, 82 (S.C.C.).

It would greatly advance fairness in contracts if we could distinguish the normal and appropriate use of bargaining power from its abuse — especially abuse to systemically amplify pre-existing socio-economic disparities — and counter this. The difficulty is that the doctrine's effect is not to somehow make a contract more fair. Rather, as one of Contract Law's vitiating doctrines, it operates to rescind transactions.[63]

This effect is suitable for the doctrine's traditional scope of application to exceptional situations of exploitation of a special disability — quintessential cases cited by *Uber* including "rescue at sea", "financial desperation" or cognitive impairment.[64] Not exceptional in this way is inequality of bargaining power; indeed, courts have observed that inequality of bargaining power attends almost every contract.[65] It has been said, for instance, that "any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power".[66] As far as sources of inequality, the *Uber* majority added that "differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes . . . There are no 'rigid limitations' on the types of inequality that fit this description."[67] Hence, expansive is the scope of contracts potentially meeting the procedural condition of the doctrine as modified by *Uber* — and thus at risk of rescission. This significantly reduces stability of contract. And that is a foundational problem, for just as order is a precondition of justice, stability of contract is a precondition of fairness and other virtues we might wish to see reflected in markets or their regulation. Moreover, any disruption that occurs will likely not be limited to exchange, as business arrangements of all kinds are planned around the contracts that parties make and assume to be valid.

Reinforcing the points just made was another change in *Uber*, alluded to earlier: the lowering of the bar of substantive unfairness required to trigger unconscionability.[68] Previously, qualifiers such as "gross" or "substantial" unfairness conveyed this high bar.[69] Abella and Rowe JJ.'s rejection of the high bar, and endorsement of

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[63] Text to note 27.

[64] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 69-71 (S.C.C.).

[65] See, *e.g.*, *Floyd v. Couture*, [2004] A.J. No. 377, [2004] ABQB 238, at para. 146 (Alta. C.A.); *Alec Lobb (Garages) Ltd. & Ors v. Total Oil (GB) Ltd.*, [1985] 1 W.L.R. 173, at 183 (Dillon L.J.).

[66] *Alec Lobb (Garages) Ltd. & Ors v. Total Oil (GB) Ltd.*, [1985] 1 W.L.R. 173, at 183 (Dillon L.J.).

[67] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 67 (S.C.C.).

[68] Text to note 35.

[69] *Cain v. Clarica Life Insurance Co.*, [2005] A.J. No. 1743, [2005] ABCA 437, at para.

the doctrine applying to unfairness *simpliciter*, further expands the number of contracts subject to being rescinded as unconscionable.[70] The thinking behind the adoption of this new position seems to have been that the rationales for deferring to freedom of contract are absent where there has already been found to be an inequality of bargaining power.[71] An inclination to see its value as attenuated in circumstances where, in practice, freedom of contract substantially means the freedom of one party to impose its will on the other, is understandable. But that leaves the key question of what is the alternative? In some civil law jurisdictions, including Quebec, prodigious use of legislated terms for nominate contracts effectively circumscribes freedom of contract.[72] But this is not necessarily limited to situations of inequality of bargaining power. And this approach's cost in lost freedom outside those situations, and the resulting constraints on market experimentation and potential innovation, have never been welcomed in the common law.[73] In the present context, the alternative in question is that courts condition the validity of more contracts on an assessment of their substantive fairness, measured to a fine degree of precision. It is doubtful that courts have the institutional capacity to accommodate a burden as onerous as that would be. And the subjectiveness of fairness assessments at that degree of precision would invite opportunistic litigation, which would exacerbate the burden on courts. All of this would come again at the expense of the foundational interest in stability of contract. The traditional high bar of substantive unfairness for unconscionability reflected the thinking that disrupting stability of contract was unworkable other than exceptionally where the unfairness was intolerable. Hence, even Lord Denning suggested that relief be restricted to where the inequality of bargaining power was "grievous" and the substance "very" unfair.[74]

Another development in *Uber* with respect to unconscionable bargains was elimination of the doctrine's knowledge requirement. Traditionally, the doctrine required that the defendant of the unconscionability claim knew, or perhaps ought

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32 (Alta. C.A.); *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710, at 713 (B.C.C.A.); *Floyd v. Couture*, [2004] A.J. No. 377, [2004] ABQB 238, at para. 150 (Alta. Q.B.); Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171, at 192, 194.

[70] Text to note 35.

[71] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 59 (S.C.C.).

[72] *Civil Code of Québec*, CCQ-1991, Book V, Title II.

[73] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury, forthcoming 2022).

[74] *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326, at 339; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257, at 274.

to have known, of its counterpart's impairment.[75] But the majority in *Uber* found such a requirement to be both unnecessary and improper.[76] Notably, a knowledge requirement conflicted with Abella and Rowe JJ.'s reconception of unconscionability as about protecting vulnerability, regardless of whether the other party had acted unconscientiously or innocently.[77] As they wrote:

> The purpose of unconscionability [is] the protection of vulnerable persons in transactions with others . . . Unconscionability, in our view, is meant to protect those who are vulnerable in the contracting process from loss or improvidence . . . A weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation.[78]

The significance of a knowledge requirement had been to establish a minimum level of wrongdoing by the party seeking to uphold the contract: even without a more active form of exploitation, to conclude the contract knowing that its counterpart was impaired, or perhaps knowing of circumstances that should have led it to take steps that would have revealed that, was an unconscientious advantage-taking.[79] Without this element, it comprised "strict liability", as Brown J. put it, or perhaps strict unenforceability.[80] In the view of Brown J., this change represented a

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[75] Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014), at 537, 544-548; John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at 431; Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171, at 195; Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 L.Q.R. 257, at 273-78; *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710, at 714 (B.C.C.A.); *Cain v. Clarica Life Insurance Co.*, [2005] A.J. No. 1743, [2005] ABCA 437, at para. 32 (Alta. C.A.); *Waters v. Donnelly*, [1884] O.J. No. 294, 9 O.R. 391, at para. 59 (Ont. H.C.J.); *Downer v. Pitcher*, [2017] N.J. No. 64, [2017] NLCA 13, at paras. 44-49 (N.L.C.A.); *Hart v. O'Connor*, [1985] UKPC 17; *Earl of Chesterfield v. Janssen*, [1751] 2 Ves. Sen. 125, at 155; *Earl of Aylesford v. Morris*, [1873] L.R. 8 Ch. App. 484, at 490-91; *Ayres v. Hazelgrove*, unreported, 1984; Charles Rickett, "Unconscionability and Commercial Law" (2005) 24 U.Q.L.J. 73, at 78.

[76] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 84-85 (S.C.C.). For an expanded discussion of this and related developments, see Marcus Moore, "The Doctrine of Contractual Absolution" (2022) 59:4 Alta. L. Rev. (forthcoming).

[77] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 60, 85 (S.C.C.).

[78] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 60, 85 (S.C.C.).

[79] See note 75.

[80] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 165 (S.C.C.).

"wholesale shift in the law".[81]

Theoretically, this seems hard to dispute: while there had been debate about how much knowledge was required, and whether unconscionability required a more active form of exploitation than knowledge, there was little suggestion the doctrine omitted at least a requirement of knowledge in some form.[82] As there can be no "inadvertent exploitation", the dispensing of this requirement reestablishes the Canadian doctrine of unconscionable bargains on a novel footing, outside the sphere of exploitation inhabited by its sister doctrines found in other Commonwealth jurisdictions.[83]

Meanwhile, practical implications of the change include that parties will be at risk of having contracts rescinded that the law agrees they had no reason to doubt the validity of when they were made, and upon whose validity they have subsequently relied.[84] As was colourfully stated long ago, "to make inadequacy of consideration of itself a distinct principle of relief in equity . . . Courts of Equity . . . would throw everything into confusion and set afloat all the contracts of mankind."[85] Indeed, a party that knows it is impaired could enter a contract, see how things go, and later get a court to cancel it, despite the innocent reliance of its contracting partner. That seems unfair.[86] For the reason just discussed, parties may even be incentivized to conceal impairments. If so, it will increase the frequency with which these problematic — indeed unconscionable — contracts will be made, and unpredictably, rescinded.

In short, as a vitiating doctrine, unconscionable bargains is best suited to play a vital but limited role in protecting fairness in contracts. To greatly expand its scope of application, as happened in *Uber*, is worrisome on account of its detrimental impact on stability of contract. Freedom of contract often must be abridged for the sake of fairness. Certainty also frequently gives way to other considerations, which

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[81] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 167 (S.C.C.).

[82] Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014), at 544. McInnes cites *Marshall v. Canada Permanent Trust Co.*, [1968] A.J. No. 81, 69 D.L.R. (2d) 260 (Alta. S.C.) as one of the few cases possibly suggesting otherwise.

[83] See, *e.g.*, Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171.

[84] As noted by Brown J.: *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras 166-167 (S.C.C.).

[85] *Griffith v. Spratley* (1787), 1 Cox. Eq. Cas. 383, at 388, 29 E.R. 1213, at 1215.

[86] See, *e.g.*, Peter Birks & Catherine Mitchell, "Unjust Enrichment" in Peter Birks, ed., *English Private Law* (Oxford: Oxford, 2000); Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171; Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford, 2004).

overall is manageable because departures from the parties' reasonable expectations are limited. But stability of contract cannot routinely be put in question. What good to parties are contracts, if they might often, and unpredictably, be found unenforceable? What use is Contract Law if it fails to establish conditions allowing parties to know when contracts they make will be enforced, and to plan accordingly? As suggested earlier, regulations with a more measured effect are better suited than vitiating doctrines to the routine protection of fairness in contracts.[87]

3. Public Policy

As mentioned above, Brown J. preferred to address the fairness of the arbitration clause in *Uber* not under unconscionability but as a matter of public policy.[88] The doctrine of public policy, he submitted, is "fundamental" to Canadian Contract Law.[89] Thus, although the parties had not argued it in the appeal, courts will consider public policy of their own motion.[90] While parties generally enjoy freedom of contract, there are limits on what they can bind themselves to; in such cases, freedom of contract is overridden by public policy.[91] Courts can decline to enforce contractual provisions that are contrary to public policy.[92]

Dealing with the fairness of the arbitration clause using the doctrine of public policy has contrasting effects in terms of how broad or narrow an approach it represents to regulating the fairness of contracts. On one hand, as Côté J. argued, public policy is vague and open-ended as a ground of exception to the general rule of contract enforcement.[93] Justice Brown having criticized the majority's approach as harming stability of contract, he was keen to emphasize that courts have cautioned against expanding the doctrine of public policy, that its existing applications are well established, and that his reasons in *Uber* were a straightforward application of existing law.[94] Whether public policy is itself circumscribed as an

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[87] See notes 7 and 72.

[88] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 101, 106 (S.C.C.).

[89] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16, at para. 109 (S.C.C.), quoting *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69, at para. 116 (S.C.C.) (Binnie J.).

[90] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 106 (S.C.C.), citing *Pro Swing Inc. v. Elta Golf Inc.*, [2006] S.C.J. No. 52, [2006] 2 S.C.R. 612, at para. 59 (S.C.C.).

[91] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, 2020 SCC 16, at para. 108 (S.C.C.), citing *Millar Estate (Re)*, [1938] S.C.J. No. 41, [1938] S.C.R. 1, at 4 (S.C.C.).

[92] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 105 (S.C.C.).

[93] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 307, 312, 316 (S.C.C.).

[94] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16 at paras. 109,

exception to the rule of contractual enforcement may be doubted: on another occasion, the Court remarked that public policy was "memorably described as an unruly horse".[95] That said, in my view Brown J. was correct in noting that in the contexts *where it does apply*, it tends to furnish a "narrowly framed solution".[96]

Take for example the issue of unfair terms in standard form contracts, discussed earlier. An approach based on public policy may be confined to specific types of clause. For example, previously, the Court had dealt in this way with exemption clauses in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, and forum selection clauses in *Douez v. Facebook Inc.*; in *Uber*, Brown J. applied it to the arbitration clause, and the majority saw part of that clause's unfairness as its incorporation of a foreign choice of law provision.[97] Even if one takes these instances as jointly embodying a common principle, the principle could be drawn narrowly as a concern with impeding access to justice — which is indeed how Brown J. describes the principle upon which he relied (as detailed below). This framing corresponds with a special focus, in Margaret Radin's recent work, on those standard form terms whose effect is to impede access to justice.[98] But terms which have that effect represent only a narrow subset of the term-types typically covered by legislative and judicial controls addressing unfair standard form terms outside of Canadian common law.[99] Presumably, a reason Abella J. argued in *Douez v. Facebook Inc.* and a unanimous Court signalled in *TELUS Communications Inc. v. Wellman* that it would move towards relying on unconscionability to control unfair terms[100] — as the majority then did in *Uber*[101] — was to have a more general fairness control for standard form terms, consistent with the more general approach

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137 (S.C.C), citing *Millar Estate (Re)*, [1938] S.C.J. No. 41, [1938] S.C.R. 1, at 4-7 (S.C.C.) (see B. Kain & D.T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" in T.L. Archibald & R.S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007) 1, at 17 and fn. 85).

[95] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69, at para. 116 (S.C.C.).

[96] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 109 (S.C.C.).

[97] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4, [2010] 1 S.C.R. 69 (S.C.C.); *Douez v. Facebook Inc.*, [2017] S.C.J. No. 33, [2017] 1 S.C.R. 751 (S.C.C.); *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 89 (S.C.C.).

[98] Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton, 2014).

[99] Note 7.

[100] *Douez v. Facebook Inc.*, [2017] S.C.J. No. 33, [2017] 1 S.C.R. 751 (S.C.C.); *TELUS Communications Inc. v. Wellman*, [2019] S.C.J. No. 19, [2019] 2 S.C.R. 144, at para. 85 (S.C.C.).

[101] Putting aside its unfortunate conflation of the unconscionable clauses doctrine

typical in other jurisdictions. By contrast, Brown J.'s approach of dealing with unfairness discretely clause-type by clause-type through a series of specific applications of public policy, is a narrower approach than unconscionability (as it also was precedingly in *Douez v. Facebook Inc.* and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*).

The previous paragraph alluded to the public policy principle upon which Brown J. based his approach in *Uber*. In arriving at that principle, he started by asserting that the right to a legal recourse is "inalienable even by the concurrent will of the parties".[102] Unless one could enforce one's contractual rights, a contract was self-evidently of no value.[103] To protect the integrity of the legal system and the market, public policy therefore will not enforce terms which bar access to dispute-resolution according to law.[104] To enforce such terms would enable the denial of access to justice, which would in turn violate the rule of law.[105]

Although at times the principles were stated in terms of court access, after reviewing the history of the movement toward acceptance of arbitration, Brown J. confirmed that alternative dispute resolution ("ADR") mechanisms may qualify, provided they afford a comparable measure of justice.[106] This was the case for arbitration under legislation that provides for a legally determined outcome, fair and equal treatment of parties, and court oversight.[107]

While the contract in *Uber* did not purport to exclude access to civil justice, that was its effect, and there was no reason to distinguish between these.[108] Specifically, the issue in Brown J.'s view — and the crux of his disagreement with Côté J. — was

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applicable to these with the unconscionable bargains doctrine dealing with different situations.

[102] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 110 (S.C.C.), quoting *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121, at 1133.

[103] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 112 (S.C.C.).

[104] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 110-112 (S.C.C.).

[105] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 111 (S.C.C.), citing *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214, at 230 (S.C.C.).

[106] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 115-118 (S.C.C.); *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] S.C.J. No. 15, 2003 SCC 17, at para. 38 (S.C.C.); *Hryniak v. Mauldin*, [2014] S.C.J. No. 14, 2014 SCC 14, at para. 2 (S.C.C.); *Sport Maska Inc. v. Zittrer*, [1988] S.C.J. No. 19, [1988] 1 S.C.R. 564, at 581 (S.C.C.).

[107] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 118 (S.C.C.).

[108] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 113 (S.C.C.).

that he saw the arbitration clause in the case as in practice operating not to provide for arbitration but to preclude it; as he wrote, "a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right."[109]

The reason the clause had the effect of barring access to justice was because it required an upfront fee that was substantial in proportion to the plaintiff driver's annual earnings under the contract, and grossly disproportionate to the amount of any dispute reasonably likely under it.[110] Analogously to the court fees ruled an unconstitutional barrier to access to justice in *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, the arbitration fees in *Uber* were such a deterrent to initiating proceedings as to be indistinguishable from precluding access altogether.[111] On this point, Brown J. noted that "during the hearing of this appeal, Uber's counsel would not concede that a clause requiring an upfront payment of 10 billion dollars to commence a civil claim would necessarily be equivalent to a brick wall standing in the way of dispute resolution."[112] This defiant stance surely boosted the plaintiff in respect of the outcome, by rendering the difficult question of *at what point* costs become a barrier irrelevant to Uber's position.[113]

To offer some general guidance, useful in other contexts regarding the question of when costs become an unfair barrier, Brown J drew again on *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)* to suggest that the test would be whether the clause at issue would cause undue hardship for the party wishing to bring a claim.[114] Further, he elaborated factors to consider in assessing whether undue hardship is caused. These include: (1) whether the cost to pursue a claim is disproportionate to the value of disputes likely to arise under the contract; (2) whether there is compensation elsewhere in the contract for a term which discourages access to low-value claims; (3) whether there was a disparity in

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[109] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 119, 138 (S.C.C.).

[110] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 132 (S.C.C.).

[111] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, paras. 114, 120, 132 (S.C.C.); *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.A.); *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.).

[112] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 114 (S.C.C.).

[113] Indeed, Brown J. chided: "It is the rule of *law*, not the rule of Uber": *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 137 (S.C.C.).

[114] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 129 (S.C.C.). *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59, at para. 45 (S.C.C.).

bargaining power between the parties; (4) whether the clause in issue is an unnegotiated standard form clause; (5) whether the restrictions on access are tailored to limit or offset prejudicial effects.[115]

While these factors were seen to clearly line up behind the conclusion that the clause in *Uber* was contrary to public policy, the analysis called for is complex and its outcome harder to predict in less extreme cases. Elsewhere in his reasons, Brown J. supported the view that certainty is important with regard to the validity of arbitration clauses.[116] He submitted that his approach furthers certainty because it only applies where the arbitration provided for is "arguably inaccessible".[117] One might question this, however: after all, the test is not inaccessibility, but hardship. Precisely *when* hardship becomes undue, considering multiple factors, is not so obviously certain. Further, Brown J. allowed that arbitration may justifiably require significant upfront costs, where warranted based on the context.[118] Thus, even where it is accepted that a clause creates significant impediments on access, a careful contextual analysis may reveal that this hardship is not undue. At least in standard form contracts, greater certainty might be achieved by a bright-line rule that arbitration clauses are unenforceable. The provision along these lines for consumer contracts in Ontario's *Consumer Protection Act* reflects concerns of inequality of bargaining power and information.[119] Taking this further, standard form terms are not bargained and typically not even known. Dealing in this way with standard form contracts would leave far fewer contracts in need of the more complex, less predictable analysis above. And presumably, in the remaining cases consisting of negotiated contracts, rarely would courts find arbitration clauses (including ones carrying significant upfront fees) unenforceable. Such an approach would be more conducive to certainty and better reflect contracting parties' reasonable expectations in each situation.

As to the remedy for a violation of public policy, Brown J. held that the only appropriate remedy is to find the clause unenforceable.[120] In particular, he rejected Côté J.'s suggestion of blue pencil severance, noting that this is only permitted where excising the illegal portion of the clause would not alter the meaning of the

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[115] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 131, 134-135 (S.C.C.).

[116] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 126-128 (S.C.C.).

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

[118] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 130 (S.C.C.).

[119] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, s. 7(2).

[120] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at para. 146 (S.C.C.).

portion left over, or distort the original intentions of the parties.[121] In this case, he argued that it was the total effect of the clause that made it illegal, and moreover the intention was illegal in that it was to dissuade the very claims likely to arise under the agreement.[122]

This completes the section of this article dealing with issues of fairness related to the making of contracts. I now turn to fairness issues in the performance of contracts.

III. FAIRNESS IN THE PERFORMANCE OF CONTRACTS

Playing a central role in supervising fairness in contractual performance is good faith. During the 2020-2021 period, the Supreme Court released some prominent decisions dealing with good faith. The good faith duty of honest performance was clarified in *C.M. Callow Inc. v. Zollinger*.[123] Shortly thereafter, the meaning and contours of the duty to exercise contractual discretion in good faith were elaborated by the SCC for the first time in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*.[124] A third case in which good faith was raised, *Matthews v. Ocean Nutrition Canada Ltd.*, is principally of significance to Employment Law, and is not discussed in detail in this article.[125] With respect to the Law of Contract, I would simply note that the Court held in *Matthews* that the duty to provide reasonable notice of dismissal is not in itself a matter of good faith, but a free-standing duty. Good faith's relevance was on the manner of dismissal, for example, if done in a callous or insensitive way that would foreseeably cause harm, in which case there could be separate damages on that basis.[126]

1. Good Faith

The aforementioned SCC judgments in the 2020-2021 term dealt with good faith in the common law context, where good faith was fairly recently substantially

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[121] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 140, 142 (S.C.C.); *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6, [2009] SCC 6, at paras. 29, 32 (S.C.C.); *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] S.C.J. No. 9, 2004 SCC 7, at para. 57 (S.C.C.), *per* Bastarache J., dissenting.

[122] *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, [2020] SCC 16, at paras. 142-146 (S.C.C.).

[123] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45 (S.C.C.) [hereinafter "*Callow*"].

[124] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 (S.C.C.) [hereinafter "*Wastech*"].

[125] *Matthews v. Ocean Nutrition Canada Ltd.*, [2020] S.C.J. No. 26, [2020] SCC 26 (S.C.C.).

[126] *Matthews v. Ocean Nutrition Canada Ltd.*, [2020] S.C.J. No. 26, [2020] SCC 26 (S.C.C.).

reorganized in in *Bhasin v. Hrynew.*[127] The Court's unanimous decision in *Bhasin* continues to provide the overarching framework for good faith in Canadian common law. As a major component of judicial supervision of fairness in the *performance* of contracts, I now explain aspects of that superstructure relevant to the particular developments that occurred in the term reviewed here.

Bhasin accepted "that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance".[128] Good faith is therefore not itself a doctrine or rule of direct application, but a broader principle that animates specific doctrines applicable in different contexts. As Cromwell J. explained, good faith "is not a free-standing rule, but rather a standard that underpins . . . more specific legal doctrines . . . in different situations . . . Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding".[129] As an underlying principle, the role of good faith in Canadian common law, then, is that it "states in general terms a requirement of justice from which more specific legal doctrines may be derived".[130] Specifically, it "exemplifies the notion that, in carrying out [one's] own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner".[131] Fairness in this sense was distinguished from the fiduciary principle through the observation that good faith "does not require acting to serve . . . interests" of the counterpart in every case; "it merely requires that a party not seek to undermine those interests in bad faith . . . Unlike fiduciary duties, good faith performance does not engage duties of loyalty . . . or a duty to put the interests of the other contracting party first."[132] The difference between good faith and bad faith was explained by the observation that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily".[133] It therefore serves to help ensure that parties adhere to a basic standard of fairness in contractual performance.

Underpinned by this organizing principle of good faith, *Bhasin* recognized four actual doctrines applicable to contracts generally: a duty of cooperation to achieve the objects of a contract; a duty to exercise discretionary powers under a contract in good faith; a duty not to evade one's contractual duties; and a duty of honest

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[127] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494 [hereinafter "*Bhasin*"].

[128] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 63 (S.C.C.).

[129] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at paras. 64, 69 (S.C.C.). See also John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 923, discussing the distinction between organizing principle and specific legal doctrine.

[130] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 64 (S.C.C.).

[131] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 65 (S.C.C.).

[132] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 65 (S.C.C.).

[133] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 63 (S.C.C.).

performance.[134] The possibility of recognizing additional rules in the future, applicable to contracts generally, was also left open for situations where "the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and giv[ing] due weight to the importance of private ordering and certainty in commercial affairs".[135] *Bhasin* also acknowledged the existence of duties of good faith in special classes of contractual relation, in particular employment, insurance and tendering.[136]

The framework for good faith in Canadian common law set out in *Bhasin*, then, was the background for the Court's decisions in *Callow*, rendered in December 2020, and *Wastech*, rendered in February 2021.

(a) The Good Faith Duty of Honest Performance

Callow concerned the termination of a commercial services contract allegedly in bad faith. Callow was under contract to the Baycrest condominium complex to provide maintenance services. Callow wished to procure a renewal for a further term, and discussions were held about this during which Baycrest actively misled Callow that this was likely and Callow provided free extra services in hopes of sealing the deal.[137] In fact, several months prior to this, Baycrest had become unhappy with the services and had decided to terminate the *existing* contract early, under a clause which allowed it do so on 10 days' notice. But awaiting a more opportune time to provide the notice, it withheld this information for many months while deceiving Callow about the latter's standing. As a result of the deception, Callow had lost the opportunity to bid on other work for the period after the contract with Baycrest was terminated, and had incurred expenses for maintenance equipment needed for the work expected to be performed for Baycrest during that period.

Justice Kasirer, writing for a five-justice majority, and Brown J., in a concurring opinion representing three justices, both held that Baycrest's conduct breached the good faith duty of honest performance. Justice Côté dissented, objecting to the trial judge's finding that Baycrest actively misled Callow.

Although the majority and concurring opinions in *Callow* agreed that the dispute

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[134] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at paras. 47-48, 92 (S.C.C.).

[135] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 66 (S.C.C.).

[136] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at paras. 54-56 (S.C.C.). For more on these classes, see John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 922-23.

[137] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 39 (S.C.C.).

could be resolved on the basis of the law as already established in *Bhasin*,[138] an opportunity was seen to exist to clarify certain points pertaining to the duty of honest performance.[139] This duty serves to protect parties against being unfairly deceived or misled by their contracting partner about the performance of their contract. Unlike in *Bhasin*, there were no outright lies in *Callow*. Thus, it was confirmed (as already stated in *Bhasin*) that other forms of conduct that actively mislead or deceive a contracting partner qualify as dishonesty for purposes of the duty.[140] What all counts as actively misleading or deceiving could not be comprehensively stated in the abstract, as it is a "highly fact-specific determination".[141] However, the deception must be done knowingly, and may include half-truths, omissions, and even silence where communication is necessary to correct a misapprehension by the other party caused by one's own prior misleading conduct.[142] Beyond this, it was affirmed as earlier stated in *Bhasin* that the duty of honesty should not be taken to impose a general duty of disclosure.[143] Justice Côté expressed concern that the distinction between conduct that is actively misleading versus permissible non-disclosure was "far from" clear, and argued that parties' interests in contractual certainty called for a duty of honesty that is clear and easy to apply.[144] To that end, Brown J. suggested that courts use the well-established jurisprudence on misrepresentation in drawing the same distinction. In his opinion, the standard for when communication is necessary to correct a counterpart's misapprehension is when the party's own conduct contributed to that misapprehension; Côté J. favoured an apparently higher standard of materially contributing to the misapprehension.[145]

Although *Bhasin* concerned dishonesty in relation to a contractual *right* (a right of renewal), the duty of honesty had been described there as in relation to contractual *obligations*. Hence, Kasirer J. also clarified in *Callow* that the duty

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[138] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 44, 129 (S.C.C.).

[139] See, *e.g.*, *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 30, 64, 121 (S.C.C.).

[140] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 81, 121 (S.C.C.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 87 (S.C.C.).

[141] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 91 (S.C.C.).

[142] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 90-91, 130, 133 (S.C.C.).

[143] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 81-82, 131-133 (S.C.C.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at paras. 73, 86 (S.C.C.).

[144] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 197-199 (S.C.C.).

[145] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 133, 201 (S.C.C.).

equally applies to contractual rights (in this case, a right to terminate).[146]

A related concern for the Court in *Callow* was to clarify the necessary link between the dishonesty and performance of the contract, under the duty. On this, the Court emphasized that the dishonesty and the performance must be "directly linked".[147] Here, Baycrest misled Callow into believing that the contract would be renewed, and Callow inferred from this that the existing contract would not be terminated. The justices seem not to have treated this inference as encompassed by the requirement of a direct link between the dishonesty and the exercise of the termination clause; however, because Callow's inference was reasonable, it then fell upon Baycrest to correct it — failing which its *silence* was dishonesty that *did* bear directly on its exercise of the termination clause.[148]

The above clarifications of the duty of honesty pursued by the SCC in *Callow* also spoke to questions about its scope and limits: the border between fair non-disclosure and unfair silence that actively misleads; and the requirement that the dishonesty be directly linked to exercise of a right or performance of an obligation under the contract.[149] In the absence of such limits, as Kasirer J. acknowledged, "there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability".[150]

The proper measure of damages for breach of the duty of honesty was disputed between the majority and concurring opinions. Justice Kasirer held that breach of the duty of honest performance gives rise to damages according to the usual contractual measure of expectancy damages. These put the innocent party in the position it would have been in had the contract been performed without being breached — in such cases by breaching the duty of honesty imposed by the common law.[151] Justice Brown, on the other hand, submitted that the damages to be awarded are reliance damages compensating the innocent party for loss it suffered as a result of detrimental reliance on the wrongful party's dishonest representations about its

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[146] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 42 (S.C.C.).

[147] See, *e.g.*, *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 49, 51, 130 (S.C.C.).

[148] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 37, 135 (S.C.C.). If in general the duty covers omitting to correct false but reasonable inferences about performance drawn from misleading communication, one might question whether in practice the duty is limited to dishonesty "directly" linked to performance.

[149] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 49, 51 76-77, 121 (S.C.C.).

[150] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 49 (S.C.C.).

[151] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 109 (S.C.C.).

performance. This followed from Brown J.'s conceptualization of the dishonesty not as a defect in contractual performance but as an extra-contractual misrepresentation concerning its performance.[152] The two justices agreed that in many cases the damages would be the same by either measure.[153] Justice Kasirer further conceded that there could be cases in which reliance damages would be necessary or preferable, for example, in cases "where it would be difficult for the plaintiff to prove the position they would have been in had the contract been performed".[154] According to Brown J., in *Bhasin* itself, although what were spoken of were expectancy damages, what were actually awarded were reliance damages: the contract was fully performed and concluded. An expectancy interest in its renewal was rejected by the Court, with Cromwell J. explaining that "it is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration."[155] The *Bhasin* Court noted the unfairness of this manner of contractual performance, in that were it not for the dishonesty, the innocent party "would have been able to retain the value of his business rather than see it, in effect, expropriated"; thus, it awarded damages for the lost value of the business.[156] It might be added that this also appears to be what the majority actually did in *Callow*: the "expectation" damages awarded were from a hypothetical contract with a third party, representing Callow's "lost opportunity" to procure such a contract as a result of its reliance on the dishonest statements by Baycrest.[157] Given *Callow*'s affirmation of *Bhasin*'s position that breach of the duty of honesty in relation to the date of renewal or termination does not allow a court to treat the contract as if its term were extended beyond its point of termination according to the terms the contract provides, it is difficult to see how such cases could be compensated by expectancy damages. A meaningful damage award, commensurate with the foreseeable consequences of the breach, would be reliance damages based on the deception unfairly causing a lost opportunity of a contract with some other party. Presumably, for the Court to give effect rather to expectancy damages, it would have to treat the contract indeed as if its term was extended — that the dishonesty created

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[152] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 142 (S.C.C.).

[153] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 108, 139 (S.C.C.).

[154] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 108 (S.C.C.).

[155] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 90 (S.C.C.).

[156] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 143 (S.C.C.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 109 (S.C.C.).

[157] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 116-117 (S.C.C.). See also Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, 2d ed. (Toronto: LexisNexis Canada, 2021), at 558-60.

such an expectation, notwithstanding what the contract otherwise provided regarding termination.

In *Callow*, the Court also considered the relationship between the duty of honesty and the duty to exercise discretionary powers in good faith. Justice Kasirer cast them as closely connected, explaining that both concern the unfair exercise of a "contractual prerogative".[158] To explain this, he drew on the civilian doctrine of abuse of right, which provides that no right can be exercised in an abusive manner.[159] Accordingly, he noted, "it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised."[160] Hence, although a contractual right may be drafted in a way that depicts it as absolute, it is still constrained by the duty to exercise it honestly. The duty of honesty fulfils a "limiting function" on how rights may be exercised, subjecting them to a basic standard of fairness that they be exercised honestly.[161] Justice Brown disagreed that the duty of honesty concerns the manner in which rights are exercised, describing it rather as consisting in dishonest representations *about* contractual performance.[162] He observed that in the case at bar, for instance, the dishonesty occurred at a time prior to the exercise of the termination clause.[163] In his view, what was to be emphasized was not a connection between the duty of honesty and the duty to exercise discretionary powers in good faith, but their distinction.[164] He noted that the duty of honesty may arise in other contexts not involving the manner of a right's exercise.[165]

Of this debate, it seems to me that at least in cases where the dishonesty lies (no pun intended) in representations about one's performance, the view of Brown J. is preferable. Consider the situation where a party misrepresents its performance to its counterpart. For example, suppose a water leak damages premises. Anxious to have remediation completed as soon as possible so it can move onto repairs, thus enabling

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[158] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 51 (S.C.C.).

[159] *Civil Code of Québec*, CCQ-1991, art. 7.

[160] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 68 (S.C.C.).

[161] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 68 (S.C.C.).

[162] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 177 (S.C.C.).

[163] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 177 (S.C.C.).

[164] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 176-181 (S.C.C.).

[165] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 179 (S.C.C.).

the tenant to return, the insurer regularly asks for updates from the remediator. Anxious to get more work from the insurer by completing the work quickly, and thinking it unlikely that there is mould, the remediator replies that remediation is completed of water damage in the flooring and walls, and that only the fixtures remain. The insurer then proceeds with the repairs to the walls and floor, and advises the tenant that they can return. But the samples that the remediator had sent off for mould testing at the outset then come back positive. The remediator tells the insurer that there is mould, and that sections of the underflooring and walls will need to be removed. As a result, the newly refinished walls and floor will need to be cut out and redone. It seems odd to describe the situation as that the remediator's contractual obligation — to remediate the floor and walls — was performed in a dishonest manner. One could perhaps conceive of there being an implied term granting the remediator a right to choose what updates to give the insurer prior to completing its work, and hold this implied term to have been exercised dishonestly. Indeed, one could say in *every case* that there is an implied term granting a party the right (except as otherwise specified by the written contract) to choose what representations to make regarding its performance, and say that the duty of dishonesty therefore concerns the manner in which *that* right is exercised. But *Bhasin* held that the duty of honesty did not depend on an implied term; it was a rule of the common law.[166] Either way, this is a convoluted and unintuitive way of describing the unfairness.

There may be concern not to be seen as imposing obligations on the parties outside the terms of their contract. But this is what Contract Law normally does where it is regulating in any respect parties' performance of contracts. For example, the parties' agreement may say nothing of the consequences of breach. But the common law imposes a secondary obligation on a party found to be in breach to remedy the breach, by paying expectancy damages or what other remedy the court may order. The same is true of the obligation to compensate the innocent party for consequential loss according to the principle in *Hadley v. Baxendale*. The parties' agreement also may say nothing of frustration. But if the conditions for that doctrine's application are met, even if the parties specified what damages would be paid in the event of breach, the party that did not receive the performance it was promised may be obliged to forego those damages. Hence, concern about imposing obligations not chosen by the parties would not seem to provide a compelling reason for casting the duty of honesty as a wrongful exercise of a contractual right.

Relatedly, this way of depicting it might reflect concern about ensuring an ascertainable scope to the duty of honesty's expansion of potential contractual liability. Characterizing it as contained within the rights and obligations agreed and established by the contract gives it the appearance of being bounded — merely a matter of how the already established rights are exercised and obligations discharged. But substantively, characterizing the duty this way does not make it any

[166] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 74 (S.C.C.).

more circumscribed; meanwhile, the artificiality of this representation of it makes the duty's scope (and application) more uncertain. It seems more straightforward just to say that the dishonesty must be about contractual performance. This suffices to convey the point that dishonesty about other matters, or in general, is not covered by the duty — that it does not amount simply to a "duty not to lie".

Further delimiting the scope of the duty of honesty does not depend on whether the dishonesty is framed as "in the exercise of" or as "about" a contractual performance. A way of further delimiting its scope — and using an approach typical of Contract Law (indeed an approach recently relied on by the SCC in a very different context, in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*[167]) — would be to focus on the intent to be legally bound.[168] The question would then be: was it reasonable for the receiver of the statement to interpret it as one the maker would intend that the recipient could legally rely on? This question would also be asked in the case of misrepresentation. Here, there is a potential problem in that *Bhasin* had said that "breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on".[169] The meaning of this statement from *Bhasin* is not entirely clear. If it means that the representor need not intend that the false statement *could* be relied on, then this would conflict with the suggestion above that the intention to be legally bound play a role in delimiting the duty. However, it would be surprising if that were the meaning. One would expect, for instance, that a false statement that is obviously a "puff" or said in jest would not breach the duty of honesty. A better reading of the statement (and perhaps the more grammatical one) is that it means that the representor need not intend that the false statement *should* be relied on. In that case, it makes sense in referring to the inducement element of misrepresentation that is not required of conduct which breaches the duty of honesty.[170]

Given that Brown J. disagreed that the duty of honest performance concerns the manner in which a right is exercised, it is hardly surprising that he further objected to the recourse made by Kasirer J. to the civilian concept of abuse of right.[171] The

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[167] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, [2021] S.C.J. No. 22, 2021 SCC 22 (S.C.C.).

[168] Objectively determined, as usual, by a reasonable person in the position of the party to whom the statement is communicated.

[169] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 88 (S.C.C.).

[170] More problematic is *Bhasin*'s repetition of this statement as supposedly helping distinguish the duty of honesty from estoppel. As estoppel does not require inducement, this statement would seem to be an error. As it appears in the same paragraph as the virtually identical statement distinguishing misrepresentation which, as just discussed, is more understandable, perhaps it was reproduced twice (*i.e.*, again regarding estoppel) accidentally.

[171] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45 (S.C.C.): see the reasons of Brown J. generally. He objected to a second recourse to Quebec civil law in *Wastech*, in his concurring opinion co-authored with Rowe J. (Côté J. concurring).

present article on developments in Contract Law is not the place to discuss these broader "methodological" questions on use of comparative law or of cross-fertilization between Canada's two systems of private law. However, it is possible to address the more limited question of the utility of the reference made to the doctrine of abuse of right in Quebec in illuminating the common law's good faith duty of honesty. As I hold a civil law degree besides a common law degree, and have a comparative law formation as an alumnus of McGill's trans-systemic law program, it may be that I am not among the group of "unijural" common lawyers Brown J. had in mind for whom he felt the reference to Quebec law was least useful.[172] Still, for the reasons stated above, I did not find the reference helpful in clarifying the duty of honesty. That said, I *did* find it helpful in relation to the *duty to exercise discretion* in good faith. Breach of that good faith duty had been argued as an alternative claim in *Callow*,[173] and thus was part of the record. Also, that good faith duty was at issue in the *Wastech* case that was under reserve concurrently with *Callow*, and whose release would shortly follow it. Thus, the discussion of abuse of right in *Callow* likely had, in part, these factors in mind. Indeed, the civilian doctrine of abuse of right was discussed again in *Wastech* by Kasirer J., writing there too for the majority. In that case, he seemed to suggest that it was superfluous, as the duty to exercise contractual discretion in good faith was already "uncontroversial[ly]" conceptualized in common law jurisdictions as an abuse of a right (the right to exercise the discretion).[174] However, I found the references useful with regard to the duty to exercise discretion in good faith in supporting the more specific — and contentious — claim (disputed by the concurring justices in *Wastech*) that even a discretion which is cast as absolute is still subject to limitations if abused in bad faith. The civil law-backed argument in *Callow* that any right (including ones not consisting in exercise of discretion) can be unfairly exercised served to lay or soften the ground in advance for the subsequent claim in *Wastech* that a discretion billed as unfettered is in fact subject to limitations and can be unfairly exercised.[175] In terms of non-discretionary rights, one general example would be taking advantage of necessitous circumstances of a counterpart to extort a modification.[176]

This brings me to the proposition in *Callow* and *Bhasin* that damages are to be measured by comparison to the "least onerous" means of good faith performance by

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[172] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 163 (S.C.C.).

[173] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 33 (S.C.C.).

[174] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 108 (S.C.C.).

[175] Discussed in the next section.

[176] American Law Institute, *Restatement (Second) of Contracts* (ALI, 1981) § 205 cmt [e].

the party in breach.[177] This common law rule applies where there is a contractual prerogative — that is, where the contract provides a party "alternative ways of performing a contract at his option".[178] Above, it was argued that breach of the duty of honesty is *not* best understood as necessarily consisting in misuse of a contractual prerogative. From this suggestion, it follows that the rule of measuring damages by comparison to the least onerous means of good faith performance is not always relevant to the duty of honesty. *Callow* is an example of where this rule is of dubious application. Justice Kasirer reasoned that "[w]hile damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference."[179] The position of Brown J. was similar.[180] However, the defendant correcting a misapprehension that it caused through dishonesty is not a less onerous means of honest performance. By then, the duty of honesty has already been breached. What Kasirer J. and Brown J. reference is simply a way in which the defendant could have mitigated its liability by making it unreasonable for the plaintiff to continue to rely on the prior dishonest representation. Justice Kasirer observes that had Baycrest made the correction, "Callow would have had the opportunity to secure another contract for the upcoming winter."[181] But suppose, for example, that the industry was characterized by a short window of time in which maintenance contracts for the following season are bid on and awarded. It may not have reduced Callow's loss if Baycrest had corrected its deception quickly, but the window of opportunity was already closed.[182] Surely, Baycrest would still be liable for the full damages of Callow's unfairly lost opportunity.[183]

It seems to me that the question of the least onerous means of performance is only relevant under two cumulative conditions. First, the breach of the duty of honesty must have been one that gives rise to expectancy damages. In cases like *Bhasin* and

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[177] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at paras. 114, 148 (S.C.C.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 90 (S.C.C.).

[178] *Hamilton v. Open Window Bakery Ltd.*, [2003] S.C.J. No. 72, [2004] 1 S.C.R. 303, at paras. 11-13 (S.C.C.).

[179] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 114 (S.C.C.).

[180] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 148 (S.C.C.).

[181] *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45, [2020] SCC 45, at para. 114 (S.C.C.).

[182] This may be particularly relevant in fast-moving markets like securities trading or in situations where the dishonesty induces the other party past a point-of-no-return in relation to some risk or opportunity (such as missing the annual window to bid on contracts with third parties, in this example).

[183] This, again, shows why in my view the damages to be awarded are reliance damages.

Callow where the breach gives rise rather to reliance damages, the damages are simply the loss unfairly caused to the innocent party in relying to its detriment on the dishonest representation. It is irrelevant what the least onerous means of honest performance was. Second, the contract had to be one where, as mentioned above, the "defendant ha[d] alternative ways of performing a contract at his option". In such cases, the rule is needed in order to determine which of them supplies the benchmark for measuring the expectancy against which the defendant's performance fell short. The classic discussion is that of Scrutton L.J. in *Withers v. General Theatre Corp*.[184] He gives two examples: (1) where a seller had an option to supply 800 to 1,200 tons of a certain commodity — in this case, the damages will be measured by the difference between his performance versus if he supplied 800 tons; and (2) where the landlord who could determine a lease after seven, 14, or 21 years wrongfully terminated it after five years — the damages assume the tenant had only two more years of the lease to run.[185] Thus, in *Bhasin*, had the Court awarded expectancy damages, this rule would have dictated that the damages be based on the agreement ending at the three-year point, which would have resulted in no damages. In *Callow*, it would have been based on the agreement ending in 10 days, again resulting in no damages.

Next I turn to the duty to exercise contractual discretion in good faith, elaborated in *Wastech*.

(b) The Duty to Exercise Discretion in Good Faith

The dispute in *Wastech* centred around whether a discretionary power in a long-term contract had been exercised in bad faith. The corporation responsible for waste disposal in Metro Vancouver ("Metro") had a 20-year contract with Wastech for waste hauling and disposal. By its terms, Wastech would be paid at different rates depending on the volumes of waste sent to different disposal sites. The contract provided that the allocation among the disposal sites was at Metro's discretion. Wastech had limited protection through provisions for adjustments in certain events, such as compensation for small departures from a target annual profit margin, and prospective adjustments in case of larger or more sustained deviations.[186] Notably, the contract did not guarantee Wastech its annual target profit margin,[187] and the parties had considered but failed to agree an additional mechanism that would provide compensation for the impact of a large variance in one year's waste allocation.[188] In 2011, a sharp reallocation of waste flows by Metro caused Wastech

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[184] *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536, at 548-50.

[185] *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536, at 548–50.

[186] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 124 (S.C.C.).

[187] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 11 (S.C.C.).

[188] *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, [2018]

to fall well short of its target annual profit margin.[189] Wastech argued that Metro used its discretion unfairly to the prejudice of Wastech's legitimate interests under the contract.

Unanimously, the Supreme Court held that Metro's exercise of its discretion over the waste allocation was not in bad faith. Justice Kasirer again authored the majority judgment, for six justices. Brown and Rowe JJ. (Côté J. concurring) agreed in the result. However, they excepted to the treatment by Kasirer J. of certain issues, including the scope of the duty to exercise contractual discretion in good faith, and the relative authority of the terms of the contract in establishing the standard according to which a breach of that duty should be assessed.

The existence of a duty to exercise contractual discretionary powers in good faith had been recognized earlier in *Bhasin*.[190] However, prior to *Wastech*, the meaning and content of that duty had yet to be elaborated.[191] The overarching significance of the Supreme Court's judgment in *Wastech* is in fleshing out the essential features of what that duty requires in terms of fair treatment of one's contracting partner.

Elaborating the meaning and content of the duty to exercise contractual discretion in good faith firstly required settling on a basis for assessing what fairness in this context required. Prior to *Wastech*, this was unclear.[192] For example, there was authority for the proposition that the discretion had to be exercised reasonably.[193]

B.C.J. No. 684, 2018 BCSC 605, at para. 56 (B.C.S.C.).

[189] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 15-18 (S.C.C.).

[190] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 47-50, 89 (S.C.C.).

[191] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7 at paras. 59, 129.

[192] John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 932-42.

[193] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 65-67, 129 (S.C.C.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 50 (S.C.C.); *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] S.C.J. No. 37, [1995] 2 S.C.R. 187 (S.C.C.); *Greenberg v. Meffert*, [1985] O.J. No. 2539, 50 O.R. (2d) 755, at 763 (Ont. C.A.); *2123201 Ontario Inc. v. Israel Estate*, [2016] O.J. No. 2756, 2016 ONCA 409, at para. 28 (Ont. C.A.); *LeMesurier v. Andrus*, [1986] O.J. No. 2371, 54 O.R. (2d) 1, at 7 (Ont. C.A.); *Jack Wookey Hldg. Ltd. v. Tanizul Timber Ltd.*, [1988] B.C.J. No. 534, 27 B.C.L.R. (2d) 221, at 225 (B.C.C.A.); *Canadian National Railway Co. v. Inglis Ltd.*, [1997] O.J. No. 4728, 36 O.R. (3d) 410, at 415-16 (Ont. C.A.); *Marshall v. Bernard Place Corp.*, [2002] O.J. No. 463, 58 O.R. (3d) 97, at para. 26 (Ont. C.A.); *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919, 64 O.R. (3d) 533, at para. 96 (Ont. C.A.); *Filice v. Complex Services Inc.*, [2018] O.J. No. 3642, 2018 ONCA 625, at para. 38 (Ont. C.A.); *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (The "Product Star") (No. 2)*, [1993] 1 Lloyd's Rep. 397, at 404 (Eng. C.A.), *per* Leggatt L.J.; *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R.

However, the meaning of reasonableness in this context was itself undetermined.[194] Meanwhile, there was also precedent that the duty called for the discretion not to be exercised "arbitrarily or capriciously".[195] Some support existed for the claim that the discretion had to be exercised "honestly" — including as part of the case history in *Wastech*, in the approach of the arbitrator.[196] Another common take on the duty was that it meant that the holder of the discretion was to be restrained from exercising it for an improper purpose.[197] In a different vein, a number of cases had held that a contractual discretionary power is exercised in bad faith where it is used to nullify the benefit of the bargain for the other party.[198] Also, the duty had been said to target abuse of contractual discretion "contrary to community standards" of fairness.[199]

Faced with this variety of ways of understanding the meaning of the duty to exercise contractual discretion in good faith, the Supreme Court unanimously

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234, at 258 (C.A.), *per* Priestley J.A.; A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 L.Q.R. 66, at 76; J.D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2005) 29 Adv. Q. 72, at 80; John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 937; J.M. Paterson, "Good Faith Duties in Contract Performance" (2014) 14 O.U.C.L.J. 283, at 284, 299 and 302; A. Gray, "Development of Good Faith in Canada, Australia and Great Britain" (2015) 57 Can. Bus. L.J. 84, at 113; Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Canada Law Book, 2017), at para. 503.

[194] John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020).

[195] *Greenberg v. Meffert*, [1985] O.J. No. 2539, 50 O.R. (2d) 755, at 763 (Ont. C.A.); *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 63 (S.C.C.); *British Telecommunications Plc. v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, at para. 37.

[196] John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 942; *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, [1955] S.C.J. No. 25, [1955] S.C.R. 398 (S.C.C.); *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919, 64 O.R. (3d) 533 (Ont. C.A.); *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 55 (S.C.C.).

[197] John McCamus, *The Law of Contracts*, 3d ed. (Toronto: Irwin Law, 2020), at 943. *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634; *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201, 149 A.R. 187 (Alta. C.A.); *Greenberg v. Meffert*, [1985] O.J. No. 2539, 50 O.R. (2d) 755 (Ont. C.A.).

[198] *Gateway Realty Ltd. v. Arton Holdings Ltd.*, [1991] N.S.J. No. 362, 106 N.S.R. (2d) 180, at paras. 38, 58 and 60 (N.S.S.C.-T.D.); *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201, 149 A.R. 187, at para. 22 (Alta. C.A.); *Klewchuk v. Switzer*, [2003] A.J. No. 785, 2003 ABCA 187, at para. 33 (Alta. C.A.); G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at 530.

[199] *Gateway Realty Ltd. v. Arton Holdings Ltd.*, [1991] N.S.J. No. 362, 106 N.S.R. (2d) 180 (N.S.S.C.-T.D.).

endorsed the improper purpose conception.[200]

In arriving at this conclusion, Kasirer J. explained that nullification of a benefit describes a result, and does not in itself speak to whether that result was necessarily caused by action that was in breach of the duty to exercise contractual discretion in good faith — or of any other contractual duty.[201] Hence, this was not the measure of breach of the duty to exercise discretion in good faith, nor a prerequisite for finding that the duty was breached.[202] I add that the Court's disfavour of that focus appears consistent with its earlier move away from the doctrine of fundamental breach, which was likewise focused on whether the plaintiff was substantially deprived of the benefit of a bargain.[203]

The Court did not overtly respond to the "community standards" of fairness theory of exercising discretion in good faith. However, a definite rejection of that approach is perhaps implicit in Kasirer J.'s concern to avoid "*ad hoc* judicial moralism".[204] More broadly, the Court emphasized that the duty "does not reflect the imposition of external standards on the exercise of discretion, but rather giving effect to the standards inherent in the parties' own bargain."[205] And Kasirer J. added that the duty — and the organizing principle of good faith more broadly — are "anchored" by the notion of corrective justice,[206] not by principles of distributive justice such as what the court would find to be "morally opportune or wise . . . from a business perspective".[207] The implicit rejection of the community standards of fairness approach can be seen as consistent with the Court's avoidance in *Uber* of the "community standards of commercial morality" approach to unconscionability

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[200] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 4, 68-71, 115 (S.C.C.).

[201] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 83 (S.C.C.), citing A. Swan, J. Adamski & A.Y. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis, 2018), at § 7.73.

[202] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 82, 84 (S.C.C.).

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

[204] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 74 (S.C.C.), quoting *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 70 (S.C.C.).

[205] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 131, 75 (S.C.C.).

[206] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 111-112 (S.C.C.).

[207] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 73 (S.C.C.).

from *Harry v. Kreutziger*.[208]

On the need to exercise contractual discretion honestly, the Court seemed to take the view that this was a matter for the duty of honest performance that was the good faith doctrine at issue in *Callow*.[209] A discretionary power, like any other contractual right, was by that duty bound to be exercised honestly.[210] The concurring opinion read the majority as holding that courts should assess whether the duty of honesty has been breached as a "preliminary step" to analyzing potential breach of the duty to exercise discretion in good faith. Brown and Rowe JJ. objected to that proposition, worried that it conflated the two duties.[211] However, this is not my reading of what the majority was saying: where in the passage complained of, Kasirer J. had written "beyond the requirement of honest performance, to determine whether a party failed in its duty to exercise discretionary power in good faith . . .",[212] he probably did not intend to prescribe a sequential analysis of the two duties. Instead, it is likely that he simply meant that *it already having been discussed* that exercising a discretionary power dishonestly would breach the duty of honesty, there are other ways a discretionary power could be exercised that will breach the duty to exercise discretion in good faith. It is true that in his opinion, Kasirer J. did first assess whether Metro breached the duty of honesty before assessing whether it breached the duty to exercise discretion in good faith. However, this is readily explained by the fact that the arbitrator had found Metro's conduct to be "dishonest".[213] If Kasirer J. had meant to direct courts to analyze the duties sequentially, one would expect the judgment to have said so more plainly and directly, as generally his opinion is clearly written and shows no hesitation to underline points of potential significance.

As with the need to exercise discretion honestly, the Court in *Wastech* agreed that good faith required that discretion be exercised in a way that is not arbitrary or capricious.[214] This implies that there must be some mode of exercising the

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[208] *Harry v. Kreutziger*, [1978] B.C.J. No. 1318, 95 D.L.R. (3d) 231, at paras 27-28 (B.C.C.A.), *per* Lambert J.A.

[209] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 54, 137 (S.C.C.).

[210] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 54 (S.C.C.).

[211] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 115 (S.C.C.).

[212] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 69 (S.C.C.).

[213] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 26 (S.C.C.). For a different reading of these comments of Kasirer J., see Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts*, 2d ed. (Toronto: LexisNexis Canada, 2021), at 524.

[214] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021]

discretion that would *not* be arbitrary or capricious. And that in turn suggests that there existed some guidelines for the exercise of the discretion. In that regard, the Court endorsed the view of the UKSC in *British Telecommunications Plc. v. Telefónica O2 UK Ltd.* that the purpose of the discretion provides these guidelines:

> Although capriciousness and arbitrariness have sometimes been referred to independently of improper purpose, I agree with the Supreme Court in *Telefónica* that a capricious or arbitrary exercise of a discretionary power is an example of such a power being exercised contrary to that standard. When seeking to demonstrate that discretion was exercised capriciously or arbitrarily, one necessarily considers contractual purposes by showing that discretion was exercised in a manner unconnected to the underlying contractual purposes for which the power was conferred.[215]

Thus, also citing the views of John McCamus, Hugh Collins, Lord Sales (writing extrajudicially) and others, the majority decisively held the duty to exercise contractual discretion in good faith to mean that the discretion be exercised consistently with the purposes for which it was conferred.[216] This was the "touchstone" for assessing fairness in this context.[217] The test is whether the exercise of the discretion fell "outside the range of choices" connected to "the purpose for which the contract granted discretion . . . If so, the party has not exercised the contractual power in good faith."[218] The stated conceptualization of the meaning and content of the duty is also consistent with the American position.[219] And it was supported by the concurring opinion in *Wastech*: "we agree that the purpose of a discretion is the proper focus of the good faith analysis."[220] That said, likely in order to underscore that analogies should not be drawn to construction of purpose in Public Law,[221] Brown and Rowe JJ. preferred in lieu of the word

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S.C.J. No. 7, 2021 SCC 7, at para. 86 (S.C.C.).

[215] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 87 (S.C.C.).

[216] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 68-72 (S.C.C.).

[217] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 70 (S.C.C.).

[218] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 71, 69 (S.C.C.).

[219] S.J. Burton & E. Andersen, *Contractual Good Faith: Formation, Performance, Breach and Enforcement* (Boston: Little, Brown and Co., 1995), at 57.

[220] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 115 (S.C.C.).

[221] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para 68 (S.C.C.). On construction of purpose in Public Law, see Marcus Moore, "R. v. Safarzadeh-Markhali: Elements and Implications of the Supreme

"purpose" the phrase "shared reasonable expectation" of the parties.[222] Moreover, they suggested that one cannot always reliably interpret the purpose of a contractual discretion (a point to be discussed further below).[223]

Having decided that the duty to exercise contractual discretion in good faith meant that the holder of the discretion should not abuse it for an improper purpose, it remained for the Court to specify how the purpose of a contractual discretionary power should be ascertained. The Court explained that this was a matter of interpreting the contract. Where the purpose emerged from applying the ordinary principles of contractual interpretation, the majority and concurring opinions agreed that this supplied the answer.[224] But where the purpose is not evident from this, as the discretion is simply cast as general, the majority held that the court itself must ascertain the limits of the power. The majority presented this as still a matter of construction: in those cases, "it is necessary . . . to form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power."[225] The concurring opinion objected. In its view, this went beyond construction, and represented "the imposition, post facto, of a judicial view". This, they said, distorted the bargain and infringed on freedom of contract.[226]

The dispute among the opinions on this point can perhaps be illuminated by looking by analogy at different elements of the law on terms implied-in-fact: The guidance given by Kasirer J. can be compared with the business efficacy test for terms implied-in-fact, wherein courts decide whether an obligation unmentioned by

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Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223.

[222] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 131 (S.C.C.), citing *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201, 149 A.R. 187, at para. 19 (Alta. C.A.); J.T. Robertson, "Good Faith as an Organizing Principle in Contract Law: Bhasin v. Hrynew — Two Steps Forward and One Look Back" (2015) 93 Can. Bar Rev. 809, at 839; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 L.Q.R. 433, at 434.

[223] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 131-133 (S.C.C.).

[224] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 76, 131 (S.C.C.).

[225] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 72 (S.C.C.), quoting Philip Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 L.Q.R. 384, at 393. See also Hugh Collins, "Employment as a Relational Contract" (2021) 137 L.Q.R. 426, at 435-36.

[226] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 132 (S.C.C.).

the parties might be necessary to give effect to the purpose of the contract.[227] Drawing this analogy is far from strained, as Kasirer J. himself observed that "on the facts of this case, a duty on Metro to exercise its discretion in good faith", had it not been applicable as a general common law duty, would have been "necessary to give business efficacy to the Contract".[228] And similarly to Kasirer J. characterizing the majority's approach to ascertaining the content of the duty as a matter of construction, terms implied-in-fact under the business efficacy test are said to arise from the "presumed intention of the parties".[229] The law presumes that the parties intended that their agreement should be effective for the purposes for which they created it, and if a term unexpressed by the parties is necessary to that, the court will treat the term as implied. One assumes that Brown and Rowe JJ. accept this settled position of the common law on terms implied-in-fact. Thus I wonder whether their concern was perhaps misidentified in casting it as merely about construing broad purposes tied to the objectives of a contract.[230] Indeed, they themselves state that where a contract "reflects a shared reasonable expectation as to the manner in which a discretion may be exercised, that expectation will be enforced".[231] This is a similarly broad assessment, and whether framed in reliance-terms as about the parties' expectations of the contract or in voluntarist-terms as about the parties' contractual intentions, either way the judge is bound to draw inferences about what the contract was to do, and how that relates to whether a certain exercise of discretion was contemplated. This is reinforced by their later statement, this time using the voluntarist language preferred by Kasirer J., that "the purpose of a discretion is . . . defined by the parties' intentions, as revealed by the contract".[232]

Continuing with the implied terms analogy, a separate rule provides that a term will not be implied if it conflicts with the express terms of the contract.[233] In the context of terms implied-in-fact, this rule protects against the concerns voiced by Brown and Rowe JJ. about a court's construction of a contract's broad purposes and associated presumption of party intention being permitted to distort a bargain or

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[227] *Moorcock (The)*, [1889] 14 P.D. 64.

[228] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 92 (S.C.C.).

[229] *Moorcock (The)*, [1889] 14 P.D. 64.

[230] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 132 (S.C.C.).

[231] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 131 (S.C.C.). See in another context of contracts requiring cooperation Hugh Collins, "Employment as a Relational Contract" (2021) 137 L.Q.R. 426, at 435.

[232] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 133 (S.C.C.).

[233] *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Ltd. & Anor*, [2015] UKSC 72, at para. 28.

override freedom of contract. What Brown and Rowe JJ. seem keen to ensure is that "where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts . . . must give effect to that intention", and likewise that if parties "choose to specify the purpose for which a discretion has been granted . . . their intention should be given effect and not subverted".[234] In my view, what this calls for is a rule, like that constraining implication of terms, that no limitation on a contractual discretion be held to exist that conflicts with a clear intention by the parties to exclude such a limitation.[235] As for the propriety of construing the broad purposes of a contract, it is inevitable that there will be cases in which it is this which shows that a certain limit on a discretion necessarily exists, just the same as in implication it is often this which reveals the necessary existence of an entirely unexpressed term. Indeed, it might be better to think of those limits on a discretion ascertained by reference to the contract's broad purposes as the result of implication, as distinct from the limits ascertainable by straightforward interpretation. However, I will leave consideration of this proposition aside here, in order to avoid causing confusion in light of Kasirer J. stating, on the separate issue of how the *duty* to exercise discretion in good faith arises, that it is not an implied term but a common law rule.[236]

A situation deserving of special attention is clauses which purport to confer unfettered discretion. As mentioned in the preceding paragraph, Brown and Rowe JJ. submitted that courts must give effect to that. Indeed, they said further that "with careful drafting, parties can largely immunize the exercise of discretion from review" as to compliance with the duty to exercise discretion in good faith.[237] By contrast, the majority was of the view that "even unfettered, the discretionary power will have purposes that reflects [*sic*] the parties' shared interests and expectations, which purposes help identify when an exercise is" unconnected to these and hence breaches the duty.[238] Justice Kasirer, citing *Bhasin*, Angela Swan *et al*. and Lord Sales, went on to explain that:

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[234] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 133 (S.C.C.).

[235] Putting aside whether this exclusion might violate other rules of law.

[236] The referenced statement of Kasirer J. pertains to what he calls the "source" of the duty, as distinct from the "content" of the duty, which as mentioned earlier, he said was to be determined by interpretation. I am suggesting that further consideration be given in the future to whether those cases in which he said the limits of a discretion cannot be determined by an ordinary exercise of interpretation, but only by looking at a contract's broad purposes, might be better understood as having been determined by implication (according to the business efficacy test for terms implied-in-fact).

[237] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 133 (S.C.C.).

[238] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 62 (S.C.C.).

> it is difficult to imagine any party wishing to confer . . . untrammelled power on its contracting partner. For this reason, when contracting parties confer a discretionary power, even without any apparent constraining criteria or conditions, courts have long recognized that the "natural inference" is that they intend some minimum constraints on the exercise of the discretion. . . those minimum constraints include the expectation that the parties will not exercise their discretion in a manner unconnected to the purposes for which it was granted, for example in a capricious or arbitrary manner [references omitted].[239]

Thus, the majority reject the suggestion, implicit in the position of the concurring opinion, that the purpose could simply be to confer an unfettered discretion. This would be to license limitless unfairness, including maliciously motivated. On this question of whether there could be a fully unfettered discretion, it is perhaps of note that in *Wastech* itself, the contract had framed the power conferred on Metro regarding waste allocation as "absolute discretion".[240] The majority, consistent with its position just described, did not give effect to this; it said it needed to look further at the contract as a whole, and concluded that the purpose was to allow Metro flexibility to allocate waste in a way that would be efficient and minimize costs.[241] Interestingly, Brown and Rowe JJ. seemed to agree: they took note of the contract's careful drafting,[242] but did not argue that Metro's exercise of its purportedly "absolute" discretion should be immunized from review. Nor, in enumerating their disagreements with the majority, did they include Kasirer J.'s construction of the discretion held by Metro in the case.[243] Indeed, similarly to Kasirer J., they held that "the parties contemplated that Metro could exercise the discretion so as to advance its own interests", which were efficiency and least cost.[244] Thus, *in practice* they did not treat Metro's "absolute discretion" as simply that, and beyond review.

On this issue of absolute discretion, it seems to me that the position espoused by the majority in principle, also adhered to by the concurring justices in practice,

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[239] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 92 (S.C.C.); Philip Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 L.Q.R. 384, at 387; see also A. Swan, J. Adamski & A.Y. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis, 2018), at § 8.304; *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 45 (S.C.C.).

[240] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 13 (S.C.C.).

[241] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 97-99 (S.C.C.).

[242] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 134 (S.C.C.).

[243] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 115 (S.C.C.).

[244] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 135 (S.C.C.).

reflects good sense. After all, a discretion is provided for a reason. As Ronald Dworkin famously wrote: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction ... It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards'." And as Todd Rakoff argues, to say the reason was to give one party absolute power over the other is offensive to our fundamental value of equality.[245] Indeed, to suggest that this is the reason for a discretionary power only raises larger concerns of possible unfair imposition — whether via standard form contracts, in which such clauses are common[246] — or circumstances such as duress, undue influence or unconscionability. As Kasirer J. said, "it is difficult to imagine any party" in a contracting process not afflicted by issues such as those just mentioned agreeing to confer "untrammelled power" on its counterpart. Reading a clause in this sort of literalist way is not consistent with the reasonable expectations of business-people.[247] Nor does it reflect a correct application of the principles of contractual interpretation.[248] Assuming the discretion is created for some other reason, then, that reason is — to use Brown and Rowe JJ.'s terms — what was "contemplated" by the parties, and affects their "reasonable expectations". Moreover, even if several purposes are contemplated, it is unrealistic to suppose that the parties could have contemplated every purpose conceivable, let alone approved of them all. As Collins explains, good faith "enables a court to control discretionary decisions . . . where the power is used for a purpose not originally expected by the subject of the power".[249] This provides a minimum standard of fairness in contractual performance that courts will expect parties to adhere to, as part of the legal protections needed around market exchange.

Justice Kasirer's invocation of arbitrary or capricious exercises of discretion is an apt example of unlikely reasons for which to provide for a contractual discretion. Thus, for instance, a law faculty may want wide discretion to decide which courses it will ask a professor to teach, so that it can factor in considerations such as course enrolment, other available instructors, experience, workload, leaves, *etc.* But its discretion should not be construed as unfettered in the sense that it could decide this

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[245] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013), at 48 (first published in 1977); Todd Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv. L. Rev. 1173.

[246] Todd Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv. L. Rev. 1173.

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

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

[249] H. Collins, "Discretionary Powers in Contracts" in D. Campbell, H. Collins & J. Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford: Hart Publishing, 2003) 219, at 223.

based on consulting a Magic 8 Ball, nor based on personal rivalry or vindictiveness. Thus, in my view, an expressed intent to make a discretion absolute is more realistically to be understood as an intent to *exclude limitations* that might otherwise be reasonably expected to apply, such as having to make a decision based on one prominent consideration, or the need to consult a contracting partner or take its interests into account. In *Wastech*, for example, the arbitrator was persuaded that the latter sort of expectations existed due to the long-term and cooperative aspects of the contract; the Supreme Court explained that the "wide" discretion given to Metro regarding the disputed waste allocation should be understood as excluding those expectations.[250]

Another question to be answered regarding the duty to exercise contractual discretion in good faith was the status of the duty: did it exist as an implied term in parties' contracts, or was it a common law rule? As the Court had earlier held with respect to the good faith duty of honest performance,[251] the duty to exercise discretion in good faith was likewise said to be a general common law doctrine.[252] Two reasons were given for the conclusion that the duty was a common law rule: first, that consistency with the status of the duty of honest performance enhances the law's coherence; and second, that the law presumes that parties would not intend a discretion to truly be unlimited.[253] While both of these propositions may readily be accepted, neither provides an especially compelling reason for holding that the status of the duty is a rule of law rather than a term. More compelling are the policy reasons that inhere in the consequences of that determination: establishing the duty as a general legal doctrine makes the duty applicable to discretionary powers in every contract.[254] Its presence does not depend on whether or not the parties provided for it in fact (expressly or by implication), nor on whether or not the contract is a standard type in which such a term would by default be implied-by-law. The duty simply applies by operation of law. By thus assuring its application to all contracts, the duty creates a minimum standard of fair conduct constraining abuse of contractual discretionary powers. As well, the duty's status as a rule of law means it cannot be excluded by the express terms of a contract, as it could if it were an implied term.[255] This too is helpful, in guarding against the risk of the minimum

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[250] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 135, 101 (S.C.C.).

[251] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 74 (S.C.C.).

[252] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 91, 94 (S.C.C.).

[253] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 94 (S.C.C.).

[254] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 94 (S.C.C.).

[255] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 94 (S.C.C.).

standard of fair conduct the duty requires in the exercise of discretionary powers being carved out of those contracts where discretion is most likely to be abused, through express terms excluding the duty being pushed on parties of little bargaining power, or inserted among the form terms of contracts of adhesion.

Looming over some of the issues just discussed is the degree of party autonomy over permissible exercises of contractual discretion. As mentioned earlier, Brown and Rowe JJ. espoused an especially strong view of this, including that parties can control the standard by which the exercise of a discretion is measured by specifying its purpose, or largely immunize the exercise of a discretion from review by specifying that it is unfettered. The majority also deferred extensively to party autonomy, rejecting as discussed above, external measures of fairness such as community standards, commercial morality or a judicial appraisal. As Kasirer J. saw it, the duty gave effect to party intention by upholding their reasonable expectations that a discretionary power would not be used for an ulterior purpose than that set by the parties themselves.[256] Moreover, for parties who might wish to craft their agreement in a manner that would retain the most party sovereignty over permissible exercises of a provided discretion, Kasirer J. gave at least some guidance on how different possible formulations would be treated by courts assessing compliance with the duty:

> the following comment [provides] a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement — e.g., matters relating to "operative fitness, structural completion, mechanical utility or marketability" — the range of reasonable [exercises] will be relatively smaller. For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement — [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power — the range of reasonable [exercises] will be relatively larger.[257]

A misconception of the duty to exercise contractual discretion in good faith that both opinions were keen to dispel was that it necessarily required that the party holding the discretion exercise it in a way that would not harm the interests of the other party. The arbitrator accepted this proposition,[258] which derived from the statement in *Bhasin* that "a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner."[259] However, as the Court emphasized in *Wastech*, that statement could not be read in isolation: *Bhasin* had

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[256] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 92-93 (S.C.C.).

[257] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 77 (S.C.C.).

[258] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at paras. 26-28 (S.C.C.).

[259] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 65 (S.C.C.).

gone on to say that the meaning of "appropriate regard" and "legitimate interests" of the other party would vary with the context,[260] and "does not require acting to serve those interests in all cases".[261] Indeed, Cromwell J. had expressly said in *Bhasin* that "a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest"; what it could not do is "seek to undermine those interests in bad faith".[262] For this reason, Brown and Rowe JJ. had said that the dispute in *Wastech* required no more than a straightforward application of the principles from *Bhasin*.[263]

Perhaps most importantly, *Bhasin* had also been clear that the principle above is "not a free-standing rule, but rather a standard that *underpins* and is manifested in *more specific legal doctrines*" that are what directly govern the various situations in which arise disputes about whether parties had performed a contract in good faith.[264] Thus far, repetition and emphasis of this point from *Bhasin* has not succeeded in it being universally understood that in Canadian common law, good faith is not a general duty, but a general *concept* that helps explain and inform a number of specific and discrete doctrines. The above articulation of the principle is not directly applicable to a dispute, but serves at most — and alongside other statements from *Bhasin*, such as those above — to guide application of the actual doctrines within their own specific terms. The confusion about this is a major factor in the extent of litigation over good faith that has followed *Bhasin*, and the uncertainty observed as surrounding it in practice. For example, Geoff Hall has written extensively on this uncertainty. It seems to me, however, that Hall treats the organizing principle as if it were an actual doctrine; as if there were a general duty of good faith.[265] Inadequately attending to this distinction between a duty or doctrine on one hand, and an organizing concept or principle on the other, in my view contributes more than anything to the uncertainty around good faith. One observes, for instance, that freedom of contract is more readily understood as only a principle or value, not in itself a rule that one can raise as a defence or as an immunity from other rules. And invocation of that principle is not seen as leading to problematic uncertainty. The relative novelty of good faith as a general principle in Canadian common law may therefore be a factor in this confusion. Either way, it may serve to highlight that good faith is a way of thinking about what kind of

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[260] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 52 (S.C.C.).

[261] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 65 (S.C.C.).

[262] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at paras. 70, 65 (S.C.C.).

[263] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2021] S.C.J. No. 7, 2021 SCC 7, at para. 116 (S.C.C.).

[264] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494, at para. 64 (S.C.C.) (emphasis added).

[265] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016), s. 2.4.5.

conduct is unfair in the performance of contracts.[266]

IV. CONCLUSION

In conclusion, a number of significant developments relevant to fairness in Contract Law transpired in the 2020-2021 Supreme Court term. These included changes in the law and/or the elaboration of details applicable to control of unfair terms in standard form contracts, unconscionability, public policy, and the good faith duties of honest performance and of proper exercise of contractual discretion. As detailed here, the cases' discussion of all these matters leave unfinished business, and it will be interesting to see how the jurisprudence evolves with respect to remaining questions and problems going forward. As well, additional issues of fairness in contracts exist and are continually emerging; hence it is welcome to see the Supreme Court of Canada placing a priority on this important interest in judicial regulation of markets, with their wide-ranging and profound effects on society.

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[266] In certain cases, good faith might also apply at the negotiation stage. But arguably such cases could be conceptualized as a matter of performance under an implicit contract related to the further potential contract under negotiation.