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The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts

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The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts

Unconscionability has long been a troublesome area in Canadian jurisprudence. This is of significant concern given unconscionability's pre-eminence as a protection of contractual fairness. This article elaborates a much-needed reorganization and rationalization of unconscionability in Canada. Under current law, a single doctrine hopelessly targets two divergent purposes. I set out here a proposed redevelopment rather of separate common law doctrines, each fit-for-purpose: (1) An English-style unconscionable bargains doctrine for avoiding bargains that exploited disability, and (2) an American-style unconscionable clauses doctrine to control unfair terms in standard form contracts. Extensive Canadian precedent supports this solution, assuring its feasibility and legitimacy. To manage the doctrines' coexistence and clarify this universally confounding area of law, I recommend further a distinctly Canadian approach: Recognizing unconscionability as an "organizing principle". Alongside that of good faith which governs performance, this one would address enforceability in abuse of power situations, elevating fairness in Canadian contract law.

L'iniquité a longtemps été un domaine problématique dans la jurisprudence canadienne. Ceci est un enjeu important étant donné la prééminence du concept de l'iniquité comme protection juridique de l'équité contractuelle. Cet article élabore une réorganisation et une rationalisation nécessaire de l'iniquité au Canada. En vertu du droit actuel, une seule doctrine vise vainement deux objectifs divergents. J'expose ici une proposition de redéveloppement : à la place de cette approche futile, on devrait déployer deux doctrines de common law distinctes, chacune adaptée à son objectif unique : (1) une doctrine de négociation inique à l'anglaise pour éviter les transactions qui exploitent une faiblesse particulière, et (2) une doctrine des clauses iniques à l'américaine pour contrôler les clauses abusive dans les contrats d'adhésion. De nombreux précédents canadiens soutiennent cette solution, assurant sa faisabilité et sa légitimité. Pour gérer la coexistence des doctrines et clarifier ce domaine du droit universellement déroutant, je suggère une approche typiquement canadienne : reconnaître l'iniquité comme un « principe ». Parallèlement à celui de la bonne foi qui régit l'exécution contractuelle, celui-ci traiterait de la force exécutoire dans les situations d'abus de pouvoir, augmentant l'équité dans le droit des contrats au Canada.

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Introduction

Unconscionability has been a troublesome area in Canadian jurisprudence for at least 30 years, and according to some writers, for its entire 150-year history. That trouble is of great significance in that in the eyes of some, such as Peter Benson, unconscionability is "the paradigm of contractual fairness."[1] Currently, the state of the law in Canada is that a single doctrine is expected to cover functions elsewhere served by different doctrines. Stretched by the effort to combine these, the features of unconscionability in Canada are insufficiently tailored to either, seriously limiting its

1. Peter Benson, *Justice in Transactions* (Cambridge: Harvard University Press, 2019) at 167.

functionality. This article investigates this predicament and proposes a solution that is novel but supported by strong Canadian precedent.

The law in Canada has been influenced by two distinct types of common law doctrine sharing the title "unconscionability." The first of these derives from England. Its purpose is to allow the avoidance of transactions in which a party under a special disability was taken advantage of in the bargaining process. The other originated in America. Its primary function is to control unfair terms in standard form contracts. Each of these distinct unconscionability doctrines has its own features, which are aligned with the doctrines' respective purposes, so that both are reasonably fit-for-purpose.

Influenced by the unconscionability doctrines from England and America, unconscionability in Canada tries to pursue both purposes with a single doctrine. Reflecting this dual purpose, the doctrine is characterized by features that either try to span or split the difference between contrasting positions embodied in the English and American doctrines. Some of these features govern key matters, such as the doctrine's scope and effects, and the import of unconscientiousness.

In this article, I demonstrate the flaws of this "magic bullet" approach[2]: rather than empowering a single doctrine to hit both targets, these intermediate and/or bridging features instead leave unconscionability unsuited to serve either purpose well. I then demonstrate how this unfitness flows directly from the idea of having a single doctrine perform these two differing functions. As a result, the prospects of refining the doctrine to enable it to achieve its double-aim would seem dim. Of note, in England and America where a doctrine of "unconscionability" serves one or the other function, but not both, separate legal devices exist to deal with the other function.

To ameliorate the fitness-for-purpose of unconscionability in Canada, I suggest a similar differentiation: Canada should employ separate doctrines, each dedicated to only one of the contemplated purposes. An unconscionable bargains doctrine of the type of the English doctrine would assure Canadian common law has a device fit for avoiding transactions where a party's disability was exploited in the bargaining process. An unconscionable clauses doctrine similar to the American doctrine would provide Canadian law a tool properly tailored to control of unfair terms in

2. The term "magic bullet" is "used to describe a universal solution a person uses for any problem they encounter: "Urban Dictionary: magic bullet" (17 May 2005), online: *Urban Dictionary* <www.urbandictionary.com/define.php?term=magic%20bullet> [perma.cc/HW72-EZP4]. Some Ivory Tower dictionaries confuse this popular expression with a different expression, "silver bullet," which refers rather to a quick solution to a difficult problem.

standard form contracts.[3] Due to the longstanding influence of the English and American doctrines on unconscionability in Canada, a wealth of Canadian precedent already exists to support this solution, thus ensuring its feasibility and legitimacy.

To rationalize the coexistence of distinct unconscionability doctrines in Canada, explain the broad concept overarching both, and better illuminate this long troublesome area of law more generally, I further recommend recognizing unconscionability as a general organizing principle (not an all-purpose doctrine) in Canadian contract law. The latter step has been advocated by Stephen Waddams for a half-century and would dovetail with the Supreme Court of Canada's prior recognition of an organizing principle of good faith in contractual performance—which likewise contains distinct doctrines for differing situations. As with good faith, this organizing principle would relate to and strengthen fairness in contract law. The organizing principle of unconscionability would be distinguished from that of good faith by its focus on potential relief from contractual *enforcement* in situations of unconscientious abuse of power—subject to the specific conditions of the applicable subordinate doctrines.

These steps would assure the fitness-for-purpose of unconscionability in Canada, drawing on established doctrines long in use, and fostering harmonization to remove impediments to cross-border trade. Yet, the doctrines would be organized inside a clear and rational framework that is distinctively Canadian.

The paper's discussion starts, below, by looking at the English and American unconscionability doctrines which have influenced the Canadian doctrine, before turning to the current state of the law in Canada. After demonstrating the deficiencies of the current "magic bullet" approach, I discuss the preferability of using separate doctrines for avoiding transactions in which a party's disability was exploited and for controlling offensive standard form terms. I then develop the specific three-part solution proposed above to revitalize this area of law, building on a suite of important precedents in Canadian contract law.

I. *Two influential types of "unconscionability" doctrine*

As mentioned in the introduction, two distinct types of common law doctrine titled "unconscionability" have been influential in Canadian law: one originating in England, and one in America. Each type pursues a different purpose, and each type has different features, aligned with its

3. Throughout, I use the phrase "standard form contract" in its narrow/specific sense (aka "contract of adhesion"). "Standard form contract" is sometimes used, in other writings, to refer to a broader array of standardized contracts.

corresponding purpose. I survey these two types of unconscionability doctrine below, starting with the English doctrine, before turning to the American.

1. *The English doctrine of unconscionability*

The English doctrine of unconscionability serves the purpose of enabling the setting aside of unfair bargains in unusual circumstances in which one party suffered from a special disability that its counterpart took advantage of in the bargaining process.[4]

The formulation of the doctrine reflects this purpose. There is some variation in how its requirements have been cast.[5] As well, orthodox articulations can be misleading if read literally; and thus in conveying the doctrine's requirements, modern writers often add considerable clarification and explanation.[6] Factoring these into presentation of the doctrine's elements, they can be restated more directly as: (1) one party was impaired in the bargaining process by a special disability such as poverty, ignorance, illiteracy, age, mental infirmity, or necessity;[7] (2) its counterpart knew or ought to have known in the making of the contract of the other party's impairment;[8] and (3) the substance of the resulting contract is markedly unfair, suggesting that advantage was taken of the impairment.[9] In that case, unless the advantaged party disproves that

4. See e.g. Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2004) [Bigwood, *Exploitative Contracts*]; John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 214-220; 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 Law Q Rev 257 at 273-278 [Moore, "Denning's Lead Ballon"], online: <works.bepress.com/marcus-moore/3/> [perma.cc/VD48-JNG8]; *Treitel on The Law of Contract*, 14th ed by Edwin Peel (London, UK: Sweet & Maxwell, 2015) at para 10-043.

5. Compare e.g. Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020) at 398; Mindy Chen-Wishart, *Contract Law*, 6th ed (Oxford: Oxford University Press, 2018) at 361.

6. See e.g. Chen-Wishart, *supra* note 5 at 362-365; Beatson, Burrows & Cartwright, *supra* note 5 at 398.

7. Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 343-344; Peel, *supra* note 4 at para 10-043; Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84:2 Can Bar Rev 171 at 182-187 [Bigwood, "Antipodean Reflections"]; *Earl of Aylesford v Morris*, [1873] LR 8 Ch App 484 at 491 (Ch (Eng)), Lord Selborne LC [*Aylesford*].

8. *Hart v O'Connor*, [1985] UKPC 17; *Earl of Chesterfield v Janssen*, [1750] 2 Ves Sen 125 at para 155, 28 ER 82 (ChD (Eng)) [*Chesterfield*]; *Ayres v Hazelgrove* (9 February 1984), unreported (QBD (Eng)); Moore, "Denning's Lead Balloon," *supra* note 4 at 273-278; Charles Rickett, "Unconscionability and Commercial Law" (2005) 24:1 UQLJ 73 at 78, online: <ssrn.com/abstract=2356050> [perma.cc/2LY2-YWGN].

9. *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*, [1983] 1 WLR 87 at 95, [1983] 1 ER 944 (ChD (Eng)) [*Alec Lobb (HC)*]; *Fry v Lane*, [1888] 40 Ch D 312 at 322 (ChD (Eng)); Bigwood, *Exploitative Contracts*, *supra* note 4, 4.3.1-4.3.2; Smith, *supra* note 7 at 342; Moore, "Denning's Lead Balloon,"

presumption of advantage-taking (for example by showing that the disabled party received legal advice that made up for its impairment, or intended a partial gift), the contract is voidable.[10]

The doctrine's conceptual foundation also mirrors its purpose of enabling relief from unfair bargains resulting from exploitation of a counterpart's special disability. The doctrine is conceived of as a defect in contract formation: the consent of the disabled party is vitiated, as it was tainted by impairment of the party's decisional autonomy, and exploitation of that by its counterpart.[11] This explains the doctrine's effect of avoiding a transaction that was unconscionable.

The doctrine's justification also accords with its purpose of relieving unfair bargains taking advantage of a counterpart's disability: the "unconscientious use of power" by a stronger party against a weaker offends equity's concern with conscience.[12]

As just explained, the various features of the English doctrine, including its elements, operation, conception, and justification are all aligned with its purpose, thus ensuring that it is fit-for-purpose.

2. *The American doctrine of unconscionability*

Sharing the title "unconscionability," but comprising a different type of doctrine with a different purpose than the English doctrine, is the American doctrine.[13] A central purpose animating the development of the American doctrine was control of unfair terms in standard form contracts.[14] While it is also capable of applying where one party lacked meaningful choice over the terms for a reason other than their being imposed by standard form, courts tend to be "chary" about finding that the facts establish that the doctrine's procedural condition of lack of choice.[15] Control of unfair standard form terms is the doctrine's principal function in practice.[16]

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supra note 4 at 261; Chen-Wishart, *supra* note 5 at 361.

10. Beatson, Burrows & Cartwright, *supra* note 5 at 399; Chen-Wishart, *supra* note 5 at 364-365; SM Waddams,*The Law of Contracts*, 7th ed (Toronto: Thomson Reuters Canada, 2017) at para 552 [Waddams, *Law of Contracts*].

11. Bigwood, "Antipodean Reflections," *supra* note 7 at 211-214; Cartwright, *supra* note 4 at 214-220; Chen-Wishart, *supra* note 5 at 204.

12. *Aylesford*, *supra* note 7 at 489-491; *Chesterfield*, *supra* note 8; Bigwood, *Exploitative Contracts*, *supra* note 4.

13. David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 Law Q Rev 403; Moore, "Denning's Lead Balloon," *supra* note 4 at 262.

14. Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960) at 369; American Law Institute, *Restatement of the Law: Consumer Contracts: Tentative Draft* (18 April 2019), online (pdf): *ALI* <www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf> [perma.cc/XU3V-LAE7] [ALI, *Consumer Contracts*]; E Allan Farnsworth, *Contracts*, 4th ed (New York: Aspen, 2004), § 4.26-4.28.

15. Farnsworth, *supra* note 14 at 287, 303-304.

16. *Ibid*, § 4.26-4.28; ALI, *Consumer Contracts*, *supra* note 14, § 5. With the rise of the consumer

The features of the American unconscionability doctrine reflect this purpose. It applies to the terms of standard form contracts as a result of the form-recipient's "absence of meaningful choice" over the terms arising from the imposition that characterizes the form contracting process.[17] It inquires into whether the drafter included among these imposed standard form terms some specific clause that is markedly unfair. If so, the court declines enforcement of that clause while typically leaving the rest of the contract in force.[18]

The conceptual foundation of the American doctrine accords with this function of controlling unfair standard form terms. Drawing on inspiration from Uniform Commercial Code (UCC) § 2-302, which governs sale of goods, the courts developed "either by analogy or as an expression of a general doctrine" for contracts of any subject-matter a mechanism that "directly" and "explicitly" authorizes judicial control of unfair standard form terms.[19] This alleviated the problem of judges previously having to "covertly" rely on strained applications of procedures such as interpretation, implication, and incorporation in order to effectively control the fairness of standard form terms. As Karl Llewellyn argued, the covert approach was problematic both in offering inadequate control and in discrediting normal use of those procedures.[20]

The justification for the American doctrine also accords with this function of controlling unfair terms in standard form contracts: "[t]he principle is one of the prevention of oppression and unfair surprise."[21] These phrases that the principle invokes are used in discussions of standard form contracting to describe when a form-drafter abuses its power to impose terms by including harsh or surprising clauses within the unnegotiated form.

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economy, it is also said that consumer contracts are a concern of the doctrine; but consumer contracts are themselves overwhelmingly in standard form: *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011) ("the times in which consumer contracts were anything other than adhesive are long past" at 346-347).

17. *Williams v Walker-Thomas Furniture*, 350 F (2d) 445 at 449 (DC Cir 1965) [*Williams*]; Farnsworth, *supra* note 14, § 4.28 at 301.

18. While "the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability" of the clause (see Uniform Commercial Code § 2-302 Official Comment 2 (2002) [UCC]), "courts have usually confined their attention to unconscionable clauses themselves": Farnsworth, *supra* note 14, § 4.28 at 306.

19. Farnsworth, *supra* note 14, § 4.28 at 298-299; UCC, *supra* note 18, § 2-302 Official Comment 1; Llewellyn, *supra* note 14 ("these provisions may lead appellate courts into a machinery for striking down where striking down is needed" at 369).

20. Llewellyn, *supra* note 14 at 364-365; UCC, *supra* note 18, § 2-302 Official Comment 1.

21. UCC, *supra* note 18, § 2-302 Official Comment 1.

The American doctrine's significant differences from the English doctrine reflect its differing purpose. Meanwhile, as just explained, the American doctrine's various features, including its elements, operation, conception, and justification align with its own purpose, assuring that it is fit for its proper distinct purpose.

Unconscionability in Canada has been strongly influenced by both the English unconscionability doctrine and the American unconscionability doctrine. The next section looks at the current state of the law on unconscionability in Canada.

II. *Current state of the law on unconscionability in Canada*

The current state of the law on unconscionability in Canada derives from the Supreme Court of Canada's leading precedent, *Uber v Heller*.[22] The formulation of unconscionability established by that case was not a consensus view: two justices well-versed in private law disagreed with it sharply.[23] However, the current state of the law is established by the majority judgment.[24] In order to distinguish that formulation from preceding formulations of unconscionability in Canada (discussed later in this paper) prevailing prior to the reconstruction of unconscionability in Canada in the *Uber* case, I will refer to the doctrine representing the current state of the law as the *Uber* unconscionability doctrine. As I summarize below, Canada's *Uber* doctrine, both in its purposes and in its doctrinal features, reveals strong influences of the English doctrine as well as the American doctrine.

1. *Dual purpose*

Canada's *Uber* unconscionability doctrine strives to cover under one doctrinal roof the different purposes of both the English and American unconscionability doctrines.

Starting with the English doctrine, its purpose of allowing for the setting aside of unfair contracts in which a party suffering from a special disability was taken advantage of in the bargaining process is clearly among the purposes of Canada's *Uber* unconscionability doctrine. On this, there is said to be scholarly consensus that unconscionability in Canada covers

22. *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*]. For a general summary of the case, see Mitchell McInnes, "Uber and Unconscionability in the Supreme Court of Canada" (2021) 137 Law Q Rev 30.

23. Brown J (concurring) and Cote J (dissenting). Certain aspects of Brown J's discussion are relevant to the solution proposed here, and will be discussed later.

24. Authored by Abella and Rowe JJ. Discussion in this paper of its present location being somewhere in between the English and American doctrines builds on Marcus Moore, "The HMCS Unconscionability: adrift in the Atlantic" (2021) 21:2 Oxford University Commonwealth Law Journal 336.

situations in which there is "some weakness or vulnerability affecting the claimant" such that they "cannot adequately protect their interests in the contracting process."[25] As a result:

> weaker parties may be vulnerable to exploitation in the contracting process. Regardless of the type of impairment involved, what matters is the presence of a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied." In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship.[26]

As these statements demonstrate, Canada's *Uber* unconscionability doctrine certainly encompasses the purpose of the English doctrine. But as the statements reveal, the *Uber* doctrine envisions coverage extending beyond special disabilities (poverty, ignorance, illiteracy, age, mental infirmity, necessity, etc.)[27] to circumstances characterized by the existence of relative bargaining strength and weakness in general: "any contract with…inequality of bargaining power"; "[t]here are no 'rigid limitations' on the types of inequality that fit this description."[28]

Turning to the purpose of the American doctrine in controlling unfair terms in standard form contracts, Canada's *Uber* unconscionability doctrine aspires to fulfil this function also.[29] The intent to apply the *Uber* doctrine of "unconscionability in connection with standard form contracts" is described as a "modern application" of unconscionability to circumstances where consent, "the normative rationale for contract enforcement…[is] stretched beyond the breaking point."[30] In explaining the *Uber* doctrine's intention of controlling unfair standard form terms, the SCC majority expressly noted that this has been done "in American jurisprudence for more than half a century," and cited the leading case of the American doctrine of unconscionability.[31] The SCC majority also invoked the inspiration behind the American doctrine: the UCC and scholarly writing about control of standard form terms by Karl Llewellyn, the "primary drafter" of the section on unconscionability (§ 2-302).[32]

25. *Uber*, *supra* note 22 at paras 62, 66.
26. *Ibid* at para 72 [references omitted].
27. See *supra* note 7.
28. *Uber*, *supra* note 22 at paras 54, 67 [references omitted].
29. *Ibid* at paras 87-91.
30. *Ibid* at para 90.
31. *Ibid*.
32. *Ibid* at para 87.

As these references from current Canadian authority show, the *Uber* doctrine of unconscionability shares the American doctrine's aim of controlling unfair terms in standard form contracts. But the references also signal that whereas the American doctrine (as mentioned) sees this unfairness as in the drafter's abuse of its power to impose terms by including an offensive clause, Canada's *Uber* doctrine sees the unfairness as in the form-recipient having to consent without being duly informed of the content and import of the clause.

The *Uber* unconscionability doctrine sums up its combined purpose of: (1) setting aside bargains made through exploitation of disability; and (2) controlling unfair terms in standard form contracts, by observing: "in many cases where [unconscionability] has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract" (per 1), "compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms" (per 2), "or both."[33]

2. *Doctrinal features*

Reflecting its attempt to combine these dual purposes, the *Uber* unconscionability doctrine displays features which try to span or split the difference between contrasting positions embodied in the English and American unconscionability doctrines. Below, I illustrate this through three examples representing key matters: the doctrine's scope of application; whether it includes a requirement of unconscientiousness on the part of the defendant of the unconscionability claim; and the proportion of the contract at stake.

a. *Scope of application*

The scope of application of the *Uber* unconscionability doctrine falls between those of the English and American doctrines. Thus, as alluded to above, the *Uber* doctrine encompasses the English doctrine's application to circumstances of special disability (poverty, ignorance, illiteracy, age, mental infirmity, necessity, etc.) but extends further to a generalized circumstance of "inequality of bargaining power," regardless of cause, and including stemming from common sources such as "differences in wealth, knowledge, or experience."[34] Application to generalized circumstances is a feature the *Uber* doctrine shares with the American doctrine, which applies to a pervasive phenomenon, standard form contracting. Indeed, standard form contracts are expressly covered by the *Uber* doctrine, unlike

33. *Ibid* at para 68.
34. *Ibid* at paras 67-72.

the English doctrine.[35] However, due to the *Uber* doctrine's differing identification of the source of unfairness in standard form terms (as noted above), its application to such terms is restricted to where the form-recipient is not informed about them. The *Uber* doctrine does not apply if a standard form "clearly and effectively communicate[s] the meaning of clauses with unusual or onerous effects."[36] By contrast, the American doctrine still would apply because of the form-recipient's "absence of meaningful choice" over standard form terms: that is, regardless of a form-recipient's information, in "a form contract the terms…are not subject to negotiation."[37] In short, the *Uber* unconscionability doctrine tries to bridge the scope covered by the English and American doctrines—extending the former, and limiting the latter, to cover any circumstance of consent that is not free and informed.[38]

b. *Requirement of unconscientiousness*

Another key feature illustrating how the *Uber* unconscionability doctrine tries to negotiate a compromise position between those of the English and American doctrines is in omitting an unconscientiousness requirement. As noted earlier, the wrongfulness that makes for "unconscionability" is unconscientious abuse of power, in the sense of knowingly taking advantage of a counterpart's inability to protect itself in the contracting process. This is a required element of the English doctrine, which grants the disabled party relief only if the other party (actually or constructively) knew of its impairment.[39] The *Uber* doctrine rejects such a requirement—a surprising position.[40] It must do so in order to also cover standard form terms, because of its thesis that what makes these unfair is if the form-recipient's consent to them was not informed. In the making of a standard form contract "the parties [do] not interact or negotiate," and so the drafting party is ignorant of the form-recipient's information.[41] The American doctrine also omits such a requirement, but only because it would be superfluous. As mentioned above, the American doctrine

35. *Ibid* at paras 87-91.

36. *Ibid* at para 88 (it similarly does not apply if the recipient has prior familiarity with the form or receives explanations or advice).

37. *Williams*, *supra* note 17 at 449; ALI, *Consumer Contracts*, *supra* note 14 at 7; American Law Institute, *Restatement (Second) of the Law of Contracts* §§ 211(2), 208 (1981) [ALI, *Restatement (Second)*]; *Carnival Cruise Lines Inc v Shute*, 499 US 585 at 593 (1991) [*Carnival Cruise*].

38. See text to *supra* note 33.

39. See *supra* note 8.

40. *Uber*, *supra* note 22 at paras 84-85. For more on this surprising position, see Marcus Moore, "The Doctrine of Contractual Absolution" (2022) 59:4 Alberta Law Review 871 [Moore, "Contractual Absolution"].

41. *Ibid* at para 85.

perceives the unfairness in standard form contracting as where a drafter abuses the characteristic lack of meaningful choice over the terms of the form-recipient in this mode of contracting by knowingly including an offensive term.[42] The unconscientiousness element of unconscionability that is distinctly required by the English doctrine is therefore omitted from the *Uber* doctrine as by the American doctrine; but in the *Uber* doctrine, it is not meanwhile already incorporated implicitly as in the American doctrine via the latter's position regarding what makes unfair terms unfair.

c. *Proportion of contract at stake*

The *Uber* doctrine also tries to straddle the positions of the English and American doctrines of unconscionability with respect to the proportion of a contract at stake. Under the *Uber* doctrine, "a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it."[43] By contrast, the English doctrine's inquiry into substantive fairness is of the bargain as a whole. And if consent to the bargain was tainted by unconscionability, the doctrine's effect is to avoid the bargain as a whole. It does not apply to individual terms. Meanwhile, the focus of the American doctrine, with its purpose of controlling standard form terms, is on individual clauses. The term-specific effect is not subject to a severability proviso, as under the *Uber* doctrine. Instead, under the American doctrine, the reasonable expectations of the parties arising from the basic terms actually negotiated supply a baseline against which form terms can be judged, so that if an unfair term is not enforced, an implied term based on the parties' reasonable expectations can prevent the contract from being incomplete.[44] Here again, the *Uber* doctrine therefore occupies an intermediate position between those of the English and American unconscionability doctrines.

Next, I assess whether the *Uber* unconscionability doctrine's just described blending of the features of the English and American doctrines suit it to pursuing the dual purposes of those doctrines, as it aspires to do.

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42. See *supra* note 17.
43. *Uber*, *supra* note 22, n 8.
44. ALI, *Restatement (Second)*, *supra* note 37, § 211(3); Llewellyn, *supra* note 14 at 370-371; W David Slawson, "The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms" (1984) 46:1 U Pitt L Rev 52-53; Todd Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96:6 Harv L Rev 1173 at 1258, DOI: <10.2307/1341009>.

III. *Appraisal of existing law on unconscionability in Canada*

1. *Fitness-for-purposes?*

In this section, I argue that rather than arming the *Uber* doctrine to realize its ambition of killing two birds with one stone, its intermediate or combination design leaves the doctrine unsuited to either purpose. This is demonstrated using the same features from the last section as examples. Along the way, I further show how these key features' unfitness-for-purpose *flows directly from* the ambition of a single "uber"-doctrine performing the different functions of the two distinct doctrines it aspires to transcend.

a. *Scope of application*

The English doctrine's limitation to situations of special disability (poverty, ignorance, illiteracy, age, mental infirmity, necessity, etc.) keeps the doctrine exceptional. Confined to aberrant circumstances, based on particular facts, it can achieve the purpose of granting relief from bargains defectively formed because of consent that was tainted by impairment and exploitation, without generally undermining stability of contract.[45] By contrast, the *Uber* unconscionability doctrine's generalized requirement of inequality of bargaining power may be satisfied in a wide array of circumstances, including common ones, as reflected in the reference to "differences in wealth, knowledge, or experience" as well as the invocation of even broader possible circumstances through the additional provision that "inequality encompasses more than just those attributes."[46] Courts have observed, for instance, that "[a]ny individual wanting to borrow money from a bank…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."[47] Some courts have even suggested that *most* contracts are made under conditions of inequality of bargaining power.[48] Whether or not that is so, the vast swath of contracts subject to scrutiny and potential rescission under the *Uber* doctrine of unconscionability makes it unworkable. Applying it on that scale would be immensely destructive of stability of contract, upon which a great deal of broader economic planning depends. As a result, the *Uber* doctrine must

45. Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (London, UK: Bloomsbury, forthcoming 2023) at 56 [Moore, *Regulating Boilerplate*].

46. *Uber*, *supra* note 22 at para 67. Special disabilities are not required, they merely "assist in organizing and understanding prior cases of unconscionability": *Uber*, at para 72.

47. *Alec Lobb (Garages) Ltd & Ors v Total Oil (GB) Ltd* (1984), [1985] 1 WLR 173 at 183, [1984] EWCA Civ 2 [*Alec Lobb (CA)*].

48. *Ibid*; *Floyd v Couture*, 2004 ABQB 238 at para 146.

necessarily be applied sparingly in practice, despite the liberality of its articulated scope. The cases in which unconscionability's application is held back are then quite arbitrary, unlike under the English doctrine whose scope-defining principle of special disability is limited enough that it can be adhered to in practice. For these reasons, the *Uber* doctrine is more of a "wildcard" than a doctrine that can be counted on to relieve any specific set (wide or narrow) of exploitive bargains.[49]

Seeking to use a single magic bullet doctrine to achieve not just the purpose of the English doctrine of unconscionability, but also the American doctrine's different purpose of controlling standard form terms, forces the hand of the *Uber* doctrine on this question of its scope of application: standard form contracting is a general—indeed ubiquitous—source of vulnerability in the contracting process. Whereas the English "doctrine finds its staple only with the disadvantaged who are indeed 'special.' All members of modern Western society are vulnerable in a general way to the standardized contract."[50] To cover this, the *Uber* doctrine needs a scope-defining principle that is general and covers common situations; to confine itself to special situations that occur exceptionally, like the English doctrine, would exclude standard form contracting. The principle in fact chosen to define the scope of the *Uber* doctrine—inequality of bargaining power—is one that because of its breadth and generality had been invoked in connection with both the English and American doctrines. Notably, an actual doctrine of inequality of bargaining power was earlier rejected by high courts as too broad and routine a circumstance to respect stability of contract.[51]

Meanwhile, the prescribed scope of the *Uber* doctrine is also not well-suited to controlling unfair terms in standard form contracts, as it aims to do in encompassing that purpose of the American doctrine. The *Uber* doctrine's inapplicability in cases where the standard form-recipient is informed regarding the terms limits its usefulness for that purpose. For instance, the fact it does not apply where the contract "clearly and effectively communicate[s] the meaning of clauses with unusual or onerous effects" prevents the doctrine from going much further than "red hand"-type rules under the law of incorporation.[52] Information-based

49. The "wildcard" metaphor is borrowed from Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013).
50. Bigwood, *Exploitative Contracts*, *supra* note 4 at 276.
51. *Pao On v Lau Yiu Long* (1979), [1980] AC 614 at 634, [1979] UKPC 17 [*Pao On*]; *National Westminster Bank Plc v Morgan*, [1985] 1 AC 686 at 708, [1985] UKHL 2 [*Morgan*].
52. *Thornton v Shoe Lane Parking*, [1970] EWCA Civ 2; *Tilden Rent-a-Car Co v Clendenning* (1978), 83 DLR (3d) 400, 18 OR (2d) 601 (ONCA).

strategies more generally have been repeatedly tried and resoundingly proven not to significantly alter form-recipients' decisions regarding standard form contracts.[53] This is because form-recipients do not share the *Uber* doctrine's assumption that limiting information and negotiation are a *problem*; they see it as a savings in transaction costs that they *benefit* from when they engage in standard form contracting, and which they need in modern society where contracting is a constant feature of daily life.[54] The American doctrine does not fixate on the form-recipient's information. Forms are dealt with "treating alike all [recipients]…without regard to their knowledge or understanding of the standard terms."[55] As the American Law Institute Restatement of Consumer Contracts strongly emphasizes, the American doctrine recognizes that the real problem is a form-drafter's abuse of its ability to impose terms in standard form contracting by inserting an unfair term.[56] Thus, for controls of standard form terms to be effective, they must apply whether or not the form-recipient is informed about the terms—as they do under the American doctrine, but not the *Uber* doctrine.

In this regard, the *Uber* doctrine is doomed by its goal of covering under one roof bargained contracts (as in the English doctrine) and standard form contracts (as in the American doctrine): it must uphold as essential the weaker party's true consent to the terms of a bargain in order to cover scenarios typical of the English doctrine, where relief from enforcement is available because the consent was tainted by impairment and exploitation. As a consequence, it cannot at the same time treat the weaker party's consent to terms as nonexistent and unnecessary, as the American doctrine does in accepting that form terms are made without meaningful choice by the form-recipient,[57] and thus concerning itself only with whether the terms are substantively unreasonable. In the face of this predicament, the *Uber* unconscionability doctrine bases its case on classical contract theory, in which consent is the lynchpin.[58] From there, the doctrine can only try again the hopeless strategy of solving the unfairness in standard form

53. Omri Ben-Shahar & Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014) ch 2 at 14-32; Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen, "Does Anyone Read the Fine Print?: Consumer Attention to Standard-Form Contracts" (2014) 43:1 J Leg Stud 1, DOI: <10.1086/674424>; ALI, *Consumer Contracts*, *supra* note 14 at 35.

54. Moore, *supra* note 45 at 9; Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) at 3; RH Coase, "The Nature of the Firm" (1937) 4:16 Economica 386, DOI: <10.1111/j.1468-0335.1937.tb00002.x>.

55. ALI, *Restatement (Second)*, *supra* note 37, § 211(2).

56. ALI, *Consumer Contracts*, *supra* note 14 at 4-5; on the broader point, see *supra* note 37.

57. Llewellyn, *supra* note 14 at 370; ALI, *Consumer Contracts*, *supra* note 14.

58. *Uber*, *supra* note 22 at paras 55-59.

contracts through consent that is better-informed[59]: "unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract"; "Applying the unconscionability doctrine to standard form contracts…encourages those drafting such contracts to make them more accessible to the other party."[60] Besides this approach's futility in controlling unfair standard form terms, it is further unhelpful in that it undermines the informational transaction-cost savings that motivate parties to contract by standard form, despite it not being the *Uber* doctrine's goal to discourage standard form contracting altogether: "Standard form contracts are in many instances both necessary and useful."[61]

As the foregoing discussion showed, the *Uber* doctrine's attempt to serve the dual purposes of the English and American doctrines of unconscionability results in a compromise on its scope of application that leaves it unfit to serve well either purpose.

b. *Requirement of unconscientiousness*

Whether to include a requirement of unconscientiousness by the defendant of the unconscionability claim is another aspect in which the *Uber* doctrine's aspiration of fulfilling the functions of both the English and American doctrines causes it to be ill-suited to do either.

The English doctrine's requirement of knowledge of the counterpart's impairment represents a minimum of wrongfulness by the advantaged party that, as explained by Peter Birks, is essential to justify the law's avoidance of a contract even though the disadvantaged party's impairment was less than incapacity.[62] The *Uber* doctrine, by excluding such a requirement, therefore is not necessarily serving the English doctrine's purpose of granting relief from exploitation.[63] The *Uber* doctrine counters that "a weaker party…is as disadvantaged by inadvertent exploitation as by deliberate exploitation."[64] However, "inadvertent exploitation" is an oxymoronic term, and elsewhere the *Uber* doctrine acknowledges that it does not require wrongfulness, as it focuses on protection of the vulnerable.[65] Even with no unconscientiousness by the defendant of the

59. See *supra* note 53.
60. *Uber*, *supra* note 22 at paras 89, 91.
61. *Ibid* at para 88.
62. Peter Birks & Charles Mitchell, "Unjust Enrichment" in Peter Birks, ed, *English Private Law* (Oxford: Oxford University Press, 2000).
63. *Uber*, *supra* note 22 at para 164 (a point made by Brown J at the time).
64. *Ibid* at para 85.
65. *Ibid* at paras 84-85. On the broader significance of this novel position with regard to fairness and justice in contract law, see Moore, *supra* note 40.

claim, the doctrine thus relieves unilateral improvidence by the claimant if the claimant was inadequately able to protect itself.[66] Rescinding a contract relied on by an innocent party, to relieve disadvantage suffered by a party weak but not incapable, is not consistent with the purpose of the English doctrine.[67] Indeed, without an element of unconscientiousness, arguably the *Uber* doctrine's use of the title "unconscionability" is a misnomer. As well, one assumes the law would wish in the first place to minimize the number of "unconscionable" contracts made. In that case, it is counterproductive if the one remaining party that may well know of the weakness—the weaker party itself—is incentivized to make such contracts. Arguably, the *Uber* doctrine invites weak parties to enter contracts without taking any step to protect themselves or alert their contractual counterparts of the problem, because if bargains turns out to be improvident for them, they can get the bargains rescinded.[68]

Despite these problems, the *Uber* doctrine is compelled to omit an unconscientiousness requirement in pursuit of its simultaneous ambition of serving the American doctrine's purpose of controlling unfair standard form terms. As discussed above, comprising one doctrine seeking to cover the different scenarios dealt with by the English and American doctrines, the *Uber* doctrine relies on classical contract theory to perceive in them a common problem of the conditions surrounding consent.[69] In standard form contracts, this issue is whether the form-recipient's consent was not properly informed. But in that mode of contracting, the drafting party may have no contact with the form-recipient, and not know if the latter is well-informed.[70] If the doctrine requires knowledge of that, then there would be a problem. As the *Uber* doctrine explains, "[a] rigid requirement based on the stronger party's state of mind would erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate."[71]

Noted earlier was how focusing on whether the form-recipient was informed, as the *Uber* doctrine does, *itself* shields from the doctrine's reach offensive standard form terms imposed as part of the process, despite the

66. *Ibid* at para 66.
67. *Ibid* at para 166 (part of the objection raised by Brown J at the time).
68. Anthony J Duggan, "Stolen Goods, a Cruise Disaster and a Right of Way Gone Wrong: Three Unconscionable Contract Cases from a Law and Economics Perspective" (2004) 40:1 Can Bus LJ 3 at 14-17, online: <ssrn.com/abstract=2295717> [perma.cc/GC4V-9Z8L].
69. See text to *supra* notes 58-60.
70. See text to *supra* note 41.
71. *Uber*, *supra* note 22 at para 85.

fact, for instance, that their meaning may have been "clearly and effectively communicated" to the form-receiving party.[72] Where on the other hand the form-recipient was not informed, the omission of a knowledge requirement facilitates the *Uber* doctrine's application. However, this creates a converse problem: the *Uber* doctrine invalidates provisions even where a drafter does what the doctrine would want a drafter to do, but yet the form-recipient remains uninformed. An example would be where the drafter does what it can to communicate the meaning of the clause, and to verify that this was understood, but is misled by the form-recipient, who confirms having been informed when in fact they were not. Such circumstances are likely quite common, as they are in incorporation cases, where due to red hand-type rules, drafters sometimes also do what they can be expected to do to draw attention to harsh or surprising clauses and their implications, and ask form-recipients to confirm that they are aware, understand, and accept this before concluding the contract.[73] Form-recipients do so, where required, in order to complete the adhesion contract. That the *Uber* doctrine nonetheless applies to such cases is difficult to reconcile with its own theory of what is unfair in standard form contracting, in that it encourages form-recipients to conceal that they are uninformed, so that the drafter will let them conclude the contract; and since that happens commonly, it becomes futile for drafters to make such efforts to inform recipients.[74] In that regard, the *Uber* doctrine's omission of a knowledge requirement is self-defeating. As well, in these cases too it is inapparent how the drafter acted unconscientiously such that this should be called "unconscionable" (all the more so if the drafting party only entered the contract with the party in question as a result of being deceived).

Thus, the *Uber* doctrine's omission of a knowledge requirement does not make it well-suited to serve the purpose of controlling unfair standard form terms, as the American doctrine does. The American doctrine omits such a requirement only because it locates the unfairness of the offensive term in the fact that drafters know that in standard form contracting, form-recipients lack meaningful choice over the terms, whether or not they are informed of them. Knowledge is inherent in this understanding of the unfairness. As noted earlier, the *Uber* doctrine had to use a different understanding based on classical contract theory in order to accommodate

72. See *supra* note 52.

73. See e.g. *Karroll v Silver Star Mountain Resorts Ltd* (1988), 33 BCLR (2d) 169, 40 BLR 212 (BCSC), McLachlin CJ.

74. Duggan, *supra* note 68 at 14-17.

its additional aim of relieving exploitive bargains as the English doctrine does.

Thus, as shown here, the *Uber* doctrine's attempt to serve the dual purposes of the English and American doctrines of unconscionability result in it omitting unconscientiousness as a required element, and this leaves the doctrine unsuited to serve the purpose of either doctrine, or perhaps altogether of relieving circumstances accurately described as "unconscionable."

c. *Proportion of contract at stake*

The *Uber* doctrine's attempt to span the disparate proportions of a contract at issue under the English and American doctrines is another aspect in which the *Uber* doctrine is inapt to fulfil the purpose of either.

Starting with the aim of enabling the setting aside of bargains defectively formed due to exploitation of a counterpart's impairment, the focus should be on the bargain as a whole, as under the English doctrine. For that purpose, the *Uber* doctrine's ability to be used to interrogate the fairness of selective provisions of the bargain is improper. This was done in *Uber* itself, although justified on the basis of construing the arbitration clause at issue as "a self-contained contract collateral or ancillary to the [main] agreement."[75] In other cases, the doctrine's ability to focus on selective provisions could obscure the existence of compensation elsewhere in a bargain for the apparent unfairness of provisions selectively targeted.[76] And in any case, if the complainant succeeds in establishing the defect in the contract's formation that the existence and effect of the doctrine rest upon, it makes little sense that the complainant can meanwhile have the court treat the contract as valid but for a bit it dislikes. This undermines the integrity of the doctrine, making it appear as merely a pretext for warrantless judicial rewriting of contracts at the invitation of a party who made a bad bargain.

The ability to train the *Uber* doctrine on selective provisions, which causes the problems above with respect to pursuing the purpose of the English doctrine, results from the *Uber* doctrine's ambition of also covering in a single doctrine the American doctrine's aim of controlling unfair terms in standard form contracts. For that purpose, a doctrine must target individual terms. As the *Uber* doctrine can do this, is it at least well-suited to fulfill that purpose?

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75. *Uber*, *supra* note 22 at para 96.

76. Omri Ben-Shahar, "Regulation Through Boilerplate: An Apologia" (2014) 112:6 Mich L Rev 883 at 895ff, online: <repository.law.umich.edu/mlr/vol112/iss6/3> [perma.cc/U64C-QYHR].

It is not. One reason for this is that the *Uber* doctrine's term-specific use is subject to a severability proviso. A severability limitation invites form-drafters to use their control over the form to shelter unfair terms by shaping the form in such a way that the potentially unfair terms are not severable. Even in cases that are not clear-cut, form-drafters are aided by the strict approach to severance endorsed by the Supreme Court of Canada.[77] Meanwhile, where unfair terms, for whatever reason, are not severable, the *Uber* doctrine avoids the whole transaction. Indeed, even aside from the question of severability, the court's "finding of unconscionability can be directed at [the] contract as a whole."[78] For unfair terms in standard form contracts, this is generally counterproductive: it leaves the form-recipient likely needing to accept a similar form from a rival firm, in a modern economy in which many transaction-types only occur by standard form.[79] Otherwise, the party would have to forego the relevant exchange need; and in fact many exchange needs would fall under this predicament, given the economy's pervasive reliance on standard form contracting.[80] Turning to the consequences for the drafting party, the prospect of the whole contract being avoided creates a separate problem: risk that is extreme and not easily controlled. Standard forms are developed and utilized for mass contracting, usually in transaction-types of especial importance to the drafting firm. The mass avoidance of a form (i.e. through a class action by recipients of that form) could be catastrophic to the firm. And that risk is not easily controlled. Fairness is a subjective assessment, and forms comprise many terms which could trigger the contract's avoidance if perceived as unfair. Further, the *Uber* doctrine's endorsement of a lower threshold of unfairness than the marked unfairness required by the American doctrine[81] makes it difficult for drafters to steer clear of a finding of unfairness. They would have to go to the opposite extreme of using terms that are unmistakably generous. But since these contracts are used en masse in transaction-types of especial importance to the firm, this could do serious damage to the firm's business interests. Thus, the unpredictability of whether the whole contract will be avoided, not just the term, makes the *Uber* doctrine inapt to incentivize fairer drafting; rather,

77. *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 32.
78. *Uber*, *supra* note 22, n 8.
79. Llewellyn, *supra* note 14 at 365-366; Friedrich Kessler, "Contracts of Adhesion: Some Thoughts about Freedom of Contract" (1943) 43:5 Colum L Rev 629, DOI: <10.2307/1117230>.
80. Mindy Chen-Wishart, "Regulating Unfair Terms" in Louise Gullifer & Stefan Vogenauer, eds, *English and European Perspectives on Contract and Commercial Law* (Oxford, UK: Hart, 2015) 105 at 110.
81. *Uber*, *supra* note 22 at paras 81-82.

it discourages firms from using standard form contracts at all. Given the integral role of standard form contracts in the modern economy—and the tremendous socio-economic progress it has produced[82]—this aspect of the *Uber* doctrine is dangerously regressive, and arguably unfair to all. In cases where standard form contracts are rescinded as a whole, there may also be significant collateral economic disruption—beyond the transaction-type at issue, for example in related classes of contracts involving third parties. To avoid all this, courts can be expected to apply the doctrine sparingly, with the consequence that it will not be able to be consistently relied on.

The above problems are rooted again in the *Uber* doctrine's attempt to be two different things in one. The need for a severability condition comes from the doctrine's conception using classical contract theory, required in order to include the English doctrine applicable to bargained contracts, as discussed earlier. Under classical theory, terms must be consented to; and if a term is unfair, unless it is severable, invalidating it would alter the parties' agreement. Such thinking is misguided in relation to standard forms, whose terms are unilaterally imposed. Unlike the *Uber* doctrine, the American unconscionability doctrine rests on the modern theory that form terms are *not* specifically consented to; rather, the form-recipient provides a conditional "blanket" assent to the incorporation of "any not unreasonable or indecent terms the [drafter] may have on his form."[83] From that perspective, the unfair term lies outside the conditional blanket assent and thus was never (an enforceable) part of the contract; it is not a question of severance.[84] As to concern about incompleteness, this is alleviated as alluded to earlier by the fact that the form terms are seen as proposing to overlay implied terms reflecting the reasonable expectations of the parties arising from the terms they did negotiate. So, if a form term is unenforceable, the implied term could govern the matter at issue.[85]

In sum, that a finding of unconscionability under the *Uber* doctrine can be directed at the whole contract (as in the English doctrine) or at individual terms (as in the American doctrine) does not fit it for the dual purposes of those doctrines. It does not provide helpful flexibility; it creates problematic uncertainty: a specific desired remedy is what interests a victim of unconscionability in either of these contexts to assert a claim; and a reasonably ascertainable and preventable risk as the outcome of a successful claim is what would induce a strong party to modify

82. John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 185.
83. Llewellyn, *supra* note 14 at 370.
84. ALI, *Restatement (Second)*, *supra* note 37, § 211(3).
85. See *supra* note 44.

its contractual behaviour in the way the law hopes for in pursuing the purposes in question. Not knowing what proportion of the contract will be found to be unconscionable and what the outcome of such a finding will be again makes it more of a "wildcard" than a doctrine that can be counted on to serve either of the purposes contemplated.

As the discussion above shows, key features of the *Uber* doctrine consist of compromises between the positions of the English and American doctrines. These compromises were seen as necessary in order for Canadian law to pursue the purposes of both of those doctrines via a single "uber"-doctrine. But instead, these compromised features leave the *Uber* doctrine unsuited to either purpose.

2. *Prospects of refinement?*

It may be wondered whether the *Uber* unconscionability doctrine could be tweaked so as to be able to suitably fulfill its two intended purposes. This would seem unlikely. As the preceding discussion explained, the features that left the *Uber* doctrine unfit for either purpose were necessitated precisely by the doctrine's ambition of pursuing those two differing purposes via one doctrine.

Relatedly, the discussion revealed how some divergences between the English and American doctrines that flow from their differing purposes are fundamental, and hence not easily comingled. For example, to cover bargained contracts like the English doctrine, a foundation in classical contract theory is used; yet effective controls of unfair terms in standard form contracts are based in modern theory, which rejects the classical perspective. Here, classical theory works to assure there is true mutual consent to the terms, whereas modern theory accepts that consent to standard form terms is neither present nor necessary, and works instead to control abuse of drafters' unilateral power. As another example, to pursue their respective purposes while preserving stability of contract and avoiding large-scale economic disruption, the English and American doctrines embody opposite approaches: the English doctrine sets aside the exploitive bargain as a whole, but applies only to exceptional circumstances; the American doctrine applies to the ubiquitous circumstance of standard form contracting, but has only a limited effect, invalidating an individual term while leaving the rest of the contract in force. For a single doctrine to fulfil both functions, it would have to apply widely, and yet be capable of invalidating whole transactions. This is clearly unmanageable, at least without major economic disruption.

Thus, the prospects of refining the *Uber* doctrine to enable it to achieve these two aims would seem dim.

Next, I discuss the alternative of dealing with the two aims separately.

IV. *A different approach: separate doctrines tailored to different tasks*

1. *Established patterns*

Avoiding unfair contracts in which a party's impairment was exploited by its counterpart, and controlling unfair terms in standard form contracts, are both important tasks within a system of contract law. And in fact, in England and America, where a doctrine entitled "unconscionability" serves one or the other of these functions but not both, separate legal devices exist to handle the other function.

In England, where unconscionability serves the purpose of providing relief from unfair bargains made through exploitation of disability, the job of controlling unfair standard form terms is overseen by legislation. The Unfair Terms portion of the *Consumer Rights Act* does this for consumer contracts, while most other contract-types are subject to standard form term controls under the *Unfair Contract Terms Act*.[86] It may be added that this is also the model followed in other common law jurisdictions such as Australia, New Zealand, and Ireland: unconscionability doctrines set aside bargains tainted by impairment and exploitation in the bargaining process, while unfair terms legislation controls offensive standard form contract terms.[87]

In America, where control of standard form terms is the function of its distinct unconscionability doctrine, which is not part of the family of unconscionability doctrines just mentioned, the task of relieving bargains made through exploitation of disability is addressed, at a general level, through the common law precept of constructive (or equitable) fraud.[88] In different scenarios, it is also supported by flexible approaches to various neighbouring doctrines such as undue influence, economic duress and mental incompetency.[89]

Thus, in America and England, exploitation of impaired bargaining and offensive standard form terms are both problems which are addressed within the overall system of Contract Law. But in each place, separate legal devices are used to target these two purposes, rather than trying to use a single "magic bullet" to hit both, as the *Uber* doctrine in Canada

86. *Consumer Rights Act 2015* (UK); *Unfair Contract Terms Act 1977* (UK).
87. Capper, *supra* note 13; *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (Ireland), SI 1995/27; *Competition and Consumer Act 2010* (Cth), Schedule 2 (*Australian Consumer Law*), ss 23-28; *Fair Trading Act 1986* (NZ), 1986/121 ss 26A, 46H-46M.
88. Farnsworth, *supra* note 14, § 4.27. This type of "fraud" does not refer to deceit, but to unconscientious advantage-taking: see *Aylesford*, *supra* note 7 at 488-491.
89. Farnsworth, *supra* note 14 at 231, 260, 264-267 (American practice is to treat a higher degree of substantive unfairness as lowering the threshold of the "procedural" element required for relief).

attempts to do. Further, as mentioned, other common law jurisdictions like Australia, New Zealand and Ireland also pursue the two tasks separately.

Outside Canada, where separate legal tools are used to pursue the two purposes discussed in this article, the presence of common patterns in how to approach them reinforces the conclusion that their separation enables tailoring to ensure fitness-for-purpose. For example, despite non-trivial variation, the unconscionability doctrines in Ireland, Australia and New Zealand do not depart radically from the English doctrine whose purpose they share, unlike Canada's *Uber* doctrine which does deviate significantly. Even the American constructive fraud operates similarly to the English unconscionability doctrine, in dealing with comparable fact situations. Regarding control of unfair standard form terms, the substantive core of the legislated regimes in England, Ireland, Australia, and New Zealand reflects a common basic approach also shared by the judicial doctrine of unconscionability in America, but not the *Uber* doctrine in Canada.[90] Thus, where the purposes discussed here are each served by dedicated legal tools, those tools show similar features across different jurisdictions. They do so in some cases despite the devices having different names, and even in spite of whether they are of legislative or common law origin. This pattern reflects the tailoring to purpose explained at the outset.

Might a similar pattern be helpful in Canada?

2. *Potential utility in Canada*

Unlike England and several other places referenced above, common law Canada does not have legislative controls of reasonably general application for unfair terms in standard form contracts.[91] However, it could, like America, use one common law doctrine to deal with that and a second to deal with unfair bargains made through exploitation of a party's disability. Doing so would allow for the tailoring seen in the legal tools used elsewhere that supports their fitness for the purpose each is devoted to.

Further, if Canada were to employ separate common law measures for the two purposes, it could draw on the established doctrines in use elsewhere in the common law that are tailored to these purposes, to aid in developing similar devices of its own. Notably, it could use one tool of the type of the English doctrine of unconscionability (and its relatives

90. In particular, the regimes decline enforcement to a standard form term that is substantively offensive (even if the form-recipient was informed of the term), while leaving the rest of the contract in force.

91. There are some specialized controls in certain contexts: for a list of several, see Waddams, *Law of Contracts*, *supra* note 10 at para 545.

elsewhere) to avoid unfair bargains made by exploiting disability, and a separate tool of the type of the American doctrine of unconscionability (whose core model is mirrored in legislated regimes elsewhere) to control unfair standard form terms. To avoid confusion, these could be differentiated as "unconscionable bargains" for the doctrine of the type used in England (where that title is already commonly used) and of "unconscionable clauses" for the doctrine of the type used in America (a phrase already associated with that doctrine).[92]

Using doctrines parallel to those in use elsewhere in the common law to deal with the same issues would also allow Canadian common law to take advantage of the extensive bodies of jurisprudence that have grown up around those doctrines, when dealing with particular scenarios that entail a similar complexity or difficult judgment call. For control of standard form contracts, a regime harmonized with that used in the United States would also be helpful to the economy, in removing trade barriers with Canada's main trading partner. The value of such harmonization in the domain of contract law has been unanimously recognized by the Supreme Court of Canada.[93] With respect to exploitive bargains, harmonization would further alleviate the risk of trade disruption that exists currently due to the expansive rather than exceptional scope of the *Uber* doctrine (which underlines the danger of experimenting with potentially unsound doctrines which may have important implications for transnational commerce).

This is by no means to say that Canadian law should not innovate. But as an innovation, the *Uber* doctrine is perhaps fundamentally ill-conceived. Canadian law often finds it fruitful to pursue a middle path, balancing English and American influences. But for unconscionability, this is a more radical enterprise, as the English and American doctrines are not different approaches to a common problem, but doctrines addressed to different problems, sharing only a common name and a broad concern with abuse of power. In this area of law, the best that can reasonably be hoped for is for Canadian courts to devise *separate* doctrines of the types of the English and American doctrines for use in addressing each of these tools' distinct purpose.

V. *Three steps to revitalize unconscionability in Canada*

Accepting that contract law in Canada would benefit from using two separate doctrines, similar to those in use elsewhere in the common law, suited to each task discussed above, the question which follows is how

92. It is found, for instance, in the title of UCC, *supra* note 18, § 2-302.
93. *Bhasin v Hrynew*, 2014 SCC 71 at para 41 [*Bhasin*].

feasible is this course of action? I submit that it is eminently feasible. Indeed, there is a wealth of existing precedent in Canada that can be drawn upon to develop an unconscionable bargains doctrine for avoiding bargains made through exploitation of a disabled party, and an unconscionable clauses doctrine for controlling unfair standard form contract terms.

There is also important precedent in Canadian contract law for being able to accommodate multiple doctrines, tailored to distinct scenarios of concern, within a larger frame of a single "organizing principle." This is the approach of Canadian contract law in another broad area of fairness concern: good faith. A similar approach could be taken to unconscionability. I would recommend doing so, in conjunction with the delimitation of separate doctrines addressed to the different contexts of unconscionability discussed. This is also my understanding of what Stephen Waddams means in long advocating for recognition of a "general principle" of unconscionability—an organizing principle, not an all-purpose doctrine, as the majority of the SCC in *Uber* seemed to assume.

In the subsections that follow, I show how feasible this three-part solution is, and the wealth of precedent that supports it. Addressed first is the prospect of an organizing principle of unconscionability. Thereafter, I turn to a doctrine of unconscionable bargains for setting aside bargains made through exploiting a party who was impaired. I then deal with a doctrine of unconscionable clauses for controlling unfair standard form terms.

1. *An organizing principle of unconscionability*

An overarching "organizing principle" of unconscionability would help accommodate and rationalize the existence in Canada of separate subordinate doctrines addressing different specific purposes.

The feasibility of this approach is supported by strong precedent, in that Canadian contract law does precisely this in another broad area of fairness concern: good faith. In *Bhasin v Hrynew*, the SCC was unanimous in accepting "that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance."[94] In that case, the Supreme Court rejected the approach of having an actual all-purpose duty of good faith[95]—the sort of approach that was inadvisedly taken to unconscionability by the *Uber* doctrine. In this regard, the vital distinction between an organizing principle and an actual doctrine was emphasized by the SCC in *Bhasin*:

94. *Ibid* at para 63.
95. *Ibid* at paras 37-40, 68-71.

> An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in 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.[96]

In the case of good faith, the organizing principle's substance was summarized thus:

> The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.[97]

Falling within this broad organizing principle of good faith, the Court recognized four specific doctrines: the duty of cooperation to achieve the objects of a contract, the duty to exercise discretionary powers in good faith, the duty not to evade one's contractual duties, and the duty of honest performance.[98] Further, the Court left open the possibility of recognizing additional doctrines in the future:

> we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.[99]

Beyond contract law alone, the SCC cited additional precedent on unjust enrichment further supporting its preference for an approach of context-specific doctrines tied together by an organizing principle. Regarding unjust enrichment, the SCC "developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what…to do with regards to the organizing principle of good faith."[100] Doing this would also be helpful in the case of unconscionability. A clear separation of jurisdiction between the organizing principle of good faith and an organizing principle of unconscionability can easily be drawn in that the former pertains to fairness in contractual *performance*,

96. *Ibid* at paras 64, 69.
97. *Ibid* at para 65.
98. *Ibid* at paras 47-48, 92.
99. *Ibid* at para 66.
100. *Ibid* at paras 67-68.

while the latter would concern the circumstances under which contractual *enforcement* is fair.

In taking in *Uber* the sort of approach unanimously rejected in *Bhasin*, of trying to devise a single doctrine which could address unconscionability in multiple different contexts, the majority cited Stephen Waddams for approval, paraphrasing Waddams to the effect that:

> Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing "islands of intervention" so that the "clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions…will disappear."[101]

In fact, however, unlike the text inserted by Abella and Rowe JJ in the paraphrase quoted above, the relevant passage from Waddams says nothing of a doctrine; it refers to unconscionability as a "general principle."[102] Moreover, this section of Waddams, entitled "A General Principle," comes after having already reviewed earlier the specific doctrines known by the name "unconscionability,"[103] among other doctrines that Waddams sees as exemplifying this general principle, such as the rules on forfeitures, penalties, restraint of trade, duress, undue influence, and many others.[104] The argument, which he has maintained for half a century,[105] is for recognition of an organizing principle of unconscionability, used by Waddams in a very broad sense "as a synonym for…unfairness" that calls for relief from the norm of contractual enforcement.[106] Waddams adds that in the event of "open recognition of a general principle of unconscionability, one would expect the courts to develop guidelines" governing its application in specific contexts.[107] He discussed some such guidelines in the preceding sections dealing with the various doctrines. Although he submits that in some cases the formal rules obscure other factors that in reality track outcomes better in cases that obtained relief, this only means that more accurate guidelines can be identified. In terms of general criteria of unconscionability, he also acknowledges that "not every case lends itself to analysis in terms of equality of exchange and sometimes it may be that there is a case for relief even when the values exchanged are

101. *Uber*, *supra* note 22 at para 60.
102. Waddams, *Law of Contracts*, supra note 10 at para 549.
103. *Ibid* at paras 549, 524, 489.
104. *Ibid*, ch 14.
105. *Ibid* at para 549; SM Waddams, "Unconscionability in Contracts" (1976) 39:4 MLR 369.
106. Waddams, *Law of Contracts*, *supra* note 10 at para 549.
107. *Ibid* at para 552.

approximately equal." Likewise, he observes that in some kinds of cases, inequality of bargaining power is not required.[108] Altogether what he is describing is a very complex picture—far from amenable to the simplistic approach of a one-size-fits-all doctrine.

Thus, it seems to me that Waddams was not describing such a "magic bullet" doctrine, but rather an *organizing principle* of unconscionability—much like the Supreme Court's recognition of an organizing principle of good faith regarding fairness in contractual performance. This distinction between unconscionability as a doctrine versus as an organizing principle, as well as understanding Waddams as advocating recognition of a general organizing principle not a general all-purpose doctrine, were shared by the concurring opinion in *Uber*. Brown J concurred in the result—but notably, strongly disagreed with the majority's approach to unconscionability, of trying to "jam" differing functions into a single doctrine:[109]

> some of the uncertainty surrounding unconscionability can be attributed to varying usage of the term "unconscionable." Unconscionability, as an independent doctrine, is "a specific concept, like duress and undue influence, that provides a basis upon which a transfer may be reversed." But unconscionability may also refer, in a more general sense, to a unifying theme or organizing equitable principle… Some commentators suggest that unconscionability as a broader principle explains several independent rules in contract law, including those relating to forfeitures, penalties, exclusion clauses, duress, and restraint of trade (SM Waddams, *The Law of Contracts*…[110]

The first part of the three-part reconfiguration of the law of unconscionability in Canada proposed here in order to ameliorate its fitness-for-purpose—recognizing unconscionability as an organizing principle under which lie distinct doctrines tailored to different contexts—is therefore supported by Waddams' longstanding argument. The majority in *Uber* were mistaken in taking it as arguing for a one-stop doctrine. They were under the "false notion" that unconscionability "is a distinct cause of action…wherever… conduct…merits the epithet 'unconscionable.'"[111]

As far as the scope of the proposed organizing principle of unconscionability, I would draw it less broadly than Waddams. Many grounds of relief from contractual enforcement that Waddams includes within unconscionability are viewed by most authors as outside of it. He includes under unconscionability even good faith, which would create

108. *Ibid* at paras 552, 550.
109. *Uber*, *supra* note 22 at para 152.
110. *Ibid* at para 149.
111. Duggan, *supra* note 68 at 4.

unnecessary conflict and duplication with the existing organizing principle of good faith, distinguished above. I would further confine the organizing principle of unconscionability to the sorts of scenarios the word suggests: ones where the concern is an *unconscientious abuse of power in the making of a contract*. An organizing principle of unconscionability with that meaning would encompass, notably, the two different contexts discussed in this article: setting aside unfair bargains made by exploiting disability, and control of unfair terms included among the form terms imposed in standard form contracting.

I now argue the feasibility of Canada having distinct doctrines dedicated to each of those scenarios, operating beneath the organizing principle of unconscionability just discussed.

2. *A Canadian doctrine of unconscionable bargains*

Prior to *Uber v Heller*, there was not a precedential judgment at the level of the Supreme Court of Canada on a doctrine of unconscionability of the English type for setting aside bargains made through exploitation of a party under a disability.[112] The *Uber* doctrine identified itself as of the family of doctrines of that type used in common law jurisdictions outside the US, descended from the English doctrine.[113] However, as discussed earlier, the *Uber* doctrine also aspires to serve the distinct purpose of the American doctrine, and thus contains a mélange of features, so that it differs significantly from doctrines of the English type.

At the level of lower courts, however, a doctrine not only claiming descent from the English one, but also embodying the general features of doctrines of that family, has long been present in Canada.[114] A widely recognized leading case for this is *Morrison v Coast Finance* (BCCA), which described it as follows:

> The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct…a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v Morris* (1873),

112. *Uber*, *supra* note 22 at para 157.
113. *Uber, supra* note 22*;* e.g. see the body of jurisprudence referenced at para 55.
114. *Waters v Donnelly* (1884), 9 OR 391, 42 ACWS (3d) 984(ON H Ct J).

> LR 8 Ch 484, per Lord Selborne, LC, at p 491; or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855), 6 De G M & G 424 at p 438, 43 ER 1298; affirmed (1860), 8 HLC 481 at pp 492-3, 11 ER 517. In *Fry v Lane* (1888), 40 Ch D 312, Kay, J, accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. At p 322 he said: The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.[115]

Another influential statement of the doctrine of the English family long used in Canada at levels beneath the SCC comes from *Cain v Clarica Life Insurance* (ABCA), which after reviewing previous authorities, provided the following synopsis:

> Those authorities discuss four elements which appear to be necessary for unconscionability. (Some cases state some of the four as exceptions to be disproved by the alleged oppressor, but nothing turns on onus in this case.) The four necessary elements are: (1) a grossly unfair and improvident transaction; and (2) victim's lack of independent legal advice or other suitable advice; and (3) overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (4) other party's knowingly taking advantage of this vulnerability.[116]

The exact contours of this English-type doctrine in Canadian law were examined in depth again in the 2017 judgment in *Downer v Pitcher* (NLCA).[117] Within this 50-paragraph discussion, the crux of the doctrine's concern was summarized as:

> whether there was a degree of vulnerability that had the potential of materially affecting the ability, through rational autonomous decision-making, to protect one's own interests. If so, a duty will be cast on the other party not to act or to refrain from acting in such a way that the resulting transaction is reached in a manner that involves the victim being unfairly taken advantage of.[118]

A qualifying vulnerability could stem from "some disabling circumstance affecting the physical or mental abilities of the claimant" or "from

115. *Morrison v Coast Finance Ltd* (1965), 55 DLR (2d) 710 at 713, 54 WWR 257 (BCCA).
116. *Cain v Clarica Life Insurance*, 2005 ABCA 437 at para 32.
117. 2017 NLCA 13 at paras 6-54 [*Downer*]. See also Rick Bigwood, "Rescuing the Canadian Unconscionability Doctrine: Reflections on the Court's Applicable Principles in Downer v Pitcher" (2017) 60:1 Can Bus LJ 124 [Bigwood, "Canadian Unconscionability"] (Bigwood salutes the examination of the doctrine in *Downer*).
118. *Downer*, *supra* note 117 at para 37.

situational circumstances such as severe financial need," but at all events is not a general condition; it can be found only by examining "the circumstances of each case."[119] Regarding the element of advantage-taking, it was explained that "by its nature the jurisdiction [to grant relief] has to be based on some degree of fault or responsibility on the part of the person from whom relief is being sought"—hence, the doctrine must include a requirement of knowledge, whether of the actual vulnerability or of circumstances as should have been taken as indicating its presence.[120]

Among the above three formulations, and other versions articulated by courts in Canada, there are some notable variations. At times, much has been made of these,[121] and also of variations between Canadian formulations and ones elsewhere, such as in Australia, New Zealand, or England for instance.[122] However, it is vital not to lose sight of the forest for the trees in the Canadian context, where the term "unconscionability" is also used in reference to a very different type of doctrine used for a different purpose, reflecting the coexistent strong influence of the American doctrine. In the big picture, it is clear that the lower court authorities above describe an unconscionability doctrine within Canada of the type of the English doctrine of unconscionable bargains set out earlier (and its relatives in other common law jurisdictions outside the US). And this Canadian unconscionable bargains doctrine shares their purpose of enabling the setting aside of unfair bargains made by exploitation of a party's disability.

All that would be needed, then, in order for Canada to have an unconscionable bargains doctrine of the type of the English doctrine, fit for the task of avoiding unfair bargains made by exploiting disabilities, would be for the Supreme Court to recognize this traditional doctrine long used by lower courts throughout Canada's common law provinces.

In fact, important steps towards that have already been taken. In particular, the existence of the traditional doctrine described above was acknowledged by the SCC in *Norberg v Wynrib*.[123] *Norberg* was not a contracts case, much less an unconscionability case; it was a tort case of battery sexual assault. Justice LaForest—who was renowned for his

119. *Ibid* at paras 41-42.
120. *Ibid* at paras 46-47.
121. See e.g. Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada, 2014) at 517ff; Bigwood, "Antipodean Reflections," *supra* note 7; Bigwood, "Canadian Unconscionability," *supra* note 117; Chris Hunt, "Unconscionability Three Ways: Unfairness, Consent and Exploitation" (2020) SCLR 37.
122. See e.g. Bigwood, "Antipodean Reflections," *supra* note 7; Capper, *supra* note 13.
123. *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449 [*Norberg* cited to SCR].

expertise in private law[124]—saw unconscionability as providing a "useful framework" for analyzing the circumstances there of a doctor exploiting a patient suffering from a prescription drug addiction to obtain sex in return for drugs: "the common thread is an illegitimate use of power…which vitiates a person's freedom of choice."[125] Thus, in *Norberg*, LaForest J summarized the traditional doctrine widely used in lower courts, quoting from *Morrison* (above) regarding the basis and elements of the doctrine, and citing Canadian contracts scholars on a similar point as *Downer* (above) that the vulnerability required is not established by general conditions but by the circumstances of each case.[126] From England, he further quoted Lord Denning, that "English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair…when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity."[127]

In short, the SCC acknowledged in *Norberg* the existence in Canada of the traditional English-type doctrine of unconscionability, endorsed leading Canadian lower court authority as to its features, and tied this to English law. Largely what remains to be done, then, is simply to carry over this obiter dicta to a case actually concerning unconscionability. On this, I add that Rick Bigwood has previously recommended building on *Norberg* as the best hope for straightening out a doctrine of unconscionable bargains in Canada.[128]

This was likely part of the intent in *Uber*: the SCC noted there that "[u]nconscionability is widely accepted in Canadian contract law," citing many cases of the traditional English-type doctrine discussed above.[129] However, as explained earlier, the majority in *Uber* was diverted from this by its ambition to have the doctrine also control standard form terms, which is not a function fulfilled by the unconscionable bargains doctrines, but by the distinct American doctrine of unconscionability. The new dual-purpose doctrine the *Uber* court therefore devised had mixed features that left it unsuited to either purpose.

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124. Beverley McLachlin, "The Evolution of the Law of Private Obligation: The Influence of Justice La Forest" in Rebecca Johnson et al, eds, *Gérard V La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project, University of Manitoba, Faculty of Law, 2000) 21.
125. *Norberg*, *supra* note 123 at 247.
126. *Ibid* at 247-250.
127. *Ibid* at 249, quoting *Lloyds Bank Ltd v Bundy*, [1974] EWCA Civ 8 [*Bundy*]. *Bundy* accepted the sufficiency for relief of the more "passive" exploitation characteristic of unconscionability, distinguished from undue influence or duress.
128. Bigwood, "Antipodean Reflections," *supra* note 7 at 209; Bigwood, "Canadian Unconscionability," *supra* note 117 at 124.
129. *Uber*, *supra* note 22 at para 55.

Going forward, *Uber* could—consistent with the suggestion in the last section—be treated as a discussion about unconscionability as an organizing principle that fell short at some points to adequately distinguish the distinct doctrines that should apply to the differing scenarios of bargains exploiting disability and of offensive standard form terms. Whether or not that is done, *Uber* approved of *Norberg*, which recognized the existence in Canada of an unconscionable bargains doctrine similar to that used in England for avoiding contracts made by exploiting a counterpart's disability.[130] That doctrine is of long pedigree throughout Canada's common law provinces, and there is certainly ample precedent to confirm its authority in relation to the scenarios it addresses.

I now turn to the feasibility of a Canadian unconscionable clause doctrine for standard form term control.

3. *A Canadian doctrine of unconscionable clauses*

In this regard too, it seems to me eminently feasible for Canadian contract law to recognize such a doctrine, and indeed on this also there already exist important precedents that could be drawn upon.

In particular, the Supreme Court of Canada came close to recognizing a doctrine of the American type as applicable in Canada in the line of cases headlined by *Hunter Engineering v Syncrude* and *Tercon Contractors v British Columbia.*[131] Tracing back more than 30 years, and including multiple Supreme Court judgments, this is an essential line of authority.[132] Moreover, the statements on unconscionability in *Tercon* were supported by a unanimous SCC, and unanimously adopted the earlier comments of Dickson CJ from *Hunter*. But due to unresolved confusion about these cases, the immense benefit it would be for Canadian contract law to draw on them in recognizing a dedicated tool for controlling unfair terms in standard form contracts still remains unfulfilled.

The usefulness of these cases as existing precedents supporting recognition of an unconscionable clauses doctrine applicable in Canada starts with the observation that there is little in these cases to support that the "unconscionability" doctrine they were discussing could be Canada's English-type unconscionable bargains doctrine, surveyed in

130. *Ibid* at paras 64-65.

131. *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426, 57 DLR (4th) 321 [*Hunter*]; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*].

132. See e.g. *TELUS Communications Inc v Wellman*, 2019 SCC 19; *Douez v Facebook*, 2017 SCC 33; *Tercon*, *supra* note 132; *ABB Inc v Domtar Inc*, 2007 SCC 50 [*Domtar*]; *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423, 178 DLR (4th) 1; *Hunter*, *supra* note 132; *Plas-Tex Canada Ltd v Dow Chemical of Canada Limited*, 2004 ABCA 309.

the last section.[133] For example, the context—business contracts among sophisticated enterprises—could hardly be more remote from the situations that would lead one even to think about unconscionability doctrines of that type. Moreover, the unconscionability doctrine discussed in these cases operated to control an offensive term while leaving the rest of the contract in force, unlike unconscionable bargains doctrines in Canada, England and elsewhere which operate to rescind whole transactions if their formation was tainted by impairment and exploitation. Further, if these cases were discussing the unconscionable bargains doctrine already used throughout Canada for over a century, there would have been no need to present novel policy justifications for it, as was done. And those justifications, focusing on the virtues of dealing overtly with surprising terms, are distant from unconscionable bargains doctrines' concern with relieving exploitation of disabled parties. Nor was there any citation of *Morrison*—as there was in *Norberg*, which was discussing the unconscionable bargains doctrine—or of other leading cases from the long history of the unconscionable bargains doctrine in Canada. In short, there is little to suggest the *Hunter* and *Tercon* line of cases could have meant this doctrine when discussing "unconscionability."

As this discussion of an unconscionability doctrine in Canada, other than the traditional unconscionable bargains doctrine, was unprecedented before *Hunter*, and thus there were no citations on it to include, a number of scholars commented that it was unclear what the Supreme Court was referring to.[134] For these reasons, it is impossible to say with certainty what doctrine of unconscionability the SCC was discussing.

However, the unconscionability doctrine in the *Hunter* and *Tercon* line of cases had to refer to something. Some writers, including Waddams and John McCamus, noted at the time that these cases seemed to accept the applicability in Canada of an unconscionability doctrine resembling that used by American courts.[135] Indeed, there are notable similarities in

133. McCamus, *supra* note 82 at 442-443; SM Waddams, "Unconscionability in Canadian Contract Law" (1992) 14:3 Loy LA Intl & Comp LJ 541 at 541-543, online: <digitalcommons.lmu.edu/ilr/vol14/iss3/6/> [perma.cc/LPQ3-6UU7] [Waddams, "Unconscionability"].

134. Robert Flannigan, "Hunter Engineering: The Judicial Regulation of Exculpatory Clauses" (1990) 69:3 Can B Rev 514 at 514, 529, 536, online: <cbr.cba.org/index.php/cbr/article/view/3477> [perma.cc/CFC3-VT3V]; Jassmine Girgis, "Tercon Contractors: The Effect of Exclusion Clauses on the Tendering Process" (2010) 49:2 Can Bus LJ 187 at 208; Shannon O'Byrne, "Assessing Exclusion Clauses: The Supreme Court of Canada's Three Issue Framework in Tercon Contractors Ltd v British Columbia (Transportation and Highways)" (2012) 35:1 Dal LJ 215 at 224, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol35/iss1/8/> [perma.cc/QFG2-U9CV].

135. Waddams, "Unconscionability," *supra* note 134 at 541-543; McCamus, *supra* note 82 at 442-443.

context, operation, and rationales between it and the unconscionability doctrine commonly used by American courts.

As McCamus noted, in discussing what he labeled a new "unconscionable term" doctrine employed in these cases, the doctrine's operation was novel in Canada in its "recognition of a…capacity of the courts to strike down unfair or unconscionable terms."[136] As Waddams explained, "English courts generally do not" do this;[137] the English doctrine and others of that type, including the traditional Canadian doctrine, "provide a basis for rescission of an agreement" as a whole.[138] The "striking out of particular terms" McCamus highlighted, "is a standard form of relief under American unconscionability doctrine."[139] In fact, the SCC described the doctrine's effect as authorizing courts to "refus[e] to give force to a contractual term". This too is consistent with the American doctrine: as Farnsworth explains, "the underlying notion is that a court may withhold [enforcement]…not that a party may avoid the contract"; "the remedies…are cast in terms of withholding [enforcement] instead of avoidance" as in English-type unconscionable bargains doctrines.[140]

As well, the novel rationales the SCC presented for the doctrine discussed in these cases, focusing on the merits of overtly controlling surprising terms, echo those which drove development of the American doctrine. As discussed earlier, American courts hoped to end dependence on covert use of processes like interpretation, incorporation, etc. to combat unfair standard form terms. Similarly, these Canadian cases expressed an aim of ending reliance on the doctrine of fundamental breach, which they saw as an "artificial legal doctrine" whose "idiosyncratic traits [are] sometimes at odds with concerns of fairness." Indeed, the cases used some of the same language as the official comment to UCC § 2-302, which inspired development of the doctrine used in American courts, in approving of dealing "directly" and "explicitly" with a term's fairness "through the doctrine of 'unconscionability,'" rather than "cloaking the inquiry" or relying on "games of characterization" or "subterfuge."[141]

The contexts seen in this line of cases were also compatible with the American doctrine. They did not involve the eccentric situations—real estate transactions with heedless expectant heirs, mortgages with elderly

136. McCamus, *supra* note 82 at 440-441.
137. Waddams, "Unconscionability," *supra* note 134 at 543.
138. McCamus, *supra* note 82 at 440.
139. *Ibid*.
140. Farnsworth, *supra* note 14, § 4.28 at 305-306.
141. *Tercon*, *supra* note 132 at paras 108, 127; *Hunter*, *supra* note 132 at 462; UCC, *supra* note 18, § 2-302 Official Comment 1.

foreign language speakers, etc.—typical of cases of unconscionable bargains doctrines. *Hunter* and *Tercon*, as mentioned, concerned business contracts among sophisticated enterprises. Moreover, *Hunter* described the issue as whether to enforce "a contractual term said to have been agreed,"[142] a phrase evoking standard form terms, on which agreement is seen as a pretence.[143] Also in *Tercon*, the clause at issue was a standard form term. In another case from this line, *ABB v Domtar*, the SCC explained that "[t]his doctrine is generally applied in the context of a consumer contract or contract of adhesion,"[144] much like the American doctrine.

Thus, there are considerable reasons to think that the type of unconscionability doctrine the SCC had in mind in the *Hunter* and *Tercon* line of cases was the type first used in American rather than English courts, identifiable despite the lack of an explicit reference by its features, rationales, and context.

This, as mentioned, was also how some other writers interpreted it. McCamus, for instance, noted that this Canadian unconscionability doctrine, like the American doctrine, "may provide a common law device, long awaited by some, to ameliorate the harsh impact of unfair terms in boilerplate or adhesion contracts."[145] Waddams, noting the development in an American law journal, saw it as an American-type "general power…to set aside contractual provisions on what may broadly be called grounds of unfairness."[146] He added that "there is much in the Canadian experience to bear out Llewellyn's thesis," echoed by the SCC, on the merits of developing an unconscionable clauses doctrine to deal overtly with unfair terms.[147] He concluded that "[a]lthough Canadian contract law traditionally follows English law" these cases point in a different direction.[148] Waddams also considered the doctrine's American origin no obstacle, as "Canada shares with the United States the traditions of English common law and equity."[149]

Full recognition of this line of cases as showing the applicability in Canada of an American-type unconscionable clauses doctrine has been hindered, however, by some ambiguities. For example, as these cases simultaneously retired the doctrine of fundamental breach in Canada,

142. *Hunter*, *supra* note 132 at 462.
143. *Suisse Atlantique v Rotterdamsche Kolen Centrale* (1966), [1967] 1 AC 361 at 406, [1966] 2 All ER 61 (HL (Eng)); Radin, *supra* note 49, chs 2, 5.
144. *Domtar*, *supra* note 133 at para 82.
145. McCamus, *supra* note 82 at 444.
146. Waddams, "Unconscionability," *supra* note 134 at 543.
147. *Ibid* at 541-543. See *supra* note 142.
148. Waddams, *supra* note 134 at 543.
149. *Ibid* at 541.

the discussion at times focused on unfair exclusion clauses, leaving uncertain whether it also covered other kinds of unfair terms. That said, Chief Justice Dickson said flat out that "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."[150] In other cases the discussion of unfair terms was more general, as the rationales for the doctrine indeed were from the beginning. As Waddams argued regarding the Court using the term 'unconscionability,' "the implication of this is…that other kinds of unfair clauses may be disallowed if they are unconscionable."[151] This was later borne out. For instance, in *Douez v Facebook*, agreeing with the interpretation of the doctrine as a control of unfair standard form terms, Abella J applied it to a forum selection clause.[152] And in *Telus v Wellman*, the SCC unanimously held the doctrine to be the appropriate device for determining the enforceability of an allegedly unfair standard form arbitration clause.[153] A separate cause of uncertainty was the lack of a citation to the American doctrine, such as its leading case, *Williams v Walker-Thomas Furniture*.[154] It may be that the Court wanted to establish a parallel type of doctrine, without expressly relying on the American one. Another possibility is that it was not realized that the unconscionable clauses doctrine commonly used in America was not already applicable in Canada. In that regard, McCamus explains, "the justices appear to assume that they are simply applying [an] existing law of unconscionability."[155] Whatever the explanation, an unconscionability doctrine with notable similarities to the one long used in America was, in this line of SCC precedents, shown to be applicable in Canada.

Of note, *Uber* cited this line of authority as precedent for the claim that unconscionability could target individual terms.[156] Moreover, the unfair standard form term at issue in *Uber* was not an exclusion clause but an arbitration clause. And it was noted that other kinds of clauses (e.g. choice of law, forum selection), if used unfairly in a standard form, would also "violate the adhering party's reasonable expectations" which is "precisely the kind of situation in which the unconscionability doctrine is meant to

150. *Hunter*, *supra* note 142 at 461.
151. SM Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49:3 Can Bus LJ 378 at 391.
152. *Douez, supra* note 132 at paras 112–114.
153. *Wellman*, *supra* note 132 at para 85.
154. *Williams*, *supra* note 17.
155. McCamus, *supra* note 82 at 442.
156. *Uber*, *supra* note 22, n 8.

apply."[157] That too parallels the American doctrine, under which persons who "adhere to standardized agreements" are not bound to standard form terms "which are beyond the range of reasonable expectation."[158] This all supports that the *Hunter* and *Tercon* line of cases allows for control not just of exclusion clauses, but of any surprising standard form clause—as does the American doctrine of unconscionability. However, as discussed, *Uber* unhelpfully attempted to develop a new doctrine which could also fulfill the task of an English-type unconscionable bargains doctrine, thus mixing features of each, and leaving it unsuited to either.

Mainly what remains to be done, then, is to confirm the existence in Canada of an unconscionable clauses doctrine of the American type—separate from the English-type unconscionable bargains doctrine discussed in the last section—by drawing on the important line of cases discussed here, headed by *Hunter* and *Tercon*.

This would be especially valuable in Canadian contract law, which presently lacks legislative controls of reasonably general scope over unfair terms in standard form contracts, as many jurisdictions have.[159] A common law solution—as in the US through the American doctrine of unconscionability—is what is in reach. Canada would then have separate doctrines dedicated to the different purposes of unconscionability doctrines of the English and American types, each fit-for-purpose and based on well-established models.

Conclusion

The current state of the law of unconscionability in Canada is lamentable, as a single uber-doctrine is relied on to pursue two different purposes, but being thus unfocused, is unsuited to achieve either.

Elsewhere, these purposes are the task of distinct unconscionability doctrines: unconscionable bargains doctrines, typified by the English doctrine of unconscionability, fulfill the function of enabling avoidance of unfair bargains made through exploitation of a party's disability; meanwhile, unconscionable clauses doctrines, typified by the American doctrine of unconscionability (and embedded in the substance of legislated regimes elsewhere), serve the purpose of controlling unfair terms in standard form contracts. Each of these doctrinal types has features tailored to the distinct scenario it addresses, so that both are fit-for-purpose.

Canadian contract law, needing legal devices to address these important purposes also, and influenced by both the English and American doctrines

157. *Ibid* at para 89.
158. ALI, *Restatement (Second)*, *supra* note 37, § 211(3) cmt f.
159. See *supra* note 91.

of unconscionability, should develop separate doctrines of each of these types for use for their respective purposes, rather than continue down the dead-end path of trying to mix features of them into a single magic bullet doctrine of unconscionability that is expected to do everything.

Specifically, this article proposed a three-part plan that is readily feasible and indeed builds on a wealth of existing precedent in Canadian contract law: (1) The traditional English-type unconscionable bargains doctrine long used by Canadian lower courts and acknowledged by the SCC in *Norberg* and *Uber* should be recognized as governing situations in which a party seeks rescission of a contract because of suffering from a special disability that was taken advantage of by its counterpart in the bargaining process; (2) The distinct unconscionability doctrine discussed in the *Hunter* and *Tercon* line of SCC cases should, due to its similarities to the American doctrine and the critical need for a dedicated and fit-for-purpose Canadian control of unfair standard form terms, be recognized as an unconscionable clauses doctrine of that type; (3) To rationalize the law of unconscionability more broadly, including explaining the relationship between the two doctrines just discussed, unconscionability should like good faith (and as a correction to *Uber*'s understanding of what Stephen Waddams was recommending) be recognized as an "organizing principle" in Canadian contract law, allowing possible relief from enforcement in case of unconscientious abuse of power—subject to conditions set by subordinate doctrines like those just mentioned, each of which address specific contexts.

These steps would assure the fitness-for-purpose of unconscionability in Canada, drawing on established doctrines long in use, and producing harmonization to alleviate barriers to cross-border trade. Meanwhile, the doctrines would be organized within a clear and rational framework that is distinctively Canadian.