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### Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?

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CONTROLLING FAIRNESS IN STANDARD FORM  
CONTRACTS: WHAT CAN COURTS DO, AND WHAT  
*SHOULD* THEY DO?

MARCUS MOORE<sup>†</sup>

INTRODUCTION

Unfair terms in standard form contracts are one of Contract Law's most notorious and enduring problems.<sup>1</sup> The vast transnational literature on this, now a century old, has long worked out its contours, even as it still searches for more effective solutions.<sup>2</sup> The central problem can be simply stated: A form drafter's ability to dictate terms—characteristically unknown and unbargained by the parties who are form recipients—allows, in the absence of any other legal control, for the incorporation of one-sided terms favouring the drafting party. The implications are significant: The exhaustive list of terms typical of such contracts, combined with the pervasiveness of their use in modern society, make unfair standard form terms a feature of the economic system which systemically and

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<sup>1</sup> 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 standard contracts.

<sup>2</sup> See Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury, 2023) at 1 (forthcoming); American Law Institute, *Restatement on Consumer Contracts- Tentative Draft* (Philadelphia: ALI, 2019); Simon Whittaker, “Unfair Terms in Commercial Contracts and the Two Laws of Competition: French Law and English Law Contrasted” (2019) 39:2 Oxford J Leg Stud 404.

significantly contributes to the post-industrial era's astounding inequalities of wealth and power.<sup>3</sup> These disparities are expanding now more than ever in the present age of technology, with the increasing migration of social activity online—governed by standard form contracts, made via “click-wrap”, “browse-wrap” and the like.<sup>4</sup>

As I will discuss in Part I of this article, many jurisdictions have tried to at least partly deal with this problem. Canada's common law provinces conspicuously lag behind many other developed legal systems in their lack of even a somewhat general control over unfair terms in standard form contracts.<sup>5</sup> Among other common law domains, the UK, Ireland, Australia, and New Zealand, for example, all have legislated controls in this area. So do the civil law nations of Europe and Canada's civilian private law jurisdiction of Québec. The United States has a common law control referred to as “unconscionability”, but which must not be confused with the doctrines of that name found widely elsewhere throughout the common law world.<sup>6</sup> The American doctrine was developed by the courts based on §2-302 of the Uniform Commercial Code, and is designed in large part to overtly control unfair standard form clauses.<sup>7</sup>

In a prominent line of cases headlined by *Hunter v Syncrude* and *Tercon v BC*, an unconscionability doctrine was invoked in Canada resembling in important ways the US doctrine.<sup>8</sup> However, the elusive discussion in these cases thus far has held them back from being clearly recognized as providing such control in

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<sup>3</sup> See Friedrich Kessler, “Contracts of Adhesion—Some Thoughts about Freedom of Contract” (1943) 43:5 Colum L Rev 629.

<sup>4</sup> See Robert A Hillman & Jeffrey J Rachlinski, “Standard-Form Contracting in the Electronic Age” (2001) 77 NYU L Rev 429.

<sup>5</sup> There are specialized controls in certain areas. For a partial inventory, see SM Waddams, *The Law of Contracts*, 7th ed (Canada Law Book, 2017) 545.

<sup>6</sup> See David Capper, “The Unconscionable Bargain in the Common Law World” (2010) 126 Law Q Rev 403.

<sup>7</sup> Discussed in §I.D, *below*.

<sup>8</sup> *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*].

Canada. Uncertain, for example, was whether this doctrine controls only unfair exemption clauses or also other unfair terms like the US doctrine. Thus, a definite control of standard form terms did not materialize.<sup>9</sup>

Given the continued absence of general legislated controls in common law Canada, the recent decision of the Supreme Court of Canada in *Uber Technologies v Heller*<sup>10</sup> raises, regarding potential common law controls, the questions addressed by this article, of: what can Canadian courts do, and what *should* they do?

The impact of the *Uber* case on development of such a general control will be discussed in Part II of the article. In this important recent decision, the Supreme Court evinces a strong desire to achieve a control over unfair standard form terms in Canadian common law—bringing common law Canada broadly in line with other jurisdictions that already have judge-made or legislated controls.

The Court took several steps in *Uber* towards realizing a regime of common law control. Firstly, and arguably most importantly, it articulated a justification for control—historically a major hurdle to common law controls of unfair terms. Secondly, the Court held that the standard form contracting process counts towards unconscionability's required procedural aspect, the remaining aspect being the needed control over substantive fairness. Thirdly, the Court applied unconscionability to an individual unfair term, an approach typical of legislated and judicially developed controls elsewhere that encompass fairness in standard form contracts. Lastly, the Court removed some impediments to class actions over unfair standard form terms, a recourse suited to unfair standard form contract terms' embodying a mass "wrong".

However, in various ways the *Uber* decision also hesitated in fully authorizing control of fairness of standard form terms. For example, the decision suggested that enhanced information to form recipients could oust the applicability of control. This could significantly curtail its scope and/or prevent it going much

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<sup>9</sup> The matters in this paragraph are discussed in §I.E, *below*.

<sup>10</sup> *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*].

further than existing rules requiring special notice for incorporation of surprising or onerous terms. In explaining why unconscionability's procedural requirement was satisfied, the majority also referenced party-specific inequalities of bargaining power, leaving it unclear whether contracting by adhesion suffices on its own. Also unclear was whether complainants could, in general, confine their attack to an individual term, as the majority principally justified its term-specific use of unconscionability in *Uber* on the basis that the arbitration clause constituted a collateral contract. The decision also did not specify that no other clause would be permitted to impede class actions as had the arbitration clause that was not enforced.

The potential to achieve effective control of the fairness of standard form terms, as well as the coherence of Contract Law within and surrounding such control, were also hurt by the case's conflation (starting at the lower court levels) of distinct doctrines of "unconscionability".<sup>11</sup> Unconscionability is a concept which plays a role in multiple doctrines using that name, and others under other names. It is the unconscionability doctrine first developed in American courts that, as mentioned, was developed with control of unfair terms among its principal aims. The doctrine used in Canada in the *Hunter* and *Tercon* case-line had important commonalities with that doctrine.<sup>12</sup> However, in *Uber*, starting at the trial level and carried over into the courts above, this was conflated with a distinct unconscionability doctrine of English origin, which does not deal with terms of standard form contracts.<sup>13</sup> The unconscionability doctrine of the English family, represented in Canada by leading cases such as *Morrison* (BCCA), *Cain* (ABCA), *Titus* (ONCA), and *Downer* (NLCA) dealt with scenarios of exploitation of a party who was impaired in the bargaining process by some special disability and thus entered

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<sup>11</sup> *Heller v Uber Technologies Inc*, [2019] ONCA 1 at paras 60–62 [Uber CA]; *Heller v Uber Technologies Inc*, 2018 ONSC 718 at paras 68, 75 [Uber SC].

<sup>12</sup> *Supra* note 8.

<sup>13</sup> See *supra* note 6.

into an improvident transaction.<sup>14</sup> That doctrine has long been seen as unsuited to control of unfair terms in standard form contracts due to its assumption of a bargaining process, its concern with individualized not standardized sources of vulnerability, and its conception as a vice of consent that negatives the validity of a contract's formation and thus avoids the transaction as a whole.<sup>15</sup> Attempts to house a standard form term control within this type of unconscionability doctrine, due to the aforementioned conflation, resulted in additional difficulties likely to endure if these doctrines are not disambiguated. To control unfair terms in standard form contracts, England and other Commonwealth jurisdictions make use of legislation.<sup>16</sup>

As the subject of this paper is control of unfair terms in standard form contracts, I do not stray into developments regarding the unconscionability doctrine of English descent except where this is relevant because of the conflation above, to standard form term control. Other issues relating to the doctrine of English origin, though important for Canadian Contract Law, merit a full discussion elsewhere as a separate topic.<sup>17</sup>

The problem of controlling unfair terms in standard form contracts is longstanding and challenging.<sup>18</sup> Hence, in the wake of both *Uber's* steps towards, and complications of, achieving a

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<sup>14</sup> *Morrison v Coast Finance Ltd*, [1965] 55 DLR (2d) 710, 54 WWR 257 [*Morrison*]; *Cain v Clarica Life Insurance*, [2005] ABCA 437 [*Cain*]; *Titus v William F Cooke Enterprises Inc*, [2007] ONCA 573; *Downer v Pitcher*, [2017] NLCA 13 [*Downer*].

<sup>15</sup> These matters are discussed in §II.B-C; III.B, *below*.

<sup>16</sup> See §I.C, *below*.

<sup>17</sup> Such issues raised by *Uber* and worthy of discussion elsewhere include: an expanded scope, open-ended procedural criteria, elimination of a knowledge requirement, a markedly plaintiff-sided conception, and generally the implications of significantly departing from features previously shared with sister doctrines throughout the Commonwealth. On these matters, see Marcus Moore, "The Doctrine of Contractual Absolution" 59:4 *Alta L Rev* (forthcoming).

<sup>18</sup> See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, 2012); Jennifer Millson & Simon Stern, "Mini-Symposium on Contract Boilerplate: Introduction" (2013) 54:2 *Can Bus LJ* 246.

common law control of unfair standard form terms, it is important and timely to consider what future courts can and should do.

Part III of this article provides a set of recommendations for how to move the jurisprudence from where it is following *Uber* to achieving what judicial control of unfair terms in standard form contracts can realistically achieve. The discussion also hopes to help clear up certain confusions and resolve conflicts within existing jurisprudence, to ensure coherence around the fairness control and with Contract Law's overall approach to reconciling its fundamental interests in freedom and fairness.

Among the recommendations offered, I suggest tweaking *Uber's* articulation of the law's justification for controlling unfair terms in standard form contracts. I also make clear that to control standard form terms, the type of unconscionability doctrine to use is the American type, applicable to unconscionable clauses. As mentioned above, a case can be made that such a doctrine has already in other SCC decisions been shown to be applicable in Canada. But at a minimum this needs to be clearly confirmed; or otherwise, that line of cases should just be extended to do so now. The unconscionability doctrine of English descent conflated with it in *Uber* should be removed from this context and returned to its normal *modus operandi*. That doctrine is needed for its distinct vocation of avoiding transactions resulting from unusual situations of exploitive bargaining. To facilitate access to class actions as a procedural recourse suited to the issue of unfair standardized terms used in mass markets, I suggest that future courts remove additional barriers to class actions beyond just standard form arbitration clauses. As well, I submit that subsequent rulings should not accept *Uber's* intimation that enhanced information might obviate the need for control of standard form terms. An exception is terms actually negotiated, which are typically exempted under unfair terms legislation elsewhere. *Uber* lowered the threshold of unfairness meriting control; I argue that courts should restore the higher threshold for the sake of certainty and predictability, which are crucial in this context, as contracts are a major cog of economic planning.

As its title may suggest, ultimately this paper counsels courts to be realistic about what judicial controls can achieve given

issues such as access to justice, market expertise, and common law remedial limitations. Judicial controls' greatest significance may actually be theoretical and symbolic rather than practical: They demonstrate that even under the common law, as arguably the most tradition-honouring area of the legal system, the need for control of unfair standard form terms is accepted, justified, and operative in practice. This could help pave the way, in the future, for more finely tuned and flexible legislated controls as employed by many jurisdictions globally to deal with this issue.

## I. CONTROL OF UNFAIR TERMS IN STANDARD FORM CONTRACTS: BACKGROUND AND CONTEXT

### A. THE PROBLEM

The problem of unfair terms in standard form contracts is well known and has subsisted for a long time.<sup>19</sup> Over a century ago, in an article in the *Harvard Law Review*, Edwin Patterson described this problem in the context of insurance contracts.<sup>20</sup> Stephen Waddams traces recognition of the problem back further, to the famous case *Parker v SE Railway* (1877),<sup>21</sup> where Sir Frederick Pollock, as plaintiff-counsel in the case, warned that the “notice rule” it laid down for incorporation of terms would lead to the introduction of “wholly unreasonable terms.”<sup>22</sup> Unfairness in this context is evaluated in substantive terms; and there is further a wide consensus in the literature and in regulations which address this problem that the terms' substantive unfairness lies in their one-sidedness in favour of the drafting party. Legislated controls refer, for instance, to terms that cause “a significant

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<sup>19</sup> See the text accompanying notes 2, 18.

<sup>20</sup> Edwin W Patterson, “The Delivery of a Life-Insurance Policy” (1919) 33:2 *Harv L Rev* 198 at 221-22.

<sup>21</sup> *Parker v South Eastern Railway*, [1877] 2 CPD 416, 25 WR 564.

<sup>22</sup> Stephen Waddams, “Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism” (2012) 53 *Can Bus LJ* 475 at 479.



imbalance in the parties' rights and obligations"<sup>23</sup> or that are "excessively and unreasonably detrimental to the . . . adhering party".<sup>24</sup> Karl Llewellyn, author of the section of the Uniform Commercial Code ("UCC") that inspired the judicially developed controls in the US, depicted unfair terms as "jug-handled".<sup>25</sup> There is less concern for one-sided terms in negotiated contracts. The focus of concern on substantive unfairness in standard form terms is due to the "adhesion" contracting *process* in which the drafting party alone decides the terms without the knowledge or choice of the receiving party. There is an obvious risk of the drafter exploiting this. Civilian systems conceive of abuse of this arrangement as contrary to good faith.<sup>26</sup> The American common law control constructs it as an element of "procedural unconscionability" required in addition to the substantive unconscionability of the oppressive clause.<sup>27</sup> What the law could and should do about this problem has been an enduring dilemma.

#### B. COVERT JUDICIAL FAIRNESS CONTROLS

Because standard form terms are treated by courts as agreed by form recipients (whether incorporated via the notice rule or the signature rule),<sup>28</sup> historically judges have struggled to find a handle that would permit them to overtly control the terms' fairness. As a result, courts were confined to stretching and straining Contract Law procedures whose real purpose was not fairness control in order to try to muster some control covertly.<sup>29</sup> One such procedure was contractual interpretation. Judges could

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<sup>23</sup> *Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts* [1993] OJ L095/29 art 3(1) [UCTD (EU)]; *Australian Consumer Law*, s 24(1)(a) [ACL].

<sup>24</sup> *Civil Code of Québec, CQLR, c CCQ-1991* Art 1437 para 2.

<sup>25</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960) at 364 [Llewellyn, *The Common Law Tradition*].

<sup>26</sup> See e.g. *UCTD (EU)*, *supra* note 23 art 3(1) (drawing on this element in preceding German law); *CCQ*, *supra* note 24 art 1437 para 2.

<sup>27</sup> American Law Institute, *supra* note 2 at 76-77.

<sup>28</sup> See *L'Estrange v Graucob*, [1934] 2 KB 394, [1934] All ER Rep 16.

<sup>29</sup> Llewellyn, *supra* note 25 at 364-65.

manipulate the interpretation process in various ways in order to get round an unfair term. As Llewellyn explained, such uses of interpretation “purport to construe, [but] do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction” in the interests of fairness.<sup>30</sup> Judges could also manipulate the exercise of implication of terms in broadly similar ways as interpretation. Implication had the advantage of being unconstrained by the plain meaning of words, since implied terms by definition are terms whose words are absent.<sup>31</sup> On the other hand, the obvious risks that such use of implication poses for freedom of contract led to strict articulations of the threshold (“necessity”) that had to be met before a term could be implied at all.<sup>32</sup> Another Contract Law procedure that could be conducted in an atypical manner was incorporation. For example, where Lord Denning’s “red-hand rule” was held to apply, the general assent of the form recipient was said not to incorporate a surprising or onerous term unless the drafting party had given special notice of it.<sup>33</sup> In signature cases, courts could follow the Ontario case *Tilden Rent-a-Car v Clendenning* which held that for contracts concluded in a “hurried, informal manner” the signature rule could not be relied on to incorporate surprising terms absent similar special notice.<sup>34</sup> Sometimes, Canadian courts, at Waddams’ suggestion, explained the need for this special notice as rather to avoid the form recipient being under a mistake-as-to-terms,<sup>35</sup> although courts have typically allowed form recipients to contract without any knowledge of the content of the form terms, correct or

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<sup>30</sup> Karl Llewellyn, “Book Review of *The Standardization of Commercial Contracts in English and Continental Law* by O Prausnitz” (1939) 52 Harv L Rev 700 at 703.

<sup>31</sup> See *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor*, [2015] UKSC 72 at para 27.

<sup>32</sup> See *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*, [1995] EMLR 472 at 481.

<sup>33</sup> *Thornton v Shoe Lane Parking*, [1971] 2 QB 163, [1971] 1 All ER 686.

<sup>34</sup> *Tilden Rent-a-Car Co v Clendenning*, [1978] 83 DLR (3d) 400, 18 OR (2d) 601.

<sup>35</sup> See e.g. *ibid.*

mistaken. Courts have also declined to enforce unfair terms that conflict with the overall purpose of a contract (using Lord Denning's doctrine of fundamental breach,<sup>36</sup> now in disfavour)<sup>37</sup> or with the reasonable expectations of the parties based on the negotiated terms.<sup>38</sup> All of these more or less covert devices of judicial control were seen as inadequate. As Llewellyn put, it "[c]overt tools are never reliable tools":<sup>39</sup> they could not be used consistently, and meanwhile this discredited legitimate use of these procedures of Contract Law for their usual purposes. A mechanism that could overtly address the problem of unfairness was called for. But because society's reliance on standard forms led courts to typically treat the terms as agreed and hence enforceable, there was no evident doctrinal justification for control. As a result, many jurisdictions turned to legislation.<sup>40</sup>

### C. LEGISLATED FAIRNESS CONTROLS

Legislated controls at least partly addressed to the problem of unfair terms in standard form contracts exist in several jurisdictions. In Europe, for example, the Unfair Contract Terms Directive ("UCTD") prescribes regulation to be implemented by EU member states through national legislation.<sup>41</sup> Under the UCTD, a standard form term that is unfair<sup>42</sup> is unenforceable against the form recipient.<sup>43</sup> As a minimum harmonisation directive, the UCTD requires EU member states to apply such controls at least to all consumer standard forms, and allows

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<sup>36</sup> See *Karsales (Harrow) Ltd v Wallis*, [1956] 1 WLR 936, [1956] 2 All ER 866.

<sup>37</sup> See generally *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827, [1980] 1 All ER 556; *Tercon*, *supra* note 8.

<sup>38</sup> See American Law Institute, *Restatement (Second) of Contracts* (Philadelphia: ALI, 1981) §211(3).

<sup>39</sup> Llewellyn, "Book Review", *supra* note 30 at 703.

<sup>40</sup> See e.g. Llewellyn, *supra* note 25 at 369; UK Law Commission, *Exemption Clauses: Second Report* (Law Com No 69, 1975).

<sup>41</sup> *UCTD (EU)*, *supra* note 23.

<sup>42</sup> See *ibid* art 3(1).

<sup>43</sup> See *ibid* art 6(1).

nations to apply the controls more widely.<sup>44</sup> Ireland as well as the UK (while it was still part of the EU) are examples of jurisdictions that implemented this directive through legislative instruments which apply to consumer contracts.<sup>45</sup> Beyond consumer standard forms, in the UK certain types of unfair terms are unenforceable or subject to reasonableness-based control under the earlier-introduced Unfair Contract Terms Act.<sup>46</sup> In Germany, the Netherlands and now France, fairness controls apply beyond consumer standard forms to all commercial standard form contracts.<sup>47</sup> Outside of Europe, legislated controls of unfair terms in standard form contracts exist, also for instance in the common law jurisdictions of New Zealand (where controls protect form recipients who are consumers), and Australia (where they also protect small-business form recipients).<sup>48</sup> In North America, the civilian jurisdiction of Québec has legislated controls on unfair (“abusive”) clauses in standard form (“adhesion”) contracts.<sup>49</sup> Under article 1437 of the Civil Code, the unfair term is null or the obligation it imposes on the form recipient may be reduced. While overt controls of the fairness of standard form terms nowadays usually exist by virtue of legislation, a notable (partial) exception is the common law regime in the United States.

#### D. OVERT JUDICIAL FAIRNESS CONTROL

In the US, state legislation implementing UCC Section 2-302 on contracts of sale inspired judicial development of an overt control of contractual fairness applicable more widely, including notably to unfair terms in standard form contracts (regardless of

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<sup>44</sup> *Ibid.*

<sup>45</sup> See European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (SI No 27/1995) (Ir); *Consumer Rights Act 2015* (UK), Part 2.

<sup>46</sup> Unfair Contract Terms Act 1977 (UK).

<sup>47</sup> See Arts 305–310 Civil Code (Germany); Arts 6:231–247 Civil Code (Netherlands); French Civil Code, art 1171.

<sup>48</sup> See *Fair Trading Act 1986* (NZ), 1986/121, ss 26A, 46H–M; *ACL*, *supra* note 23, ss 23–28.

<sup>49</sup> See *CCQ*, *supra* note 24, arts 1437–1438.

subject matter).<sup>50</sup> A key impetus for these developments was dissatisfaction with covert use of procedures like those discussed in Section B to effectively control unfair standard form terms. UCC Section 2-302 authorized an overt judicial power to refuse to enforce an “unconscionable clause”. The Official Comment to the section confirms that this was:

intended to make it possible for the courts to police explicitly against . . . clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance [i.e. incorporation] or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the . . . particular clause.<sup>51</sup>

The Comment also noted that “the principle is one of the prevention of oppression and unfair surprise”. This underlines that standard form terms were among the concerns contemplated, as unfair surprise is a phraseology often used for one-sided terms in standard form contracts, whose terms surprise because they are unknown to form recipients, unlike terms of negotiated contracts, which are discussed. After drafting the section, Llewellyn in subsequent writing urged courts to draw on this provision on sale as a platform for a doctrine of general application serving to control standard form terms.<sup>52</sup>

This the courts did, notably in the landmark decision in *Williams v Walker-Thomas Furniture Co.*<sup>53</sup> The control was known in the US as “unconscionability”.<sup>54</sup> Its procedural and substantive

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<sup>50</sup> See E Allan Farnsworth, *Contracts*, 4th ed (Aspen, 2004) at s 4.28.

<sup>51</sup> *Uniform Commercial Code*, UCC § 2-302 (Official Comment 1) [emphasis added].

<sup>52</sup> Llewellyn, *supra* note 25 (asserting that “these provisions may lead appellate courts into a machinery for striking down where striking down is needed” at 369).

<sup>53</sup> *Williams v Walker-Thomas Furniture*, 350 F (2d) 445 (DC Cir 1965), 121 US App DC 315 [*Williams*].

<sup>54</sup> See e.g. Arthur Allen Leff, “Unconscionability and the Code. The Emperor’s New Clause” (1967) 115:4 U Pa L Rev 485; American Law Institute, *supra* note 2.

elements, reflecting the theorization of the problem detailed in §I.A, above, were described in *Williams* as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” The lack of choice was said to result from “inequality of bargaining power.”<sup>55</sup> In explaining this, *Williams* added that “[t]he manner in which the contract was entered is also relevant”, and referred to “terms hidden in a maze of fine print”, thus adverting to the standard form contracting process.<sup>56</sup> The US doctrine of unconscionability thus provides an overt judicial control of the fairness of standard form terms.<sup>57</sup> What about Canada?

#### E. LACK OF A FAIRNESS CONTROL IN CANADA

As mentioned in the Introduction, common law Canada is notable among comparable legal domains for its lack of an overt control of unfair terms in standard form contracts. Missing are legislated controls of a reasonably general scope of application,<sup>58</sup> such as Québec has for all contracts of adhesion and the UK, Australia, New Zealand, and European countries have for a variable range of standard forms.<sup>59</sup> Similarly, an overt common law control has never fully materialized in Canada, as one did (long ago) in the United States.

A common law control of unfair standard form terms in Canada has for a number of years been within reach, through the *Hunter* and *Tercon* line of cases referenced in the Introduction. However, as noted, due to confusion around what was meant by

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<sup>55</sup> *Williams*, *supra* note 53 at 449. Arguably, the inequality of bargaining power element is misleading or irrelevant, as indeed the Official Comment to UCC §2-302 had said: “the principle is . . . not of disturbance of the allocation of risks because of superior bargaining power”. Nonetheless, undoubtedly, invocation of the phrase has stuck. See American Law Institute, *supra* note 2.

<sup>56</sup> *Williams*, *supra* note 53 at 449.

<sup>57</sup> See Farnsworth, *supra* note 50 at s 4.28.

<sup>58</sup> There are only specialized controls. See *supra* note 5.

<sup>59</sup> See §II.B, *above*.

the references to “unconscionability” in those cases, thus far they have not developed into the much-needed control.

In order to avoid perpetuating the confusion around unconscionability, I should first of all underline that the word “unconscionability” is used in private law with various different meanings.<sup>60</sup> Stephen Waddams uses it in a very broad sense “as a synonym for . . . unfairness”.<sup>61</sup> His writings have been very influential in Canadian jurisprudence. Respectfully, in my view, the term loses its utility where it is essentially just a more historically interesting but contemporarily less accessible word for unfairness.<sup>62</sup> I agree with Mitchell McInnes, Rick Bigwood and others that unconscionability is more usefully understood as having the more particular meaning of unconscientious abuse of power.<sup>63</sup> But on either view, unconscionability refers firstly to a *concept*.

Then there are actual *rules* of law said to exemplify the concept. In what Stephen Smith refers to as the “long list”, epitomized by Waddams’ view above, this includes several rules known by their own names such as duress, undue influence, penalties, and restraint of trade.<sup>64</sup> On any list, also present would be doctrines that themselves use the name of the overarching concept, unconscionability. This includes unconscionability doctrines of the English family which allow for the avoidance of bargains whose formation was tainted by exploitation of a particular disability such as “ignorance, need or distress”, “blindness, deafness, illness, senility, or similar”.<sup>65</sup> And it includes the US doctrine of unconscionability, discussed in the preceding

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<sup>60</sup> See *Uber*, *supra* note 10 at paras 149–50.

<sup>61</sup> Waddams, *supra* note 5 at para 550.

<sup>62</sup> See 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 267–69.

<sup>63</sup> Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ontario: LexisNexis, 2014); Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003).

<sup>64</sup> Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 341; Waddams, *supra* note 5 c 14.

<sup>65</sup> *Morrison*, *supra* note 14 at 713; *Cain*, *supra* note 14 at para 32.

section, a driving purpose of which was to provide a judicial tool tailored to control of unfair terms in standard form contracts.

Of interest in this section, as mentioned, is the unconscionability doctrine in Canada described in the *Hunter* and *Tercon* line of cases. As many Canadian Contract Law scholars observed, its features were different than the unconscionability doctrine of English descent that had long been used in Canada.<sup>66</sup> Yet, the cases “assume that they are simply applying [an] existing law of unconscionability”.<sup>67</sup> So what was it? A number of its key features were in common with the American doctrine: For example, it was applicable to an individual unfair term, was based on public policy not a defect in formation, operated to decline enforcement rather than order rescission, and was available based on “inequality of bargaining power” generally rather than special disabilities.<sup>68</sup> It was raised regarding exclusion clauses in disputes among sophisticated entities—a far cry from cases of “rescue at sea”, “financial desperation” or cognitive impairment said to characterize the doctrine of English descent.<sup>69</sup> Another case of this line, *ABB v Domtar*, added “[t]his doctrine is generally applied in the context of a consumer contract or contract of adhesion” again like the American doctrine.<sup>70</sup> And the rationales for the doctrine provided by the SCC echoed those of the US doctrine: to cease “games of characterization” and “subterfuge” and allow “courts to focus expressly on the real grounds for refusing to give force

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<sup>66</sup> See John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 442–43; SM Waddams, “Unconscionability in Canadian Contract Law” (1992) 14 *Loy LA Int'l & Comp L Rev* 541 at 541–43; Robert Flannigan, “*Hunter Engineering*: The Judicial Regulation of Exculpatory Clauses” (1990) 69:3 *Can Bar Rev* 514 at 514, 529, 536; 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.

<sup>67</sup> McCamus, *supra* note 66 at 442.

<sup>68</sup> *Hunter*, *supra* note 8; *Tercon*, *supra* note 8.

<sup>69</sup> *Uber*, *supra* note 10 at paras 69–71.

<sup>70</sup> *ABB Inc v Domtar Inc*, 2007 SCC 50 at para 82 [*Domtar*].



to a contractual term said to have been agreed,” by assessing whether the term itself is unconscionable.<sup>71</sup>

Some scholars interpreted these cases as having shown that an unconscionability doctrine of the US type was available in Canada. For example, John McCamus, who labeled this doctrine the doctrine of the “unconscionable term”, noted that it “may provide a common law device, long awaited by some, to ameliorate the harsh impact of unfair terms in boilerplate or adhesion contracts”.<sup>72</sup> And Waddams saw it as showing the existence in Canada, as in the US, of a “general power . . . to set aside contractual provisions on what may broadly be called grounds of unfairness.” Its American origins were no issue, he added, as “Canada shares with the United States the traditions of English common law and equity”.<sup>73</sup>

While the initial focus was on exclusion clauses, this may simply reflect that these cases were simultaneously retiring the doctrine of fundamental breach. Indeed, Dickson CJ expressly said in *Hunter* “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.”<sup>74</sup> Later, this unconscionability doctrine was either applied or held to apply for instance to standard form limitation clauses (i.e. beyond mere exclusion), forum selection clauses, and arbitration clauses.<sup>75</sup> *Douez v Facebook* expressed approval of McCamus’ interpretation (above) that the doctrine served to control unfair boilerplate terms generally.<sup>76</sup> All of this supports Waddams’ conclusion that “the implication of” the SCC using the

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<sup>71</sup> *Tercon*, *supra* note 8 at paras 108, 127; *Hunter*, *supra* note 8 at 462 echoing *UCC*, *supra* note 51 §2-302 (Official Comment 2).

<sup>72</sup> McCamus, *supra* note 66 at 440, 444.

<sup>73</sup> Waddams, *supra* note 66 at 543, 541.

<sup>74</sup> *Hunter*, *supra* note 8 at 461.

<sup>75</sup> See *Domtar*, *supra* note 70 at para 82; *Douez v Facebook*, 2017 SCC 33 at para 112, Abella J [*Douez*]; *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 85 [*Wellman*].

<sup>76</sup> *Douez*, *supra* note 75 at paras 113–14.

term unconscionability is “that other kinds of unfair clauses may be disallowed if they are unconscionable.”<sup>77</sup>

This interpretation has its frailties, but so does any interpretation, because of the elusive nature of the discussion in those cases, noted by several scholars.<sup>78</sup> Certainly, it would be very useful if they were taken to provide, like the US doctrine, for a tailored judicial control of unfair standard form terms in Canada. But the confusion around these cases meant that at the time of *Uber*, there was not a definite control of this type in Canadian common law. This is the background to the steps in *Uber* relevant to realizing a control, discussed in the next part of this paper.

## II. UBER: STEPS TOWARDS JUDICIAL CONTROL IN CANADA

This look at where common law Canada stands with regard to realizing an effective judicial control of unfair standard form terms is occasioned by new developments in the SCC’s judgment in *Uber v Heller*.<sup>79</sup> At issue there was the enforceability of an arbitration clause in the standard form contract between gig economy giant Uber and its gig worker-drivers in Ontario, which included the claimant, Heller. The clause was ruled unenforceable. The majority judgment of Abella and Rowe JJ (on behalf of seven justices) invalidated the clause as unconscionable. Brown J, concurring, found it unenforceable rather on the basis of public policy. Côté J, dissenting, held the clause to be enforceable.

What is of significance to this article on common law control of standard form contract terms in Canada is the several notable steps taken in *Uber* towards realization of such a control. At the same time, it is also important to recognize the ways in which the Court pulled back from this. These developments from the case

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<sup>77</sup> Stephen Waddams, “Abusive or Unconscionable Clauses from a Common Law Perspective” (2010) 49 Can Bus LJ 378 at 391.

<sup>78</sup> See Flannigan, *supra* note 66 at 514, 529, 536; Girgis, *supra* note 66 at 208; O’Byrne, *supra* note 66 at 224. The major challenge for any interpretation is the absence of any precedents cited by those cases pointing definitively to what was in mind in their references to “unconscionability”.

<sup>79</sup> *Uber*, *supra* note 10.

are analyzed below. I discuss four fronts: justification for control; the types of procedural issues that attract substantive control; control of terms versus whole contracts; and the accessibility of class actions as a mechanism supporting control.

#### A. A JUSTIFICATION FOR CONTROL

One of the most significant steps taken in *Uber* towards realizing an overt power of judicial control of substantive fairness in standard form contracts was accepting that Contract Law provides a justification for such control. Traditionally, as noted in §I.B, above, such justification has been seen as lacking—hence why courts resorted to “off-label” use of procedures like incorporation, interpretation and implication as “covert” tools for countering unfairness. The reasoning in *Uber* on this point is not entirely clear. However, the Court seemed to see the elusive justification as extant in the circumstantial inability of the form-receiving party to protect itself from unfairness due to the nature of the standard form contracting process itself. The argument begins by noting that the traditional negotiated contract is granted enforcement by the courts based on an assumption that the parties were free to protect themselves through bargaining. However, this is not the case in standard form contracting: For one thing, forms contain a lengthy and complicated list of terms that form recipients cannot reasonably be expected to read and understand. Moreover, the contract (including all the form terms) is offered on a take-or-leave basis in market contexts in which the recipient typically has little realistic choice but to take it. The form recipient’s circumstantial inability to protect itself by bargaining is thus presented as creating a risk of unfairness. If the resulting contract is substantively unfair, this confirms that the form recipient did not protect itself in circumstances where it was reasonable to expect that it could not. The usual assumption of party self-protection through bargaining thus negated, a court is justified in declining to enforce the contract.<sup>80</sup>

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<sup>80</sup> See *ibid* (the argument is largely found at paras 56–59).

This justification is not without flaws (some tweaks are proposed in §III.A, below). However, for present purposes, what matters is that the majority of the Supreme Court suggested in *Uber* that the common law of Contract provides a justification for controlling fairness in standard form contracts. The perceived lack of such a justification having previously been a key reason for the lack of overt common law controls (and reliance on covert ones), it represents a significant step for the SCC to claim a justification as it did in *Uber*.

At the same time, some hesitation is evident. At one point, Abella and Rowe JJ renounce the claim that standard form contracting “by itself” justifies control.<sup>81</sup> Some of the exceptions conjured seem not to be scenarios of standard form contracting in the adhesion sense used in this article—typically contemplated as requiring fairness control.<sup>82</sup> In those cases, the concession can be seen as merely semantic. But other exceptions suggest that control is unjustified where the form recipient is given notice, informed, advised, etc.<sup>83</sup> This limitation is problematic, for as will be detailed later (in §III.A and §III.E, below), even with enhanced information, the form-receiving party typically is still vulnerable as a result of its “absence of meaningful choice”.<sup>84</sup>

Hedging is also apparent in the majority’s mention, beyond the standard form contracting process, of other case-specific factors justifying judicial scrutiny in the particular case at bar.<sup>85</sup> However, these might just be surplus: the opinions of Brown J (concurring) and Côté J (dissenting) read the majority as holding that standard form contracting justifies control, period.<sup>86</sup>

The qualifications and hedging may give wiggle room to a subsequent court wishing to avoid considering itself bound by *Uber* to control fairness in standard form contracts. However,

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<sup>81</sup> *Ibid* at para 88.

<sup>82</sup> See *supra*, note 1.

<sup>83</sup> *Uber*, *supra* note 10 at para 88.

<sup>84</sup> §I.D, *above*.

<sup>85</sup> See *Uber*, *supra* note 10 at para 93.

<sup>86</sup> See *ibid* at paras 162; 257, 263.

overall, the weight of the reasons strongly supports the conclusion that courts are justified in controlling fairness in such contracts.

B. STANDARD FORM CONTRACTING AS PROCEDURAL  
UNCONSCIONABILITY

Given the use of unconscionability as the fairness control, a closely related question to the issue of a justification for control is, what counts as procedural unconscionability? When that element of the doctrine is established, the remaining element is the substantive control long needed. Had the unconscionability doctrine used in the *Uber* case been the doctrine from the *Hunter* and *Tercon* case line, it would just have been the ordinary operation of that doctrine to treat standard form contracting as establishing the procedural aspect.<sup>87</sup> But for the most part, it was not this doctrine of unconscionability that was discussed in *Uber*, but rather the unconscionability doctrine of the English family.<sup>88</sup> In that doctrine, standard form contracting was not typically seen as among the circumstances that establish its required procedural element.<sup>89</sup> It required a special disability.<sup>90</sup> Thus it was significant for the *Uber* majority to count standard form contracting towards the required procedural element of that doctrine, as part of moving it in the direction of affording a standard form term control.

Abella and Rowe JJ relied on the SCC case *Norberg*, a case on sexual assault battery where an analogy was drawn to unconscionability, for the proposition that this doctrine's required procedural element was just inequality of bargaining power.<sup>91</sup> However, this phrase was used only as a shorthand: the discussion in *Norberg* cited *Morrison* as the authority on the

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<sup>87</sup> §I.E, *above*.

<sup>88</sup> See e.g. *Uber*, *supra* note 10 at para 55.

<sup>89</sup> On its conceptualization as having procedural and substantive aspects, see e.g. Smith, *supra* note 64 at 343.

<sup>90</sup> See the text accompanying note 65.

<sup>91</sup> *Uber*, *supra* note 10 at para 64, citing *Norberg v Wynrib*, [1992] 2 SCR 226 at 256, 92 DLR (4th) 449 [*Norberg*].

doctrine, and quoted *Morrison* as to the doctrine's actual requirements, including the procedural element, wherein the complainant's vulnerability had to "aris[e] out of ignorance, need or distress".<sup>92</sup>

Abella and Rowe JJ submitted that these conditions were just examples of inequality of bargaining power.<sup>93</sup> They added that "the potential for [standard form] contracts to create an inequality of bargaining power is clear . . . . This is precisely the kind of situation in which the unconscionability doctrine is meant to apply."<sup>94</sup> It is true that the conditions in *Morrison* are not exhaustive.<sup>95</sup> However, the circumstances the doctrine was previously recognized as applicable to were all individualized circumstances.<sup>96</sup> By contrast, standard form contracting is a mass phenomenon: that is what a standard form contract is designed for.<sup>97</sup> As well, the special disability requirement conveys that the source of the inequality of bargaining power had to be unusual: the qualifying conditions were all particular, or in Stephen Smith's words, "peculiar," to the party or transaction at issue.<sup>98</sup> Here again, standard form contracting is not peculiar to a party or transaction, it is a widely used form of contracting. Thus, Abella and Rowe's thesis that standard form contracting falls within the ambit of the situations contemplated was quite radical.

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<sup>92</sup> *Norberg*, *supra* note 91 at 247–50, citing *Morrison v Coast Finance Ltd* (1965), 55 DLR (2d) 710 (BCCA) at 713, 54 WWR (ns) 257.

<sup>93</sup> See *Uber*, *supra* note 10 at para 72.

<sup>94</sup> *Ibid* at 89.

<sup>95</sup> See e.g. the somewhat different listing in *Cain*, *supra* note 14 at para 32.

<sup>96</sup> See *Uber*, *supra* note 10 at paras 160–61, Brown J; *Cain*, *supra* note 14 at paras 32–33; McInnes, *supra* note 63 at 524–28; Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can Bar Rev 171 at 191–92, 199; Edwin Peel, *Treitel's Law of Contract*, 14th ed (London, UK: Sweet & Maxwell, 2015) 10–043; *Earl of Aylesford v Morris*, [1873] LR 8 Ch App 484 at 491, Lord Selborne LC [*Aylesford*]; *Downer*, *supra* note 14 at para 39.

<sup>97</sup> See Arthur Leff, "Contract as Thing" (1970) 19:2 Am U L Rev 131.

<sup>98</sup> Smith, *supra* note 64 at 343–44.

And it was of great significance to the prospect of the unconscionability doctrine of the English family becoming something that could be used to control unfairness in standard form contracts. This is because once the procedural element is satisfied, what remains is the substantive element—practically speaking, a judicial control of substantive fairness.

On this, there was (closely related to the matters discussed in §A, above) again some hedging on whether contracting via standard form suffices on its own to establish procedural unconscionability, or whether more is required. For example, the exceptions from application of the doctrine where the form recipient has enhanced information (mentioned in the preceding section) can be seen as effectively adding as a further condition that the form recipient did *not* have such information. As well, the majority did recount some facts particular to Heller's case, such as the disparity in sophistication between the parties, Uber's effective concealment of the terms' unexpected implications, and how it incorporated adverse conditions by (oblique) reference.<sup>99</sup> However, as mentioned in §II.A, above, these additional factors might not have been necessary to the majority's conclusion: In explaining why the procedural element is satisfied in the case, they start with the fact the "agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it".<sup>100</sup>

Overall, the judgment is clear that standard form contracting counts as procedural unconscionability, but less clear about whether it suffices.

### C. TARGETING INDIVIDUAL CLAUSES

Another important step in *Uber* towards realizing a common law control of fairness in standard form contracts was applying unconscionability to an individual clause rather than the whole contract.

The typical operation of controls of fairness in standard form contracting, such as those from Part I, is to accept the validity of

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<sup>99</sup> See *Uber*, *supra* note 10 at para 93.

<sup>100</sup> *Ibid.*

the transaction, including the form terms generally, and only question whether to enforce the individual term alleged as unfair. From its outset, the American unconscionability doctrine, which provides such a control, could operate that way. The Canadian unconscionability doctrine from the *Hunter* and *Tercon* case line that in key ways resembles it, has also operated that way all along (whether or not it applies only to exclusion clauses, or also to other types of potentially unfair terms).<sup>101</sup>

On the other hand, the unconscionability doctrine of English origin drawn upon in *Uber* typically did not operate that way.<sup>102</sup> Its concern was with the bargain as a whole, and it would rescind the whole transaction.<sup>103</sup> As with other vitiating doctrines in Contract Law, it invalidates a party's consent, which was necessary to form the contract.<sup>104</sup> However, Abella and Rowe JJ applied it in *Uber* to render invalid only the arbitration clause, leaving the rest of the contract intact.<sup>105</sup> And they further suggested that standard form choice of law, forum selection, and arbitration clauses are "the kind of situation in which the unconscionability doctrine is meant to apply."<sup>106</sup> This brings it closer to the usual model of legislative and judge-made controls of unfair standard form terms elsewhere.

However, it is unclear how far this extends. The clause types mentioned, and the majority's discussion more generally, can be seen as concerned with the use of standard form terms to impede access to justice. This issue had earned prominent attention in recent years through the work of Margaret Radin.<sup>107</sup> Radin sees

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<sup>101</sup> See §I.E, *above*.

<sup>102</sup> See Waddams, *supra* note 66 at 543; McCamus, *supra* note 66 at 440.

<sup>103</sup> See Waddams, *supra* note 66 at 543; McCamus, *supra* note 66 at 440; McInnes, *supra* note 63 at 523; *Uber*, *supra* note 10 at para 172, Brown J; Morrison, *supra* note 14 at 713; Downer, *supra* note 14 at para 21.

<sup>104</sup> See John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Clarendon, 1991) at 197; Mindy Chen-Wishart, *Contract Law*, 6th ed (Oxford, 2018) at 204; Bigwood, *supra* note 96 at 211-14.

<sup>105</sup> *Uber*, *supra* note 10 at para 98.

<sup>106</sup> *Ibid* at para 89.

<sup>107</sup> See Radin, *supra* note 18.



such terms as most fundamentally unfair in undermining the politico-legal system itself.<sup>108</sup> Perhaps this is so.<sup>109</sup> But it is a considerably narrower effect caused by a considerably narrower set of term types than are contemplated by legislated and judicially crafted controls elsewhere addressing unfair standard form terms.<sup>110</sup>

More essentially, it is unclear whether *Uber* established that the doctrine will always be available to attack a single term. That is how the majority opinion is read by the other opinions.<sup>111</sup> However, the majority judgment is ambiguous on this: it casts the arbitration clause complained of as a “self-contained contract collateral or ancillary to the [main] agreement”.<sup>112</sup> This brings its invalidation in line with the normal application of the doctrine to whole agreements.

In a footnote, Abella and Rowe JJ suggest “unconscionability can be directed at a contract as a whole or against any severable provisions of it”.<sup>113</sup> The citations in the footnote, however, are from the US-type unconscionability doctrine—this is an instance of the conflation of features from different doctrines, mentioned in the Introduction.

As well, not every contractual provision is severable. Of note, the Supreme Court has previously counseled against liberal application of severance, advising judges to be “restrained in their application of severance” in deference to private ordering and party sovereignty.<sup>114</sup> Further, drafters’ free hand to shape a

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<sup>108</sup> *Ibid.*

<sup>109</sup> One could question, however, whether access to courts is really the most significant way in which in real terms, form recipients suffer deprivation as a result of unfair standard form terms imposed on them. To the extent that these impede class actions, however, I agree that they neutralize a potentially potent mechanism for combating unfair standard form terms of any type. See §II.D, III.D, *below*.

<sup>110</sup> See Part I, *above*.

<sup>111</sup> See *Uber*, *supra* note 10 at para 173, Brown J, and at para 290, Côté J.

<sup>112</sup> *Ibid* at para 96.

<sup>113</sup> *Ibid* at para 96, n 8.

<sup>114</sup> *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 32, Rothstein J, writing for the Court.

form gives them the opportunity to shape it in ways that could shelter an unfair term from severance, or make severance unhelpful to form recipients.

Also unclear is the weight to be given this statement that the doctrine can target any severable portion of a contract? If it establishes that the doctrine can be used to target any individual term, the statement is of great significance as an innovation in how it operates, and with respect to its potential utility as a control of unfairness in standard form contracts. Yet, the majority seem to place little weight on it, in confining it to a footnote. One might indeed wonder whether the Supreme Court could have intended to effectuate such a dramatic development in the Law of Contract in this way. Normally, such developments not only take place in the main text, but the Court provides extensive discussion around the innovation.<sup>115</sup> In fact, it did exactly that in *Uber* in its aforementioned innovation of counting standard form contracting as procedural unconscionability, as well as with another innovation (dispensing with the traditional requirement that the benefiting party knew of its counterpart's impairment).<sup>116</sup> If the intent was to alter the doctrine to authorize its application to an individual term, there would also have been no need for the majority to go to the lengths of construing the arbitration clause as a "self-contained contract collateral or ancillary to the [main] agreement";<sup>117</sup> it could simply have said that the clause was severable. Perhaps the statement on severability was an afterthought. But that too lessens the likelihood that the Court intended to effectuate the significant development in the law that the statement on its face represents. Thus, it is unclear what to make of this statement, beyond it being an instance of the conflation of doctrines noted earlier.

All in all, the aspects of the *Uber* decision reviewed in this section represent another instance of notable movement

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<sup>115</sup> See McCamus, *supra* note 66.

<sup>116</sup> See *Uber*, *supra* note 10 at paras 84–85. For more on this discarding of a knowledge requirement, see Moore, "The Doctrine of Contractual Absolution", *supra* note 17.

<sup>117</sup> *Uber*, *supra* note 10 at para 96.

towards, but also some pulling back, from realizing a fairness control for standard form terms.

#### D. REDUCTION OF IMPEDIMENTS TO CLASS ACTIONS BY FORM RECIPIENTS

Another important step in *Uber* towards achieving an effective control of fairness in standard form contracts was reducing impediments to class proceedings by form recipients. Individualized proceedings (if they are pursued at all) may provide the individual plaintiff relief from unfairness. However, the same unfairness remains in force in transactions using the same standard contract with other form-recipients. As a result, individual proceedings fail to control unfairness in standard forms in a way that reflects the mass character of the “wrong” that unfairness in a standard contract used *en masse* constitutes.<sup>118</sup> By contrast, class proceedings are a recourse that is responsive to that feature of the problem.<sup>119</sup>

However, certain types of contract terms can impede access to class actions by form recipients. For example, a contract may contain ostensibly fair terms that purport to spell out the parties’ agreement on dispute resolution processes in the event of disputes between them, but whose effect is actually unfair, as they block class actions by form recipients over (other) unfair terms. A common example of this is arbitration clauses.<sup>120</sup> In prior cases, the SCC enforced such clauses, with the effect of wholly or partially staying class proceedings.<sup>121</sup> But in *Uber*, the arbitration clause was invalidated as unconscionable.<sup>122</sup> The plaintiff, representing drivers in Ontario, had initiated a class action against Uber for \$400 million, asserting that they were

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<sup>118</sup> Moore, *supra* note 2 at 163.

<sup>119</sup> See *ibid.*

<sup>120</sup> See Radin, *supra* note 18.

<sup>121</sup> See e.g. *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34; *Rogers Wireless Inc v Muroff*, 2007 SCC 35; *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*]; *Wellman*, *supra* note 75.

<sup>122</sup> Brown J (concurring) would have held it invalid on grounds of public policy. See *Uber*, *supra* note 10 at para 101.

employees not contractors under provincial legislation, and that their employment terms as provided in their standard form contract with Uber did not meet legislative requirements.<sup>123</sup> As a result of its invalidation by the Court, the arbitration clause would not impede the drivers' pursuit of this class action.

But whether *Uber* establishes that *any* clause having a similar effect will encounter similar treatment is unclear. For one thing, the reasons given for why courts, not the arbitrator, should decide the validity of the arbitration clause were narrow.<sup>124</sup> Likewise, many of the reasons for finding Uber's arbitration clause unconscionable (prohibitive upfront costs, distance from the plaintiff, foreign law, effective concealment of important implications of the clause) may not apply to every arbitration clause.<sup>125</sup> On the other hand, Côté J's reading was that it would be hard for any arbitration clause to comply with the majority's opinion, whose "effect . . . amounts to a sweeping restriction on arbitration clauses in standard form contracts, even if they did not intend such a consequence."<sup>126</sup> Or perhaps they did? The majority as quoted above listed standard form clauses of types commonly used to impede class actions and said these are the sort of thing unconscionability should apply to.<sup>127</sup>

Even if the judgment establishes that standard form arbitration clauses (and perhaps choice of law and forum selection clauses) will always be reviewable, this does not mean they will always be unconscionable. For example, Uber's designation of Dutch law as the choice-of-law was described as problematic because it might effectively deprive the plaintiff of an *individual* remedy. This leaves open the possibility that it would be acceptable for a form drafter to specify in a choice-of-law clause the law of a jurisdiction that is highly accessible for individual claims but hostile to class actions.<sup>128</sup>

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<sup>123</sup> See *ibid* at paras 12, 133, 188.

<sup>124</sup> See *ibid* at paras 35, 37, 46.

<sup>125</sup> See *ibid* at paras 93–94.

<sup>126</sup> *Ibid* at paras 265–66.

<sup>127</sup> *Ibid* at para 89.

<sup>128</sup> See Radin, *supra* note 18 at xv.

Moreover, form drafters retain other means of impeding access to class actions. For instance, the judgment did not address clauses which purport to expressly waive the right to pursue a class action, although the SCC was certainly aware of the use of such clauses,<sup>129</sup> and aware more generally of the importance of class actions in combating unfairness in standard contracts.<sup>130</sup> No blanket statement was made that standard form terms will be unconscionable wherever they obstruct access to class actions.

Apart from the question of how clauses that impede class actions will be treated, it should be noted that the step discussed in §II.B, above, may positively facilitate use of unconscionability in class actions over unfairness in standard form contracts. This is because, if the procedural unconscionability element is satisfied by standard form contracting, it need not be established based on individualized facts, which work against certification of class actions. And this leaves only the question of substantive unconscionability, which for a standardized contract, presents a common issue that works in favour of class certification.<sup>131</sup>

Following this review of some significant developments in *Uber* relevant to realizing a judicial control of fairness in standard form contracts in Canadian common law, I turn now to the crucial matter of what happens next: What might future courts do? What *should* they do?

### III. CONTROLLING UNFAIR STANDARD FORM TERMS: WHAT CAN COURTS DO AND WHAT *SHOULD* THEY DO?

This final part of the article looks at seven issues to be dealt with by courts after *Uber* that will be pivotal in determining whether or not effective judicial power to control fairness in standard form contracts is realized and to understanding what this might realistically achieve.

The first four issues extend the discussions from Part II, addressing: a strengthened justification for control; a definitive

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<sup>129</sup> See *Seidel*, *supra* note 121.

<sup>130</sup> See e.g. *Wellman*, *supra* note 75 at paras 162–64.

<sup>131</sup> See *Hollick v Toronto (City)*, 2001 SCC 68 at paras 18, 30 [*Hollick*].

position on whether standard form contracting suffices to establish procedural unconscionability; clarification on whether control is of transactions or terms; and what more can be done to relieve barriers to class actions as a recourse that would enhance the effectiveness of fairness controls. Three further issues relating to the moves made in *Uber* are then considered: whether enhanced information for form recipients will oust the application of controls; the degree of unfairness that will trigger control; and what role judicial controls might play in the quest to achieve fairer standard form terms.

A. ON COURTS' JUSTIFICATION FOR CONTROLLING FAIRNESS IN STANDARD FORM CONTRACTS

*Courts can eliminate any doubt that they are justified in overtly exercising control of the fairness of standard form contracts—and they should—but the justification suggested in Uber needs to be tweaked.*

As discussed in §I.A, above, unfairness in standard form contracts is among the most notorious problems of contract law. A desire for legal control of this has long been felt. However, in the absence of legislated controls, the perceived lack of a common law justification for control has been a major barrier to overt judicial control. The history of (mis)using devices such as incorporation, interpretation, and implication as covert fairness controls reflects this. A justification for overt judicial control is thus of great value.

As described in §II.A, above, the Supreme Court took significant steps in *Uber* towards establishing a justification for control. To make good on the promise present in those moves, future courts should remove any doubt that they are justified in overtly exercising control of fairness in standard form contracts. That said, to do so on a basis sound and capable of consistent application requires that the justification articulated in *Uber* be tweaked.

In particular, the problem is not quite that the form-receiving party was unable in the circumstances to bargain in order to protect itself from unfairness. Were that the problem, it could and arguably should be addressed by independent legal advice. The

Court in *Uber* rightly rejected that proposition: it intuitively recognized that this would not avoid the problem; however, the Court failed to accurately identify that problem—framing it again as inequality of bargaining power.<sup>132</sup> Why is the issue not inequality of bargaining power? Suppose, for example, that form drafters refuse to contract with form recipients that have not obtained independent legal advice. Or slightly differently but more realistically, suppose that form drafters notify form recipients that there is potentially unequal bargaining power, and require as a condition precedent to entering the standard form contract that form recipients certify that they obtained independent and effective legal advice (or else that with notice of this, they declined). Presumably, it would be difficult in such cases for form recipients who then enter the contract to complain about bargaining power. Meanwhile, it will not make the contract any fairer, but merely impose additional and ultimately futile burdens on form recipients prior to entering the contract, or perhaps put them at risk of making a misrepresentation that they got advice.

Standard form contracting is not defective bargaining. Standard form contracting is a long-established alternative mode of transacting than bargaining—a fact that every party to such a contract surely understands in this day and age. It is an alternative that also, generally speaking, both parties want; in modern society, “[I]f life would become almost impossible if we had to ponder and inspect the risks every time we made a contract.”<sup>133</sup> Meanwhile, firms use this type of contract where their need for standardized arrangements exceeds what is at stake for them in any given instance of that transaction type. So, they do not bargain the terms. What does bargaining power matter where neither party has any intent to bargain? It is at best confusing and more truthfully, misleading and unhelpful to cast the form recipient’s inability to bargain as a problem when both parties are intentionally transacting by a method developed to avoid their need to bargain.

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<sup>132</sup> See *Uber*, *supra* note 10 at para 83.

<sup>133</sup> Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 2002) at 3 [Collins, *Regulating Contracts*].

As with the solution to the Gordian Knot, the reason standard form contracting justifies overt control of substantive fairness is strikingly simple: otherwise, this (useful and widely prevalent) method of contracting does not have any fairness control at all.<sup>134</sup> Contracting through a bargaining process theoretically has one: the ability to bargain. Shopping for terms also theoretically has one: competition.<sup>135</sup> Contracting on standard terms established by customary law, terms implied-by-law, or civil code provisions for nominate contracts also theoretically have one: public mandates. Contracting by a form, a process in which one party dictates the standard terms and its counterparts merely adhere, has no fairness control. Hence, the terms must be supervised. In the absence of a statutory regulator with more sector-specific expertise, judges are justified in exercising the requisite control.

B. ON STANDARD FORM CONTRACTING'S SUFFICIENCY TO ESTABLISH PROCEDURAL UNCONSCIONABILITY

*Courts can plainly state that standard form contracting by itself establishes procedural unconscionability—and they should—but in an unconscionability doctrine of the American type not of the English type.*

As noted in §II.B, above, *Uber* was clear that standard form contracting counts as procedural unconscionability but hedged on whether it suffices “by itself”. Future courts should definitively hold that it does suffice. If courts take an unequivocal stance that standard form contracting establishes the procedural element of unconscionability, all that is left is the substantive element that provides the needed fairness control. This would help alleviate the current situation described in §I.E, above, namely that common law Canada stands out among comparable jurisdictions for its lack of any generalized standard form term control.

An unequivocal stance would involve eliminating, as will be discussed in §III.E, below, a further condition that the form recipient lacked adequate information. It would also involve

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<sup>134</sup> See Moore, *supra* note 2 at ch 3.

<sup>135</sup> This includes the negotiated core terms of standard form contracts, but not the form terms, which are not shopped: see n 170–171.



specifying that the other scenarios contemplated by the statement in *Uber* “we do not mean to suggest that a standard form contract, by itself” establishes procedural unconscionability concern a broader range of standardized contracts, i.e. that fall outside the standard form or adhesion contracts which are normally seen to require a fairness control. Additionally, it would involve explaining that the particular facts cited in *Uber* (disparity in sophistication, effective concealment of important implications of the terms, etc.) were just additional context or surplus, and were not necessary to establish procedural unconscionability: Transacting by standard form sufficed by itself to establish this element. The judgment already hints at that conclusion, but the law would benefit from resolving any ambiguity over it.

In future standard form cases, it would then be clear that courts could (and should) ignore particularities such as the income or education of the form recipient, the market power of the business, etc. This is consistent with the approach recommended in §211(2) of the Restatement (Second) of Contracts, supported by leading American contracts scholars. Notably, it is also consistent with the SCC’s approach to interpretation of standard form contracts, articulated in *Ledcor*.<sup>136</sup> Also, if procedural unconscionability rides (even partly) on particular facts, that would require individualized inquiries, this could impede access to class actions which are a key recourse in countering the mass wrong of unfairness in standard contracts.<sup>137</sup>

However, as this article’s discussion thus far may suggest, it is the US-type unconscionability doctrine, not the English-type unconscionability doctrine (unhelpfully invoked in *Uber*), that standard form contracting should be held to satisfy the procedural branch of.

As mentioned earlier, the doctrine of English descent used in cases like *Morrison* and *Cain* concerns contracts made through a bargaining process in which one party could not bargain

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<sup>136</sup> *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 2 SCC 37.

<sup>137</sup> See §II.D, *above*.

adequately.<sup>138</sup> The doctrine is by nature exceptional: meant to apply in unusual situations, defined by peculiar facts, and where the inherent consequence of vitiating consent and thus avoiding the transaction can be expected to allow each party to freshly pursue its transactional needs without a similar situation simply recurring.<sup>139</sup> None of this is the case with standard form contracting: it is not a question of bargaining; the procedural concern is not peculiar but general; the doctrine is needed for typical, rather than aberrant, cases of contracting by this mode (which is itself widely prevalent); and vitiating consent will help neither party, and only cause the kind of procedural problem it does involve to recur in another standard form transaction having the same characteristic features.

By contrast, the US-type unconscionability doctrine *is* geared to standard form contracting—and was developed with that purpose squarely in mind.<sup>140</sup> It expressly contemplates contracting by standard form as establishing its procedural unconscionability element; and it typically applies to the individual unfair clause while leaving the rest of the contract in force—the effect needed to protect stability of contract in a modern economy in which the vast majority of transactions occur by standard form.<sup>141</sup> A doctrine along these lines was shown to exist in Canada in the *Hunter* and *Tercon* line of cases.<sup>142</sup> Due to these cases' simultaneous retirement of the doctrine of fundamental breach, confusion has subsisted over whether the doctrine covers only exclusion clauses or also other types of unfair term. This easily could and should be clarified: future courts should affirm that this doctrine indeed covers unfair standard form terms of any type. Or else, they should extend the doctrine so that it does. In either case, there would then be a

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<sup>138</sup> See §II.B, *above*.

<sup>139</sup> See Moore, *supra* note 2 at 56.

<sup>140</sup> See §I.D, *above*.

<sup>141</sup> See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1966), [1967] 1 AC 361 at 406, [1996] 2 All ER 61, Reid LJ; W David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84:3 Harv L Rev 529 [Slawson].

<sup>142</sup> See §I.E, *above*.

doctrine of the type crafted and tailored to the task of controlling unfair terms in standard form contracts.<sup>143</sup>

Carrying on in taking steps such as were taken in *Uber* to reshape the well-pedigreed doctrine of English descent into something closer to the doctrine of American inception amounts to selecting a sledgehammer from the toolkit and trying to modify it into something approximating a razor saw, while leaving an actual razor saw in the toolkit. The lower courts in *Uber* conflated two distinct doctrines sharing the name “unconscionability”, perhaps inducing the Supreme Court to try to harmonize or combine them.<sup>144</sup> Whether or not that is the explanation, the opposite is what is needed: Future courts must clearly distinguish the two doctrines. This could be done by labeling the one of American origin the doctrine of “unconscionable clauses”<sup>145</sup> and the one of English descent the doctrine of “unconscionable bargains”.<sup>146</sup> The word “unconscionable” simply refers to unconscientious abuse of power and is used in relation to several rules and doctrines that involve such an element.<sup>147</sup>

The unconscionable clauses doctrine, and not the unconscionable bargains doctrine, should then be relied on to deal with unfair standard form terms. This would also have the further advantage of harmonizing Canadian law and American law on unfair terms in standard form contracts—an important consideration given the enormous significance of US cross-border trade to the Canadian economy,<sup>148</sup> amplified by the

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<sup>143</sup> See §I.D–I.E, *above*.

<sup>144</sup> *Uber CA*, *supra* note 11; *Uber SC*, *supra* note 11.

<sup>145</sup> Taken from the title of UCC §2-302, which inspired it.

<sup>146</sup> The name usually given to it already in England and a number of other common law jurisdictions.

<sup>147</sup> See §I.E, *above*.

<sup>148</sup> See Global Affairs Canada, “Canada’s State of Trade 2019” (2019) at 59, online (pdf): *Government of Canada* <[international.gc.ca/gac-amc/assets/pdfs/publications/State-of-Trade-2019\\_eng.pdf](http://international.gc.ca/gac-amc/assets/pdfs/publications/State-of-Trade-2019_eng.pdf)>.

overwhelming use of standard form contracting in the modern economy.<sup>149</sup>

Meanwhile, just as sometimes one does need a sledgehammer and not a razor saw, the unconscionable bargains doctrine should be returned to its established pre-*Uber* shape and function. It is still needed in order to deal with the different sort of cases that sometimes arise that *do* fit the scenarios of a transaction entered into as a result of a special disability that was exploited.<sup>150</sup>

C. ON WHETHER CONTROL SHOULD UNDO TRANSACTIONS OR TARGET SPECIFIC TERMS

*Courts can clarify that control of fairness in standard form contracts is not a question of the validity of the whole transaction, but of the enforceability of a specific term alleged to be unfair—and they should.*

Related to the discussion in the prior section, a question *Uber* left unresolved is whether fairness control of standard form contracts applies to whole contracts or individual terms.<sup>151</sup> The result in the case was to elide just the arbitration clause, but this was explained as being because it was a separate contract collateral to the main agreement. A footnote further claimed that controls could invalidate any severable portion of a contract, but it was unclear what to make of this astounding suggestion, beyond the fact that the citations given showed that the unconscionable bargains doctrine was there conflated with the unconscionable clauses doctrine.<sup>152</sup>

What is certain is that elsewhere, standard form contract fairness controls, whether legislated or judge-made, typically operate to accept the validity of the transaction and subject only the term alleged to be unfair to possible non-enforcement.<sup>153</sup> This mode of operation is viewed as essential for the same reason that standard form terms have been routinely enforced despite

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<sup>149</sup> See Slawson, *supra* note 141.

<sup>150</sup> See *Uber*, *supra* note 10 at paras 69–71; §I.B, *above*.

<sup>151</sup> See §II.C, *above*.

<sup>152</sup> See §II.C, *above*.

<sup>153</sup> See §I.C–D, *above*.

the fact that form recipients do not really consent to them, as courts pretend: the modern economy relies intensely on this mode of contracting.<sup>154</sup> As McCamus encapsulates, “[s]tandard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate . . . the terms of many of the transactions entered into in the course of daily life.”<sup>155</sup> It would significantly disrupt the economy if whole transactions were rescinded, particularly transactions of a standard type used *en masse*. A clause-specific mode of operation is viewed also as appropriate in that standard form contracts are useful, and many of the form clauses unobjectionable, with only certain ones raising the fairness concerns that call for control.<sup>156</sup>

It is typical—as was indeed the case in *Uber*—that form recipients do not want the contract rescinded; they only want relief from a particular unfair term. They benefit from the contract—in *Uber*, it provided the drivers income; other standard form contracts provide the form recipient goods, services, use of land, and other things they need. If fairness control results in rescission of contracts, this will impair people’s ability to contract for many of their important needs or force them to paradoxically refrain from having recourse to the fairness control which produces that outcome. Meanwhile, for business, avoiding transactions—indeed, transactions of a standard type that as mentioned they have made *en masse*—would create enormous and intolerable instability of contract.<sup>157</sup> For parties on both sides, such an approach to control would disrupt the ability to plan around what they assume to be their contractual arrangements.

This is among the reasons the doctrine of unconscionable bargains had not been seen throughout the common law—prior to *Uber*—as suited to control of unfair standard form terms; as a defect in formation, it calls for the undoing of the transaction.

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<sup>154</sup> See Llewellyn, “Book Review”, *supra* note 30 at 701; Slawson, *supra* note 141 at 530; Hugh Collins, *The Law of Contract*, 4th ed (London, UK: Buttersworth, 2003) at 199 [Collins, *The Law of Contract*].

<sup>155</sup> McCamus, *supra* note 66 at 185.

<sup>156</sup> See Llewellyn, *The Common Law Tradition*, *supra* note 25 at 362, 366.

<sup>157</sup> See *Uber*, *supra* note 10 at paras 147, 163, Brown J.

*Uber's* incoherence about the effect of a finding of unconscionability reflects how this, the doctrine's normal effect, makes it unsuitable as an unfair term control.

But per the preceding section, this can be rectified as part of the recommendation that subsequent courts return the doctrine of unconscionable bargains to its traditional vocation and use instead the unconscionable clauses doctrine from *Tercon* to control unfair terms in standard form contracts. As noted, the unconscionable clauses doctrine from its outset targeted individual unfair terms.<sup>158</sup> The term-specific application of doctrines of this type was to get around the problematic "all-or-nothing" character of other contract law doctrines (including the unconscionable bargains doctrine); indeed, a major reason for creating the distinct unconscionable clauses doctrine was to be able to target the individual unfair term.<sup>159</sup>

#### D. ON WHETHER CONTROLS SHOULD ENABLE ACCESS TO CLASS ACTIONS

*Courts can facilitate the availability of class actions as an important procedural recourse supporting effective control of fairness in standard form contracts—and they should.*

Although an individual form recipient's interest may not always suffice to undertake the burden of litigation in order to enforce control of the fairness of a standard form term, the aggregate interests of form recipients as a class in controlling a standardized unfair term used *en masse* may be more than sufficient to do so through a class action.<sup>160</sup> This may make the difference in whether an on-paper control is effective in practice, and in whether it affects fairness in the market rather than only an isolated instance of a mass-transaction. For the courts as well, adjudicating a term's fairness for purposes of a single instance of

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<sup>158</sup> See Williams, *supra* note 53. To render an individual term unenforceable is the unconscionable clause doctrine's normal operation, although "the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability": *UCC, supra* note 51, § 2-302 (Official Comment 2).

<sup>159</sup> See Llewellyn, *The Common Law Tradition, supra* note 25 at 365–66.

<sup>160</sup> See Radin, *supra* note 18.

a standard contract used for mass contracting is an inefficient use of institutional resources in controlling the fairness of standard form contracts.<sup>161</sup> Many legislative unfair term controls allow a public regulator or private group representing the interests of form recipients to pursue collective enforcement.<sup>162</sup> In the absence of a regulatory mechanism such as that, class actions are an important device for ensuring that the resources invested in enforcement produce a commensurate return in terms of control achieved.

As discussed in §II-D, above, although the Court cleared the way for drivers to pursue a class action against Uber by avoiding the arbitration clause in that case, it was less clear whether arbitration clauses would always be unenforceable, much less that other types of clauses that are used to thwart class actions would also be unenforceable. Given the importance of class actions as a procedural recourse supporting access to justice on unfair terms in standard form contracts, future courts should go further in removing barriers to their use to that end. In particular, courts should hold that any form term that has the effect of impeding access to class actions addressing the fairness of a standard term is unenforceable in that respect or to that extent. If the clause has additional purposes or dimensions (as is often true of the types of terms used to effectively block class actions), courts need not make the term unenforceable in those respects or to that further extent. For example, suppose a choice-of-law clause provides for a contract to be governed by the law of a jurisdiction that does not recognize class actions.<sup>163</sup> The law of that jurisdiction could still be used to resolve other disputes, such as an action for breach of contract. It may be that this particular task, among those called for in developing a regime of common law control of standard form terms, should be assigned to public policy rather than unconscionability: the term itself may or may not be unconscionable, but either way, as a matter of public policy it will not be enforced where this would have the effect of

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<sup>161</sup> See Moore, *supra* note 2 at 174.

<sup>162</sup> See e.g. *UCTD (EU)*, *supra* note 23, art 7(2) (national legislative provisions implementing the Directive).

<sup>163</sup> See e.g. Radin, *supra* note 18 at xv.

impeding access to class proceedings addressing the fairness of the standard term. There is precedent for public policy playing a role in this area, including the concurring opinion in *Uber*, all of the opinions in *Douez*, and the hybrid approach to enforceability set out in *Tercon*.<sup>164</sup>

The recommendations in §III.B would remove further barriers to class actions as a recourse that can help counter unfair terms in standard form contracts. If standard form contracting by itself establishes procedural unconscionability, the remaining question is that of substantive fairness. As the term is standardized, its fairness represents a common question that works in favour of class certification.<sup>165</sup>

#### E. ON WHETHER ENHANCED INFORMATION TO FORM RECIPIENTS SHOULD OUST CONTROL

*Courts could treat enhanced information for form recipients as alleviating the application of controls over the fairness of standard form contracts—but they should not.*

*Uber* indicated that if form recipients had enhanced information about the standard form terms, this might oust the application of common law fairness control. For example, the majority suggested that controls would not apply in the following situations: if a sophisticated form recipient was familiar with a form as common within an industry; if a form recipient received explanations or advice that “offset uncertainty” about the terms; or if the drafting party “clearly and effectively communicated” the meaning of surprising or onerous clauses.<sup>166</sup> Abella and Rowe JJ articulated a hope that the prospect of controls being used on standard form contracts would “encourage those drafting such contracts to make them more accessible to the other party”.<sup>167</sup> And in dealing with the case at bar, there was a considerable focus on what the form recipient “could . . . be expected to

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<sup>164</sup> See *Uber*, *supra* note 10, Brown J; *Douez*, *supra* note 75; *Tercon*, *supra* note 8 at para 123.

<sup>165</sup> See Hollick, *supra* note 131 at para 18.

<sup>166</sup> *Uber*, *supra* note 10 at para 88.

<sup>167</sup> *Ibid* at para 91.



appreciate”.<sup>168</sup> In all these ways, *Uber* suggested that if the form recipient had enhanced information, fairness controls would not apply.

If that is so, then fairness control would not go much further than the pre-existing judicial ability to use “red hand”-type rules on incorporation, noted earlier as among pre-existing devices seen as inadequate.<sup>169</sup> More broadly, it is well-established regarding standard form contracts that enhanced information strategies have failed to improve form recipients’ ability to protect themselves from unfairness.<sup>170</sup> A wide variety of such techniques have been used and overwhelmingly have failed.<sup>171</sup> Oddly, the Supreme Court seemed to recognize this itself in dismissing independent legal advice as a factor that should ordinarily be expected to alleviate the need for control. The Court aptly noted that the form recipient might still have realistically no choice whether to enter the contract (or, one might add, a substantially similar one).<sup>172</sup>

If *Uber’s* suggestions about enhanced information ousting controls meant being informed beyond what would be characteristic in standard form contracting, then the thinking is even more worrisome. There is little debate among Contracts scholars or practitioners about the integral role that standard form contracting plays in the modern economy.<sup>173</sup> Certainly, social progress would not be advanced by courts inducing or encouraging the marketplace to revert to having to contract in the classical manner of negotiating (nor by explanations, disclosures or some other negotiation-equivalent in terms of the informational aspect of counterparties’ bargaining position)

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<sup>168</sup> *Ibid* at para 93.

<sup>169</sup> §I.B, *above*.

<sup>170</sup> See Yannis Bakos, Florencia Marotta-Wurgler & David Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43:1 JLS 1; American Law Institute, *supra* note 2 at 35.

<sup>171</sup> See Omri Ben-Shahar & Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014) at 14.

<sup>172</sup> *Uber*, *supra* note 10 at para 83.

<sup>173</sup> See the text accompanying notes 154–155.

rather than by standard form.<sup>174</sup> That has also usually been the view of courts over the past 150 years, during which they opted to enforce standard form contracts notwithstanding form recipients' lack of true consent to the terms.<sup>175</sup> Again, *Uber's* stance seems to not be fully coherent, for the following reason: to treat enhanced information as obviating the need for judicial scrutiny, although the form recipient might still have little choice of whether to enter the contract, is to say that contractual obligation is founded on information, not choice. If that is the case, then absent that information, it is not just unfair terms that should be unenforceable (due to being unconscionable) but *all* standard form terms, since they lack the informational foundation that makes them binding.<sup>176</sup> Yet, among the standard form terms, the Court found the arbitration clause alone to be unenforceable.

As observed in §III.A, standard form contracting operates as an alternative to negotiated contracting in allowing parties to transact with much-reduced informational transaction costs and burdens. As a mode of contracting, it is widely used in practice, and in a modern economy where so much is done by contract, it is often needed both by form-drafting and by form-receiving parties. Letting enhanced information oust control of fairness in standard form contracts at best perpetuates the unfairness, and at worst undermines altogether a socio-economic practice of widely recognized importance. Subsequent courts should follow the model of many legislated unfair terms controls by specifying that fairness controls always apply to standard form terms, and that only the few so-called "core" terms actually negotiated (subject matter and price, frequently) are exempt.<sup>177</sup>

#### F. ON THE DEGREE OF UNFAIRNESS THAT SHOULD TRIGGER CONTROL

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<sup>174</sup> See the text accompanying notes 170–171.

<sup>175</sup> The occasional refusal to enforce a term running afoul of a red hand-type rule providing some exception.

<sup>176</sup> See Todd Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96:6 Harv L Rev 1173.

<sup>177</sup> See e.g. *CRA (UK)*, *supra* note 45, s 64; *Irish UTCCRs*, *supra* note 45, s 4; *ACL*, *supra* note 23, s 26; *FTA (NZ)*, *supra* note 48, s 46K.

*Courts could confirm that controls apply to every term that is merely unfair, and not just terms that are significantly unfair—but they should not.*

In *Uber*, the majority rejected that control should just apply to terms that meet a “higher threshold” of unfairness than being merely unfair, such as having to be “grossly” unfair.<sup>178</sup> Abella and Rowe JJ appeared to assume that “stringent” articulations of the standard have been motivated only by a desire of other courts to limit control in deference to freedom of contract.<sup>179</sup> They also seemed to interpret a higher standard as unprincipled, in the sense of being unjustified by the very principles animating control.<sup>180</sup>

If that is the case, those suppositions were incorrect. It may firstly be observed that it is a near-universal feature of both legislated and judge-made controls on unfairness in standard form contracts that they apply only to terms whose substantive unfairness is pronounced. For example, in Europe, Australia, and New Zealand the term’s imbalance of the parties’ rights and obligation must be “significant”.<sup>181</sup> In Québec, the clause must be “excessive” or “unreasonable”.<sup>182</sup> In the US, the term must amount to “oppression” or be “so one-sided as to be unconscionable”.<sup>183</sup>

Secondly, these controls contemplate standard form terms, which are not freely negotiated but imposed by the drafter on recipients. The cautiousness of control is not based on any delusion of freedom of contract. A concern that is real, however, is about contract as private ordering, and apprehension about “overreaching interference by the state, including the courts.”<sup>184</sup> Associated with that are valuation of party autonomy, and

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<sup>178</sup> *Uber*, *supra* note 10 at para 81.

<sup>179</sup> *Ibid* at paras 80–82.

<sup>180</sup> See *ibid*.

<sup>181</sup> *UCTD (EU)*, *supra* note 23 at para 3(1); *ACL*, *supra* note 23, s 24(1)(a); *FTA (NZ)*, *supra* note 48, s 46L.

<sup>182</sup> *CCQ*, *supra* note 24, art 1437 at para 2.

<sup>183</sup> *UCC*, *supra* note 51, §2-302 (Official Comment 2).

<sup>184</sup> *Uber*, *supra* note 10 at para 107, Brown J. More generally, see Slawson, “Democratic Control of Lawmaking Power”, *supra* note 141.

distaste for excessive paternalism. These ideals are still seen to have value, even though the terms are not the product of party consensus.<sup>185</sup>

Thirdly, important practical considerations underlie the widespread use of higher standards of unfairness. These include the fact that attempting to apply a standard merely of unfairness would result in great inconsistency in the law, creating a sense of judicial supervision being arbitrary.<sup>186</sup> It may be that Abella and Rowe JJ considered that risk, but figured that by leaving the standard as unfairness *simpliciter*, drafters would err on the side of caution, and that this would be a good distributive justice policy as between wealthy multinational corporations on one hand and people like the plaintiff driver on the other. But for one thing, a business uses a form where the transaction-type is of such importance to the firm that its ability to thereby decide the terms is worth both the investment in drafting and the risk of refusing to negotiate.<sup>187</sup> Moreover, because a standard form contract is made for mass market transacting, a business of any size cannot afford on the scale of its own market to have to err on the side of disadvantaging itself on every term in order to have contractual certainty that its terms are enforceable. Beyond that, not every business is as wealthy and powerful as Uber, and the standard adopted must foresee other cases, notably including small businesses who also depend on standard form contracts.

Fourthly, these practical considerations have implications for principle, in that contracts are a tool of economic planning, and this planning is undermined by a legal standard that creates unpredictability.<sup>188</sup> Standard form terms are often the subject of especially-carefully calculated economic planning,<sup>189</sup> because of the multiplicative effect of their mass use in transaction-types of especial importance to a firm, as noted. The prevalence of standard form contracts in society confirms that businesses'

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<sup>185</sup> See Moore, *supra* note 2, ch 3.

<sup>186</sup> See *ibid* at 224.

<sup>187</sup> See *ibid* at 11.

<sup>188</sup> See *ibid* at 10; Collins, *The Law of Contract*, *supra* note 154 at 106.

<sup>189</sup> See Kessler, *supra* note 3 at 631–32.

enhanced ability to plan also benefits form recipients, to whom some (though obviously not all) of the benefits are passed on (at least in competitive or elastic markets)<sup>190</sup>. Hence, it is in no one's interests that a standard of unfairness be employed which will result in determinations varying from court to court and judge to judge. An unpredictable standard also spawns unnecessary litigation, reflecting the standard's failure to provide predictability *without* litigation. It fritters away parties' money obtaining answers case-by-case that the legal system was bound to give everyone in advance and without the trouble of having to litigate.

#### G. ON THE ROLE OF COURTS IN CONTROLLING FAIRNESS IN STANDARD FORM CONTRACTS

*Courts could assume primary responsibility for the control of fairness in standard form contracts—but they should not.*

Part II of this paper looked at several steps the Supreme Court took in *Uber* towards the development of a judicial power to control fairness in standard form contracts. Part III thus far focused on further steps future courts could take in order to realize such a control and make it effective. The question that remains to be answered is the overarching question of the role of judicial controls within the broader picture of potential legal mechanisms for controlling unfair standard form terms.

One possible course of action would be for subsequent courts to build on *Uber* by taking further steps to increase the scope of judicial control of standard form terms. For example, they could hold definitively that arbitration clauses in standard form contracts are always, and in all respects, invalid.<sup>191</sup> As well, they could reject the preceding section's recommendation, and double-down on a low threshold of unfairness as sufficient to authorize judicial control. Further, they could use their discretion regarding costs to make court litigation more "friendly" to form

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<sup>190</sup> See *ibid* at 631.

<sup>191</sup> As unconscionable (the approach used by the majority in *Uber*, *supra* note 10) or as against public policy (favoured by Brown J).

recipients.<sup>192</sup> However, some of those steps would be unwise, and altogether they would be inadequate. It is important that courts preserve a sober understanding of their institutional capacities and the limits of those capacities in dealing with a problem like unfair terms in standard form contracts. As discussed in Part I, most jurisdictions make use of legislation to control unfair contract terms. Many (but not all) such legislative regimes are reasonably complex regulatory schemes and reflect some attempt by the law to develop a tailored response to the problem.<sup>193</sup> Many (but not all) of them include judicial controls as one aspect of a broader, multi-faceted approach to control.<sup>194</sup> In the US, where the control is a common law doctrine, control has been insufficient: Margaret Radin depicts it as more of a “wildcard” than a control, and the regulatory environment as in-practice unduly tolerant of unfair terms in standard form contracts.<sup>195</sup> This is less due to a high bar for the unfairness that will trigger control than to more general and intractable challenges of relying mostly on courts: access to justice, remedial limitations, and generalist adjudication.

One important front on which regulation can do better than common law-based controls is *accessibility*. Whether or not class actions are used (and whether or not third-party funding and lawyer contingency fee arrangements are available in conjunction with them),<sup>196</sup> court litigation tends to be an onerous and ponderous mode of dispute resolution. Regulation can operate more expediently. As an example, some schemes include a complaint system where citizens can call upon regulators to review an alleged unfair term.<sup>197</sup> If the regulator agrees that the term is unfair, it notifies the business, and obtains a compliance

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<sup>192</sup> *Uber*, *supra* note 10 at paras 42, 51, 244.

<sup>193</sup> See e.g. *CRA (UK)*, *supra* note 45; *Irish UTCCRs*, *supra* note 45; *ACL*, *supra* note 23; *FTA (NZ)*, *supra* note 48.

<sup>194</sup> *Ibid.*

<sup>195</sup> See Radin, *supra* note 18 at 124.

<sup>196</sup> See *Uber*, *supra* note 10 at para 236.

<sup>197</sup> See e.g. *CRA (UK)*, *supra* note 45, sch 3 at para 2.

undertaking.<sup>198</sup> This can resolve the issue without the need to resort to litigation. As *Uber* itself recognized, justice depends on access. But access to justice is not always achieved by access to courts. A primary process of control that is relatively cumbersome will be underutilized and to that extent ineffective.

Another front on which regulation is more flexible than common law controls is with respect to *remedies*. In individual common law proceedings, a term accepted as unfair will not be enforceable against the claimant form-recipient but will continue in force in identical instances of the standard contract throughout the market. By contrast, some regulatory schemes provide for market-wide injunctions against the use of a term (or any similar term) that has been found unfair.<sup>199</sup> As suggested in §D, class actions could help common law control achieve a similar result. However, conventional class proceedings are an exceptional recourse and often take a long time to reach an adjudicated conclusion. Settlements are common and may leave the question of a term's fairness unresolved.<sup>200</sup> Newer species of regulation also sometimes include other remedies such as monetary or proprietary consequences that may be more potent deterrents than mere judicial non-enforcement of an unfair term.<sup>201</sup>

Regulatory controls are also more readily able to incorporate *expertise*. The SCC has recognized expertise as a presumable reason that parties opt for arbitration over court adjudication.<sup>202</sup> The discussion here is not about arbitration. However, expertise is also relevant to what kind of public authority would best exercise primary control over unfair contract terms. Fairness is

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<sup>198</sup> See *ibid*, sch 3 at para 6.

<sup>199</sup> See *UCTD (EU)*, *supra* note 23, art 7(2); *ACL*, *supra* note 23, s 232; *FTA (NZ)*, *supra* note 48, s 26A.

<sup>200</sup> Law Commission of Ontario, "Class Actions: Objectives, Experiences and Reforms: Final Report" (2019), online (pdf): *Law Commission of Ontario* <lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>.

<sup>201</sup> See generally *Directive (EU) 2019/2161 on better enforcement and modernization of EU consumer protection [2019] OJ L328/7*.

<sup>202</sup> See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 105.

subjective, and if not informed by sufficient context-specific expertise, there is a risk of determinations being impressionistic.<sup>203</sup> In that regard, some unfair contract term regulations allow complaints to be referred to sector-specific regulators, with expert understanding of contracts in the relevant industry or market.<sup>204</sup> This can allow for more reliable assessments of fairness than by a generalist court.<sup>205</sup>

For these and other reasons, regulation is better suited to serve as the primary control of unfairness in standard form contracts than common law controls. However, in the absence of a reasonably comprehensive regulatory scheme addressed to this issue in Canada's common law provinces, judicially developed controls are undoubtedly better than no controls. In addition, common law controls could serve as a stepping stone to future regulatory controls, building upon them but striving to achieve greater effectiveness and efficiency.<sup>206</sup> There are at least two reasons to hope that this might occur. First, a common law control would establish that the law, in arguably its most traditional domain, accepts that control is necessary. Second and relatedly, it would articulate a justification for control of unfair standard form terms, and one which works within the framework of the common law as again the most tradition-bound part of Contract Law. This would make it compelling and might enhance the saleability to the legal profession of regulation addressing the issue,<sup>207</sup> only in a more effective and efficient manner in practice. This reinforces again the importance of the justification for control, discussed earlier.<sup>208</sup>

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<sup>203</sup> See Bigwood, *supra* note 96 at 198; *Bhasin v Hrynew*, 2014 SCC 71 at para 70; *Uber*, *supra* note 10 at paras 152–53, Brown J.

<sup>204</sup> See e.g. *CRA (UK)*, *supra* note 45, sch 3 at para 8.

<sup>205</sup> See Karl Llewellyn, "The Effect of Legal Institutions Upon Economics" (1925) 15(4) *Am Ec Rev* 665 at 674.

<sup>206</sup> See Collins, *Regulating Contracts*, *supra* note 133 at part 2.

<sup>207</sup> See Lester M Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002) at 602.

<sup>208</sup> See §III.A, *above*.



## CONCLUSION

As discussed in this paper, common law Canada is notable among comparable jurisdictions for its lack of an overt control, whether legislated or judge-made, of relatively general application for confronting unfairness in standard form contract terms. In its recent decision in *Uber*, the Supreme Court of Canada took several steps towards realizing a judicial power to control them. However, there was also hesitation that could prevent the movement in *Uber* from being carried through to the positions needed to achieve control, as well as a few significant missteps that must be corrected in order for control to take a suitable form. This paper therefore went on to consider what future courts could and should do with respect to realizing an appropriate judicial control, as part of a response by Canadian law to the notorious and longstanding problem of unfair terms in standard form contracts. At a broad level, seven suggestions were provided of what future courts should do in this regard, in dealing with issues foreseeably to be faced after *Uber*:

1. Courts should eliminate any doubt left by *Uber* that they are justified in overtly controlling the fairness of standard form terms. However, the justification from *Uber* should be tweaked: it is not based on lack of bargaining power, but on the mutual agreement to contract without bargaining, using a standard form, which lacks a fairness control and thus justifies judicial supervision.

2. Courts should confirm that standard form contracting suffices by itself to establish the procedural aspect of unconscionability, leaving only the substantive aspect that constitutes the needed control of fairness. However, courts should clarify that this is so under the type of unconscionability doctrine first used in America—the unconscionable clauses doctrine—shown in the *Hunter* and *Tercon* case line (or extendable from them) as applicable in Canada. It is this doctrine which is tailored to policing standard form terms. Standard form contracting should not be accepted as satisfying the procedural element of the unconscionability doctrine of English origin—the unconscionable bargains doctrine. That doctrine addresses a different problem, avoiding transactions in exceptional situations where a party entered into an exploitive bargain as a

result of a special disability that was taken advantage of, so that the party's consent to the transaction is vitiated.

3. Consistent with using the unconscionable clauses doctrine as the judicial fairness control, courts should make clear that the control is term-specific and does not imperil the larger transaction.

4. Courts should support the availability of class actions as a recourse suited to the mass market character of unfairness in standard contracts. They can do this firstly by not enforcing a standard term to the extent it would block access to this recourse. Secondly, they should ignore individualized factors and rely exclusively on standard form contracting to establish procedural unconscionability, so that form recipients have a common issue (the fairness of a standard term), thus supporting certification.

5. Courts should not accept enhanced information as alleviating the application of common law controls on unfair terms in standard form contracts. The exception would be the few terms actually negotiated, which typically are exempted from other (legislated) regimes of unfair terms control.

6. Courts should return to a somewhat higher threshold of unfairness needed to trigger control. The standard should not tolerate clear unfairness. However, it must be high enough to enable consistent adjudication, so that market participants are free to pursue their interests via contract within an ascertainable sphere of compliance, and without undue litigation.

7. Courts should be realistic about what it is possible for judicial controls to achieve, given challenges such as access, generalist adjudication, and remedial limitations. Courts should appreciate that what is most important is simply for them to confirm that overt control is appropriate and justified, as a building block for future legislation providing more finely tuned regulation.

Through these steps, courts could put an end to the situation of common law Canada being conspicuous among developed legal systems for its lack of a reasonably general overt control of unfair terms in standard form contracts. These answers to the question of "what courts can and should do" would help them achieve what judicial controls can reasonably aspire to achieve, while recognizing the limits of judicial controls within a broader legal

response needed in order to deal with this problem. Further, they ensure that unfair terms control rests on a basis that fosters rather than undermines the integrity of Contract Law's overall approach to preserving harmony among its core commitments to freedom and fairness.