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# The HMCS Unconscionability: Adrift in the Atlantic

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# The HMCS Unconscionability: adrift in the Atlantic

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**Abstract**

*This paper traces the Canadian doctrine of unconscionability's distant voyage in Uber Technologies v Heller 2020 SCC 16 from the familiar waters of the English 'unconscionable bargains' family of doctrines, found in various common law jurisdictions. Since the 19th century, those jurisdictions had included Canada. However, in this important decision of the Supreme Court of Canada, the position of the doctrine shifted significantly. Its movement can be identified as towards the American doctrine of unconscionability, a distinct doctrine not part of the English family, based rather on § 2-302 of the Uniform Commercial Code. Court-watchers in the United Kingdom and other Commonwealth jurisdictions wondering whether this reinterpretation of unconscionability might represent a model for progressive reform should understand why it does not. Adrift between two doctrines with different purposes, it is insufficiently suited to serve either. Meanwhile, it may disrupt business reliance on standard form contracts, and cause tremendous contractual instability.*

## Introduction

Recently, the Supreme Court of Canada rendered a noteworthy decision in *Uber v Heller*.[1] The case is significant for a number of reasons. For employment law, it is another instance of courts' involvement of late in disputes about when workers in the new 'gig economy' are employees versus independent contractors under employment legislation—a question addressed recently in the United Kingdom in *Uber BV v Aslam*.[2] In Canada, *Uber v Heller* dealt with whether Uber, a large multinational commercial enterprise, whose software app allows passengers to book rides with registered drivers, could refer that question to arbitration using an arbitration clause in its standard form contract with drivers. For Uber, deciding the question via arbitration would effectively preclude drivers from a collective judgment.[3] The claimant had instigated court proceedings as a class action, representing Ontario drivers in a suit for $400 million in statutorily mandated benefits.[4] Ontario law barred the use of arbitration clauses to displace court access in consumer contracts, but not employment contracts.[5] Hence, the issue fell to be resolved by principles of the common law of contract.

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[1] 2020 SCC 16 (Supreme Court of Canada (SCC)).

[2] [2021] UKSC 5 (United Kingdom Supreme Court).

[3] Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2012) 17.

[4] *Uber* (n 1) [188].

[5] Consumer Protection Act 2002, s 7(2).

The Supreme Court of Canada (SCC) ruled against Uber and in favour of the drivers by an 8-1 margin. The majority opinion, penned by Abella and Rowe JJ, (with which five of the other justices concurred) invalidated the arbitration clause on the basis of unconscionability. In a separate concurring opinion, Brown J would have instead found the clause unenforceable as against public policy. Côté J, dissenting, found the clause enforceable. Both Brown J and Côté J disagreed with the majority's use of, and approach to, the doctrine of unconscionability to invalidate the arbitration clause, which they saw as inconsistent with prior authority and scholarly understanding.

This present discussion focuses on the case's treatment of the Canadian doctrine of unconscionability—of interest to readers in the United Kingdom and other common law domains because prior to *Uber v Heller*, the Canadian doctrine was closely-associated with parallel doctrines in use throughout the Commonwealth, all of which were descendent from the English doctrine of unconscionable bargains.[6] In broad terms, these doctrines provide a ground of relief from exploitive bargains in exceptional situations of bargaining gone wrong. *Uber v Heller* saw the SCC take the Canadian doctrine on a voyage far from these familiar waters. As explained below, the direction of movement can be identified as towards the American doctrine of unconscionability—which is distinct from the aforementioned family of doctrines elsewhere that are closely-associated with the English doctrine of unconscionable bargains.[7] Despite the shared use of the term 'unconscionable', the American doctrine is in fact rooted in state legislation implementing the model law contained in Uniform Commercial Code (UCC) §2-302.[8] A key motive for its development was to be able to deal 'directly' and 'explicitly' with the problem of unfair terms in standard form contracts[9]—an issue which the United Kingdom and several other common law jurisdictions confront via unfair contract terms legislation.[10] Canadian common law is notable for its lack of a general control on unfair standard form terms.[11] The SCC appropriately recognised this as a major flaw of Canadian law. However, its attempt in *Uber v Heller* to address this by taking the Canadian doctrine of unconscionability part-way from the English model to the American model has left the Canadian doctrine stranded at sea in between, ill-suited to the purposes of either.

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[6] David Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 Law Quarterly Review 403, 403; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis 2014) 518.

[7] Capper (n 6).

[8] Edward Allan Farnsworth, *Contracts* (4th edn, Panel Publishers 2004) 298–299 §4.28.

[9] Uniform Commercial Code §2-302 (Comment 1).

[10] See below (n 52–53).

[11] More specialised controls exist in certain areas. For a partial inventory, see Stephen Waddams, *The Law of Contracts* (7th edn, Thomson Reuters 2017) 373–374 [545]. The Canadian province which uses a civilian system of private law does have a general control on unfair standard form terms: Civil Code of Québec, CQLR, c CCQ-1991, art 1437, para 2.

## Away from England

The requirements of the English doctrine of unconscionable bargains have been summarised in slightly varying ways.[12] Factoring in the clarifications and explanations usually added to these,[13] the elements may be restated more precisely as: (1) one party suffered from a peculiar bargaining impairment;[14] (2) the other party was or ought to have been aware of the impairment during the contracting process;[15] and (3) the substance of the resulting contract is grossly unfair, suggesting that advantage was taken of the impairment, absent proof to the contrary.[16] The Canadian doctrine of unconscionability is descendent from the English one.[17] Conventionally, it has shared these characteristic features.[18]

The judicial discussion and bulk of authorities cited in Uber v Heller make clear that it was this doctrine of unconscionability that the SCC had in its contemplation in that case.[19] However, the majority judgment captained by Abella and Rowe JJ took the doctrine far from familiar waters.

One way in which the doctrine was taken out to sea was in abandoning the

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[12] Compare Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 398 with Mindy Chen-Wishart, *Contract Law* (6th edn, Oxford University Press 2018) 361.

[13] Beatson, Burrows, and Cartwright (n 12) 398; Chen-Wishart (n 12) 362–365.

[14] *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 (Court of Appeal in Chancery) 491 (Lord Selborne LC); Stephen Smith, *Contract Theory* (Oxford University Press 2004) 343–344; Rick Bigwood, 'Antipodean Reflections on the Canadian Unconscionability Doctrine' (2005) 84 Canadian Bar Review 171, 182–187; Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell 2015) 524 [10-043].

[15] *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155; 28 ER 82, 100 (Court of Chancery); *Ayres v Hazelgrove* (England and Wales High Court (Queen's Bench Division) 9 February 1984); *Hart v O'Connor* [1985] UKPC 17 (Privy Council); Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24 University of Queensland Law Journal 73, 78; 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 Quarterly Review 257, 273–278.

[16] *Fry v Lane* (1888) 40 Ch D 312 (England and Wales High Court (Chancery Division) (EWHC (Ch))) 322; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 (EWHC (Ch)); Smith (n 14) 342; Moore (n 15) 261; Chen-Wishart (n 12) 361. Proof to the contrary might come, for instance, from the party receivingindependent legal advice to counteract its impairment (Chen-Wishart (n 12) 364–365) or intending a partial gift (Waddams (n 11) 379 [552]).

[17] *Waters v Donnelly* [1884] OR 391 (High Court of Justice (Ontario)); *Morrison v Coast Finance Ltd* (1965) 55 DLR 710 (British Columbia Court of Appeal) 713; McInnes (n 6) 518.

[18] Leading cases include *Morrison* (n 17); *Cain v Clarica Life Insurance* [2005] ABCA 437 (Alberta Court of Appeal). With respect to the characteristic features enumerated above in Canada, on (1) see *Downer v Pitcher* [2017] NLCA 13 (Newfoundland and Labrador Court of Appeal) [39]; Bigwood (n 14) 191–192, 199; John McCamus, *The Law of Contracts* (2nd edn, Irwin 2012) 429; McInnes (n 6) 524–528; on (2) see *Waters v Donnelly* (n 17) [59]; *Morrison* (n 17) 714; *Cain* (n 18) [32]; *Downer v Pitcher* (n 18) [44]–[49]; Bigwood (n 14) 195; McCamus (n 18) 431; McInnes (n 6) 537, 544–548; on Competing Theories and Choice of Rule in Contract Law' (1993) 25 Ottawa Law Review 235, 262; McInnes (n 6) 528; McCamus (n 18) 426. (3) see *Cain* (n 18) [32]; *Morrison* (n 17) 713; John Manwaring, 'Unconscionability: Contested Values,

[19] See especially *Uber* (n 1) [55]. As explained below, in Canada there is another set of precedents also using the word 'unconscionability' which has no evident connection to the doctrine of English origin, and rather echoes the American doctrine (including its rationales, operation, and context) in how it has been invoked in Canada: See text to nn 80–88.

traditional use of categories to delineate the impairments qualifying application of the doctrine. Lists vary, but examples familiar to a British audience may include poverty, ignorance, illiteracy,[20] age, mental infirmity, and necessity.[21] In *Uber v Heller,* these categories were left behind, and the requirement cast simply as inequality of bargaining power.[22] Explaining this, the Court said that the categories 'are intended to assist in organizing and understanding prior cases of unconscionability'[23] but that 'inequality encompasses more than just those attributes'.[24] In thus making the doctrine applicable not just in the relatively circumscribed scenarios captured by the categories (and perhaps extendible to analogous ones), but whenever a more general condition is met, the scope of application of the doctrine was expanded. Indeed, as the courts have recognised that most contracts are made in circumstances of inequality of bargaining power,[25] the change could potentially radically expand the scope of the doctrine's application. As Lord Dillon observed in *Alec Lobb*,[26] for example, 'any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power'. Given that the majority also simultaneously lowered the degree of substantive unfairness formerly required for a finding of unconscionability,[27] many more contracts may be subject to judicial scrutiny and potential avoidance for unconscionability than was the case previously. Whether or not one accepts the claim of Abella and Rowe JJ that obligations contracted under an inequality of bargaining power do not exemplify freedom of contract, this expansion of judicial supervision will reduce the scope of the contractual ideals of party autonomy and private ordering.[28]

The doctrine was also out of port in Abella and Rowe JJ's assertion that

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[20] *Alec Lobb* (n 16) 95.

[21] *Hartog v Colin & Shields* [1939] 3 All ER 566 (England and Wales High Court (King's Bench Division)). Prior to Uber, the traditional Canadian equivalents were 'ignorance, need or distress', 'ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability': Morrison (n 17) 713; Cain (n 18) [32].

[22] *Uber* (n 1) [62]. The Court used this phrase earlier in *Norberg v Wynrib* [1992] 2 SCR 226 (SCC) 256. However, the surrounding discussion makes clear it was as a short-hand; the doctrine's actual formulation was quoted from the traditional leading case *Morrison* (n 17) 713, which included such categories. Also, its mention was by analogy, *Norberg* not being a contracts case but a battery case concerning sexual assault. On this, see Bigwood (n 14) 210.

[23] *Uber* (n 1) [72].

[24] ibid [67].

[25] *Alec Lobb (Garages) Ltd & Ors v Total Oil (GB) Ltd* [1985] 1 WLR 173, 183 (England and Wales Court of Appeal (EWCA)).

[26] ibid.

[27] *Uber* (n 1) [80]–[81].

[28] See, eg, *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2001] All ER (D) 152 (Nov) (England and Wales High Court (Commercial Court)) [120] (Toulson J).

standard form contracting is an instance of the scenarios the doctrine is concerned with.[29] As noted above, the doctrine addresses situations of bargaining gone wrong, unlike standard forms which are characteristically not subject to bargaining.[30] Further, the doctrine applies in circumstances which are particular, or as Stephen Smith puts it, 'peculiar' to the disadvantaged party, or more peculiar to just the transaction in question.[31] As standard forms are used for contracting *en masse*, the process is not peculiar to a party or transaction, but common to all instances of a form's use throughout the market. The peculiarity of the scenarios traditionally contemplated by the doctrine assured that they were exceptional, so that the doctrine's effect of avoiding a contract would allow parties to procure their exchange needs on the market with a fresh start. By contrast, contracting by standard form is a regular situation, so that avoiding a transaction will typically just leave a party to have to accept a similar form from another firm.[32]

Perhaps partly because of this problem, the SCC majority in *Uber v Heller* applied the doctrine so as to invalidate only the single clause complained of, rather than the whole bargain, which was otherwise left intact.[33] Invalidating an individual clause is not the normal effect of unconscionability doctrines of the family of the English doctrine of unconscionable bargains, including the Canadian doctrine.[34] As Brown J observed, that the doctrine could be used in that way was 'a novel proposition'.[35] As a vice of consent, the basis of the doctrine's effect is that it negatives the consent of the impaired party, which was necessary to the contract's valid formation.[36] Conventionally, it therefore had resulted in avoiding a whole transaction.[37]

The doctrine also departed from its traditional harbour in Abella and Rowe JJ's conclusion that the benefiting party's knowledge of the other party's impairment was irrelevant.[38] The term 'unconscionable' alludes to

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[29] *Uber* (n 1) [89]–[90].
[30] See n 14.
[31] Smith (n 14).
[32] Marcus Moore, *Regulating Boilerplate: Resolving the Problems of Imposition and Unfairness in Standard Form Contracts* (Bloomsbury 2022) ch 3.
[33] *Uber* (n 1) [98].
[34] See nn 6, 17, and 37.
[35] *Uber* (n 1) [173]. On the majority's suggestion of prior authority for its use on 'severable provisions,' see n 65.
[36] *Norberg v Wynrib* (n 22); John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Clarendon Press 1991) 197; Bigwood (n 14) 211–214; McInnes (n 6) 525; Chen-Wishart (n 12) 204.
[37] *Morrison* (n 17) 713; *Downer v Pitcher* (n 18) [21]; Stephen Waddams, 'Unconscionability in Canadian Contract Law' (1992) 14 Loyola of Los Angeles International and Comparative Law Review 541, 543; McInnes (n 6) 523; McCamus (n 18) 440; Beatson, Burrows, and Cartwright (n 12) 399.
[38] *Uber* (n 1) [84]–[85].

'unconscientious use of power'.[39] Whilst the level of wrongdoing needed to satisfy this element of 'exploitation' has been debated,[40] there was little dispute that it required at least awareness (actual or perhaps constructive) of the counterpart's disability in order to constitute an unconscientious advantage-taking.[41] Without that requirement, the risk of some hidden inequality of bargaining power being raised later makes it difficult for the other party to have any certainty about its contractual arrangements.[42] More over, it would let standard form-recipients contract without any risk at all, supported by what amounts to an eternal 'cooling off' period where they could later cancel a contract if a judge finds a term to be unfair.[43]

The moves summarised above leave the doctrine after *Uber v Heller* unsuited to what was seen as its traditional vocation: avoiding transactions in exceptional circumstances where one party took advantage of a peculiar impairment of its counterpart in the bargaining process.[44] In these ways, the Canadian doctrine of unconscionability has been propelled by the SCC majority in *Uber v Heller* quite far from the British shores that it had remained close to since its origin as the English doctrine of unconscionable bargains.

**Towards America**

In departing from English waters in the ways just described, the heading of the Canadian doctrine of unconscionability as charted by *Uber v Heller* can be distinctly identified: the United States of America. Unlike in Canada and other Commonwealth countries, the doctrine of unconscionability found in the United States is neither a variation of, nor the child of, the English doc- trine of unconscionable bargains.[45] On the contrary, the American doctrine by that name was derived from state legislation in the United States implementing UCC §2-302.[46] This section of the UCC only applied to contracts for the sale of goods.[47] However, 'either by analogy or as an expression of a general doctrine' the

[39] *Morrison* (n 17) 713; *Chesterfield* (n 15).
[40] Summarised in McInnes (n 6) 537–543.
[41] ibid 537–539; *Chesterfield* (n 15) 155; *Aylesford* (n 14) 490–491; *Waters v Donnelly* (n 17) [59]; *Ayres v Hazelgrove* (n 15); *Hart v O'Connor* (n 15); *Downer v Pitcher* (n 18) [44]–[49]; Bigwood (n 14) 195; Rickett (n 15) 78–80; Moore (n 15) 273–274, 277–278.
[42] *Uber* (n 1) [166]–[167].
[43] Cooling off cancelation periods provided for by regulation are tightly confined by situation and duration: see Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) s 4.10.
[44] *Downer v Pitcher* (n 18) [44]; *Waters v Donnelly* (n 17) [34]; *Morrison* (n 17) 713; *Cain* (n 18) [32]; *Dyck v Manitoba Snowmobile Association* [1985] 1 SCR 589 (SCC) 593; Rick Bigwood, *Exploitative Con- tracts* (Oxford University Press 2003); Bigwood (n 14); Moore (n 15) 273–274, 276–278; Chen-Wishart (n 12) 361; McInnes (n 6) 525, 539; Cartwright (n 35) 214–220.
[45] See n 6.
[46] *Williams v Walker-Thomas Furniture* 350 F2d 445 (1965) (District of Columbia Court of Appeals).
[47] Uniform Commercial Code' (*Uniform Law Commission*) <www.uniformlaws.org/acts/ucc> accessed 12 July

courts responded to an exhortation in private writing from the principal drafter of the section, Karl Llewellyn, to develop it into a doctrine that would apply to other contract-types.[48] The Restatement (Second) of Contracts confirms that courts have applied the doctrine to con- tracts generally.[49] A prime motive for these developments was to control unfair terms in standard form contracts,[50] and for courts to be free to do so without having to rely on 'covert tools'.[51] In the United Kingdom, unfair contract terms are of course regulated via legislation;[52] this is not the job of the doctrine of unconscionable bargains. Several other common law countries, including Ireland, Australia, and New Zealand also employ legislation to control unfair standard form terms,[53] as there is no common law doctrine that overtly allows for this. Even the judicial control in the United States had a legislative springboard, as mentioned.

The novel features that the Canadian doctrine of unconscionability exhibited in *Uber v Heller*, unfamiliar to its traditional profile and to the English doc- trine of unconscionable bargains from which it is derived, roughly-speaking *are familiar* to the UCC-inspired American 'unconscionable clause' doctrine.
Notably:

- The American doctrine is not confined to listed (and perhaps analogous) categories of bargaining impairments. It is applicable based on inequality of bargaining power or 'the manner in which the contract was entered',[54] namely as a standard form 'contract of adhesion',[55] leaving the complaining party with an 'absence of meaningful choice'.[56]
- The American doctrine is not confined to impairments peculiar to a party or transaction but is available to address the general problem of the risk of unfairness inherent in terms imposed via standard form. The American

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[48] Farnsworth (n 8) 298–299; Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown 1960) 369 ('these provisions may lead appellate courts into a machinery for striking down where striking down is needed').

[49] American Law Institute, *Restatement (Second) of Contracts* (American Law Institute 1981) §208.

[50] Llewellyn (n 48) 369; Farnsworth (n 8) 285–307.

[51] Llewellyn (n 48) 364–365. The doctrine 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 [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': Uniform Commercial Code §2-302 (Comment 1).

[52] Consumer Rights Act 2015; Unfair Contract Terms Act 1977.

[53] SI No 27/1995-European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (Ireland); Competition and Consumer Act 2010 (Cth), sch 2 (Australian Consumer Law), ss 23–28; Fair Trading Act 1986 (NZ), ss 26A, 46(H)–(M).

[54] *Williams* (n 46) 449.

[55] Friedrich Kessler, 'Contracts of Adhesion—Some Thoughts about Freedom of Contract' (1943) 43 Columbia Law Review 629.

[56] *Williams* (n 46) 449; Farnsworth (n 8) 301.

doctrine is not confined to exceptional scenarios but addresses the systemic unfairness enabled by standard form contracts.[57]

- The American doctrine does not vitiate consent or avoid transactions.[58] 'In the typical unconscionability case, the court passes judgement on the validity of the particular clause' within the standard form, declining to enforce it if it creates 'unfair surprise', whilst leaving the rest of the contract intact.[59] Although 'the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability' of the clause, 'courts have usually confined their attention to unconscionable clauses themselves'.[60] Rescinding the whole transaction would not normally help a standard form-recipient, who would likely just have to accept a similar form from another firm.[61]
- The American doctrine does not require the benefiting party's awareness of any special bargaining impairment of the other party as standard form contracts are drafted and sometimes made without the drafter even knowing who will be adhering to its impersonal offer 'to the world'.[62]

As the dispute in *Uber v Heller* was about the enforcement of an arbitration clause in a standard form contract, it is not surprising then that the Supreme Court of Canada found aspects of the American unconscionable clause doctrine better-suited to dealing with this than those of the English unconscionable bargains doctrine, which had traditionally shaped the Canadian doctrine of unconscionability.

**No landfall**

*Uber v Heller* did not, however, carry the Canadian doctrine of unconscionability all the way to the shores of the United States and reconstruct it on the model of the American doctrine. Certainly, the SCC did not indicate that this was its intent. Nor did the judgment rely much on legal authorities which suggest that, although it did make passing reference to the American doctrine and invoke the protagonist behind it, Karl Llewellyn.[63]

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[57] See n 50.
[58] As explained by Farnsworth, the leading American treatise on contracts, 'the underlying notion is that a court may withhold relief ... not that a party may avoid the contract'; 'the remedies for [the American doctrine of] unconscionability are cast in terms of withholding relief instead of avoidance': Farnsworth (n 8) 305–306.
[59] ibid 306; UCC §2-302 (Comment 1). This is seen as a distinguishing feature as compared with the traditional equitable doctrine of English origin: 'the typical equity cases involved suits ... that complained of the harshness of the bargain as a whole. Most of the UCC 2-203 cases ... object to the unfairness of a particular clause in a form contract': Farnsworth (n 8) 300.
[60] UCC §2-302 (Comment 2); Farnsworth (n 8) 306.
[61] Moore (n 32).
[62] *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 (EWCA) 266.
[63] *Uber* (n 1) [87], [90].

Where *Uber v Heller* carried the Canadian doctrine to stops short of the American model in some important respects. For example, although the remedy in *Uber v Heller* was to invalidate an individual clause, rather than the whole bargain, this was explained on the basis that it was a 'self-contained contract collateral or ancillary to the [main] agreement'.[64] That explanation suggests the SCC's desire was to stay within the doctrine's traditional scope and operation, still shared by sibling doctrines throughout the Commonwealth and the parent doctrine of unconscionable bargains in England, on the key issue of whether its effect is to avoid whole transactions or to decline enforcement to a single clause.[65] As reflected in the *modus operandi* of unfair contract terms regulations elsewhere, a term-specific effect, leaving the rest of the contract unimpugned, is critical to whether a legal device is useful in addressing the well-known problem of unfair terms in standard form contracts.[66] A response of avoiding whole transactions is the sort of 'all-or-nothing' approach noted by Llewellyn as unhelpful in dealing with that problem, thus creating the need for new legal tools,[67] which in the United States took the form of the unconscionable clause doctrine and elsewhere has taken the form of unfair terms legislation. It is unhelpful because in a modern economy dominated by standard forms, avoiding the whole transaction is likely to just result in the form-recipient having to contract on a similar form with another firm.[68] Otherwise, the form-recipient would be unable to procure the relevant need by contractual exchange. The form-recipient would thus be left with an unpalatable choice: abide by the unfair term, or avail himself or herself of a 'remedy' that would throw the baby out with the bathwater.[69] Moreover, if standard form contracts, which are widely seen as essential in the post-industrial economy,[70] practically-speaking could not be used—because they would be subject to whole transactions being avoided wherever a judge thought a term was unfair—chaos would ensue. situations it is suited to help with. Avoiding whole transactions can only be done exceptionally

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[64] ibid [96].

[65] Most unusually, in a footnote (ibid [96] fn 8), Abella and Rowe JJ alternately claimed that 'a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it'. The majority seem to have placed little weight on that claim, in confining it to a footnote. Were it otherwise, there would also have been no need to go to the lengths of constructing the arbitration clause as a 'self-contained contract collateral to or ancillary to the [main] agreement'; presumably, they would just have said the clause was severable. One wonders if the claim in the footnote was added just before publication, at a time when the distinction from the American doctrine of the same name was no longer fresh in mind. Indeed, cited as authority for this claim were cases in which a doctrine in the American mould was applied in Canada: see nn 81–85.

[66] See, eg, the regulations referred to in nn 52–53.

[67] Llewellyn (n 48) 365–366.

[68] Moore (n 32).

[69] ibid.

[70] Hugh Collins, *Regulating Contracts* (Oxford University Press 2002) 3; McCamus (n 18) 185.

if it is not to result in obliterating the stability of contracts and disrupting parties' ability to plan their own affairs. This is not limited to planning their market activity but extends to broader business arrangements they must make which necessarily rely on the general validity of the contractual rights and obligations they believe they have.

Another example of how the Canadian doctrine of unconscionability did not reach American waters in the voyage it was taken on in *Uber v Heller* is the qualification by the SCC majority that it will not always be the case that unconscionability is applicable to standard form contracts.[71] In particular, Abella and Rowe JJ suggested that the doctrine may be inapplicable where a form-recipient has enhanced information regarding the standard form terms.[72] This qualification distinguishes it from the American doctrine which would still apply even if the form-recipient is informed due to the 'absence of meaningful choice' still present and inherent in the adhesion contracting process.[73] In this regard, the American doctrine again shares its approach with legislated unfair contract terms controls elsewhere, which typically apply in any event to the standard form terms and exempt only the 'core' terms actually negotiated.[74] Hence, the SCC's reservation about applying the doctrine if the form-recipient has enhanced information represents another important way in which *Uber v Heller* did not carry the Canadian doctrine of unconscionability as far as reaching the territory of the American doctrine. In this way also, the voyage stopped short of the Canadian doctrine becoming, like the American doctrine, a legal device suited to address the problem of unfair terms in standard form contracts.

Also significant is that the judicial discussion and authorities cited in the case refer overwhelmingly to the English 'unconscionable bargains' family of doctrines, used widely throughout the Commonwealth, including in Canada prior to *Uber v Heller*. This fact would suggest that the SCC intended that the Canadian doctrine of unconscionability remain within that sphere, despite its carriage in *Uber v Heller* some way towards the distinct American doctrine.

## Adrift in the Atlantic

Thus, following *Uber v Heller*, the Canadian doctrine of unconscionability can be sighted somewhere in between the English and American doctrines of unconscionability. It must be acknowledged that this is not an uncommon

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[71] *Uber* (n 1) [88].
[72] ibid. For example, they suggest it may not apply where the recipient has prior familiarity with the form or receives explanations, advice, or effective notice of onerous terms.
[73] *Williams* (n 46) 449; American Law Institute, *Restatement on Consumer Contracts—Tentative Draft* (ALI 2019) 7.
[74] See Consumer Rights Act 2015, s 64; European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, s 4; Australian Consumer Law, s 26; Fair Trading Act 1986 (NZ), s 46K.

place for Canadian law (or other aspects of Canadian culture) to be, given the strong influences of Canada's British parentage and of its superpower American neighbour. However, in this instance, an in-between position has little merit, as the English and American doctrines do not reflect differing approaches to the same problem. As mentioned earlier, if anything, it would be unfair contract terms legislation in the United Kingdom rather than the English doctrine of unconscionable bargains that serves as a partial functional equivalent to the American doctrine of unconscionable clauses.[75] Unconscionability in the United Kingdom and the United States are distinct doctrines using a common name. It is true that underlying that name there and elsewhere is the law of equity's broadly-conceived concern with contractual unfairness of which there are numerous instantiations throughout the law beyond these two doctrines.[76] That said, the English and American doctrines rest on different bases, address different problems, and work in different ways, as explained in the discussion above. Stranded at sea in between, following *Uber v Heller*, the Canadian doctrine of unconscionability is conflicted in its rationales and uncertain in its operation— thus unable to suitably fulfil either the function of avoiding exploitive bargains in exceptional situations or of controlling unfair standard form terms, as the English and American doctrines respectively do.

Further, as the Canadian doctrine's conceptual and theoretical centre of gravity remains the English model, whilst after *Uber v Heller* some features of its operation have been appended from the American model, trying to further develop this position would seem challenging and unwise. The result would likely only be to sink the doctrine into deeper incoherence. In short, after *Uber v Heller* the Canadian doctrine of unconscionability is adrift in the Atlantic, certain of where it came from, but uncertain where it is headed.

**Rescue options**

Assuming the Canadian doctrine cannot remain at sea, which of the evident rescue options is preferable? To tow it the rest of the way, and rebuild it on the American model? Or to tow it back, and restore it to being within the family of the English doctrine? family of the English doctrine?

In my view, the latter option is more realistic and sensible. The origin, lineage of authorities, conceptualisation, and theoretical justification under-lying the Canadian doctrine are all those of the family of the English doctrine. It would be odd for a doctrine of long and undisputed pedigree to reinvent itself on the model

[75] See text to nn 50–53.

[76] Stephen Waddams, 'Unconscionability in Contracts' (1976) 39 Modern Law Review 369; Smith (n 14) 340–342 (discussing what he calls the 'medium-length' and 'long' lists).

of some other doctrine sharing the same name but having a different origin, history, conception, and justification associated with a different purpose. As well, the issue the Canadian doctrine traditionally addressed—exploitive bargains made in exceptional situations of bargaining gone wrong—is one that still exists and still requires a legal mechanism for deciding when to offer relief. The English doctrine of unconscionable bar- gains and parallel doctrines in force in other Commonwealth countries perform this function,[77] and Canada needs its doctrine to similarly fulfil this, its traditional function.

However, as the SCC aptly recognised in *Uber v Heller*, the need for some means of control of unfair terms in standard form contracts is a pressing one. Indeed, the lack of any legislated or judicial control of reasonably general application addressed to this issue is a major deficiency in Canadian common law. This deficiency is also internationally notable, as many countries have regulatory controls in place, and the United States has the unconscionable clause doctrine to address the issue, as mentioned. In the absence of a tailored regulatory response as have countries such as the United Kingdom, Ireland, Australia and New Zealand,[78] Canadian law would surely benefit from a judicial control like the American one. The question is how is the development of such a control best realised?

In my view, the answer clearly would be as a device separate and distinct from the English-type doctrine (which addresses a quite different problem of peculiar situations of exploitive bargaining). Attempting to split the difference between (or somehow blend) the English and American doctrines of unconscionability only confounds the ability of the Canadian doctrine to serve the purposes of either the English or American ones. Moreover, there is no need to follow such a course in order to achieve the desired control of unfair standard form contract terms. For that purpose, Canadian courts should instead look more closely at the SCC's earlier precedents in *Hunter v Syncrude*[79] and *Tercon v British Columbia*.[80] Despite undoubtedly being confusing, these cases should be understood as having accepted the applicability in Canada of the American doctrine of unconscionable clauses.[81] Certainly, there is almost nothing in this line of cases to support the proposition that the 'unconscionability' doctrine they were discussing was the traditional doctrine of English origin.[82] By

[77] Capper (n 6); Bigwood (n 14).
[78] See nn52–53.
[79] *Hunter Engineering Co v Syncrude Canada Ltd* [1989] 1 SCR 426 (SCC).
[80] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69 (SCC); see also *Guarantee Co of North America v Gordon Capital Corp* (1999) 3 SCR 423 (SCC); *Plas-Tex Canada Ltd v Dow Chemical of Canada Limited* [2004] ABCA 309; *ABB Inc v Domtar Inc* (2007) 3 SCR 461 (SCC).
[81] McCamus (n 18) 442–443; Waddams, 'Unconscionability in Canadian Contract Law' (n 37) 541–543.
[82] ibid.

contrast, both *modus operandi* of the 'unconscionability' doctrine referred to in those cases, and its rationales, follow quite closely those of the doctrine developed by American courts to control unfair terms in standard form contracts.[83] One source of confusion was that these cases simultaneously retired in Canada the doctrine of fundamental breach,[84] so that the discussion at times focused more narrowly only on unfair reliance on exemption clauses. Another reason for confusion was that the cases seemed to assume that the American doctrine was already applicable in Canada.[85] Despite the con- fusion, John McCamus recognised that this 'unconscionable term' line of cases 'may provide a common law device, long awaited by some, to ameliorate the harsh impact of unfair terms in boilerplate or adhesion contracts'.[86] And Stephen Waddams commented that Canadian courts might then have, like American courts, 'a general power … to set aside contractual provisions on what may broadly be called grounds of unfairness'.[87] In short, Canadian courts *can* assert Supreme Court authority for exercising judicial control of unfair terms in standard form contracts. However, to do so, they should not rely on *Uber v Heller*, but on *Tercon v British Columbia*.

To avert further conflation of the two 'unconscionability' doctrines in the future, it would be best for Canadian courts to use the 'unconscionable bar- gains' phrasing preferred in the United Kingdom to refer to the doctrine that deals with relief from exploitive bargaining, and the 'unconscionable clause' phrase which appears in the title of UCC §2-302 to refer to judicial control of contract terms creating unfair surprise.

## Conclusion

Karl Marx famously wrote that '[t]he way to Hell is paved with good intentions.'[88] So too was the way to *Heller*: with good intentions, the SCC in *Uber v Heller* altered the Canadian doctrine of unconscionability in problematic ways. If future courts were to follow through on those, it might severely impede the

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[83] The 'unconscionability' doctrine within this line of authority operated to allow courts to 'refus[e] to give force to a contractual term' as in the American doctrine, not to avoid whole contracts as was the case in the doctrine of English origin. The SCC's stated rationales of dealing with unfairness 'directly' and 'explicitly', rather than 'cloaking the inquiry' or relying on 'artificial legal doctrine' whose 'own idiosyncratic traits [are] sometimes at odds with concerns of fairness' echo the official comment to UCC §2-302 which inspired the American doctrine: *Hunter* (n 81) 462; UCC §2-302, quoted at text to n 51. This discussion in *Hunter* was endorsed by a unanimous SCC in *Tercon* (n 82). *ABB Inc v Domtar Inc* (n 80) [82] further confirms that the doctrine is generally applied in the context of a consumer contract or contract of adhesion.

[84] *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (EWCA); *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (EWCA).

[85] McCamus (n 18) 442.

[86] ibid 440, 444.

[87] Waddams, 'Unconscionability in Canadian Contract Law' (n 37) 543.

[88] *Capital: A Critique of Political Economy* (New York State Modern Library 1906) 213.

use of standard form contracts, one of the innovations that has facilitated modern economic progress.[89] Also, it could dramatically expand judicial scrutiny of bargains—and adventurous litigation—wherever there is unequal bargaining power. The decision in *Uber v Heller* is to be welcomed from the perspective of employment law and access to justice (including court access and class actions). However, courts in the United Kingdom and throughout the Commonwealth should be wary of the majority's judgment in this case from a contract law perspective.

If there is a lesson to be learned from *Uber v Heller* on the contract law front, it is perhaps the SCC's more fundamental intuition that in the gig economy, the situation of workers raises concerns which are crudely comparable to those which underlie consumer contract protections. Thus, in *Uber v Heller*, the SCC effectively extended the unenforceability of arbitration clauses under Ontario's Consumer Protection Act to workers of the gig economy. In the United Kingdom and other Commonwealth jurisdictions, a similar intuition might recommend extending the protection of unfair terms regulations from consumers to gig workers.

[89] Arthur Leff, 'Contract as Thing' (1970) 19 American University Law Review 131.