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THE DOCTRINE OF CONTRACTUAL ABSOLUTION

MARCUS MOORE*

The absence of a knowledge requirement is a novel and astonishing feature of unconscionability in Canada, and one that calls for scholarly reflection. In other jurisdictions and formerly in Canada, unconscionability required that the benefiting party knew or at least should have known that its counterpart was impaired in the making of the contract. Such knowledge established a minimum level of wrongdoing, so that even without more active exploitation, it was unconscionable as an “unconscientious abuse of power.” But following the Supreme Court decision in Uber Technologies Inc. v. Heller (2020), Canadian contract law rejects this conventional approach. It does not require exploitation to relieve improvidence by the vulnerable. It is argued here that this does not reflect the notion of unconscionability, and is better understood rather as a novel doctrine of contractual absolution. This article analyzes the important implications of this maverick doctrine for the law, the market, and fundamental assumptions about the nature of contractual obligation.

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I. INTRODUCTION

The doctrine of unconscionability has recently been reimagined by Canada’s highest court, embracing novel features that depart from those which had traditionally characterized it as well as related doctrines in other Commonwealth jurisdictions. Among these novel features is the absence of a requirement that the defendant of the unconscionability claim knew or at least should have known that the claimant was under an impairment in the making of the contract (“knowledge requirement”). This innovation is of great significance to unconscionability, to markets, and to long-held assumptions of contract law.

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The essential relevance of unconscionability's knowledge requirement was not in the knowledge itself. Rather, conventionally a knowledge requirement had been seen as a minimum level of exploitive conduct, which unconscionability was concerned with. Thus, even if no more active form of exploitation took place, for the defendant to conclude the contract in circumstances that it knew or should have known that its counterpart was under a disability was seen as an advantage-taking. In the language of unconscionability, it represented an unconscientious abuse of power.

From that perspective, Canada's reconception of unconscionability without a knowledge requirement, following the decision in *Uber Technologies Inc. v. Heller*,¹ is an astonishing development, and one which calls for scholarly reflection. This article investigates the practical and theoretical significance of the elimination of unconscionability's knowledge requirement for the doctrine itself, for market participants, and for broader understandings of contract law.

The discussion in the article proceeds as follows. Part II provides background on the traditional doctrine and its knowledge requirement, and the context in which this key feature of the doctrine was discarded. As well, it confirms the novelty of the doctrine's reconstruction with the knowledge requirement excised. Part III examines how this revision of the doctrine produces results that from a conventional standpoint seem unjust. This reinforces the view that the traditional doctrine's inclusion of a knowledge requirement by the defendant of the unconscionability claim, as a minimum threshold of blameworthy conduct, was a condition needed in order to avert unjust results such as these.

Part IV then looks more closely at the practical significance of the knowledge requirement's elimination in conjunction with other associated changes to the doctrine made concurrently as part of its reinvention. Of note, several of these changes operate to greatly expand the doctrine's scope of application, thereby increasing the significance in practice of not having a knowledge requirement. Also, specific changes interact with elimination of the knowledge requirement in ways that hold additional practical significance. These changes include reducing to a minimum the doctrine's procedural conditions, and correspondingly maximizing judicial supervision of the substantive fairness of contracts. Some of the changes also create special difficulties for use of standard form contracts, which could result in wider economic disruption.

Part V examines the theoretical significance of the knowledge requirement's repudiation. Looking first at unconscionability itself, the investigation confirms that it is no longer cognizable as resting on a basis of relieving exploitation. Instead, the new doctrine is characterized by a one-sided focus on the position of the disadvantaged party and, in particular, is concerned with relieving that party of the burden of a substantively improvident bargain. It is argued that the doctrine as reconceived no longer embodies an idea of unconscionability, but one of absolution — a remarkable new doctrine of Contractual Absolution. The article concludes by considering the theoretical significance of this new doctrine for contract law more broadly. There, it emerges as a challenge to conventionally held fundamental understandings of the nature and effect of contracts.

¹ 2020 SCC 16 [*Uber*].

II. UNCONSCIONABILITY WITHOUT KNOWLEDGE: A NOVELTY

The Canadian doctrine of unconscionability traces itself directly to the English doctrine of unconscionable bargains.² It is one member of a family of doctrines found also in other Commonwealth jurisdictions, each descended from the English unconscionable bargains doctrine, and sharing broadly similar features.³

The traditional requirements of the Canadian doctrine of unconscionability have been encapsulated in slightly varying ways.⁴ Factoring in the necessary clarifications and explanations usually added to these, the elements may be restated more precisely as follows: (1) one party suffered from a special impairment that seriously interfered with its decisional autonomy in the making of the contract;⁵ (2) the other party knew or ought to have known of this impairment in making the contract;⁶ and (3) the substance of the resulting contract was manifestly disadvantageous to the disabled party and advantageous to the other party.⁷ These features give effect to a conventional image of unconscionability as relieving exploitation:⁸ for the stronger party to conclude the contract in such circumstances was an improper advantage-taking.⁹ The knowledge requirement represented a minimum level of exploitation sufficient to trigger the doctrine,¹⁰ as it made the conduct “an unconscientious use of power by a stronger party against a weaker.”¹¹

² *Waters v Donnelly*, [1884] OJ No 294 [*Waters*]; *Morrison v Coast Finance Ltd*, [1965] 55 DLR (2d) 710 at 713 [*Morrison*].

³ David Capper, “The Unconscionable Bargain in the Common Law World” (2010) 126 Law Q Rev 403; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, ON: LexisNexis Canada, 2014) at 518.

⁴ Compare e.g. *Morrison*, *supra* note 2 at 713; *Cain v Clarica Life Insurance Company*, 2005 ABCA 437 at para 32 [*Cain*]; *Downer v Pitcher*, 2017 NLCA 13 at para 54 [*Downer*].

⁵ Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 343–44; McInnes, *supra* note 3 at 524–28; John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 429; Rick Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84:2 Can Bar Rev 171 at 182–87, 191–92, 199 [Bigwood, “Antipodean Reflections”]; Marcus Moore, “Why Does Lord Denning’s Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability” (2018) 134 Law Q Rev 257 at 273–76 [Moore, “Denning’s Lead Balloon”]; Edwin Peel, *Treitel: The Law of Contract*, 14th ed (London: Thomson Reuters, 2015) at 524; *Downer*, *ibid* at para 39; *Earl of Aylesford v Morris*, [1873] LR 8 Ch App 484 at 491 [*Aylesford*].

⁶ McInnes, *ibid* at 537, 544–48; McCamus, *ibid* at 431; Bigwood, *ibid* at 195; Moore, “Denning’s Lead Balloon,” *ibid* at 273–74, 277–78; *Morrison*, *supra* note 2 at 714; *Cain*, *supra* note 4 at para 32; *Waters*, *supra* note 2 at para 59; *Downer*, *ibid* at paras 44–49; *Hart v O’Connor*, [1985] UKPC 17 [*Hart*]; *Earl of Chesterfield v Janssen*, [1751] 2 Ves Sen 125 at 155 [*Chesterfield*]; *Aylesford*, *ibid* at 490–91; *Ayres v Hazelgrove* (9 February 1984), (QB (Eng)) [Ayres]; Charles Rickett, “Unconscionability and Commercial Law” (2005) 24:1 UQLJ 73 at 78.

⁷ *Cain*, *ibid*; *Morrison*, *ibid* at 713; *Fry v Lane*, [1888] 40 Ch D 312 at 322 [*Fry*]; Mindy Chen-Wishart, *Contract Law*, 6th ed (Oxford: Oxford University Press, 2018) at 361; S Smith, *supra* note 5 at 342; JA Manwaring, “Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law” (1993) 25:2 Ottawa L Rev 235 at 262; McInnes, *ibid* at 528; McCamus, *ibid* at 426; Moore, “Denning’s Lead Balloon,” *ibid* at 261; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*, [1983] 1 WLR 87 (Ch D (Eng)) at 95 [*Alec Lobb* (HC)].

⁸ Bigwood, “Antipodean Reflections,” *supra* note 5; Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003); McInnes, *ibid* at 525, 539; Chen-Wishart, *ibid*; Moore, “Denning’s Lead Balloon,” *ibid* at 273–74, 276–78; *Downer*, *supra* note 4 at para 44.

⁹ *Waters*, *supra* note 2 at para 34; *Morrison*, *supra* note 2 at 713; *Cain*, *supra* note 4 at para 32; *Dyck v Manitoba Snowmobile Association*, [1985] 1 SCR 589 at 593; John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991) at 214–20.

¹⁰ *Supra* note 6.

¹¹ *Morrison*, *supra* note 2 at 713.

As the above synopsis reveals, the Canadian doctrine of unconscionability traditionally included a knowledge requirement on the part of the benefiting party. Virtually no support can be found for the suggestion that knowledge in any form is not required.¹² Beyond that, for purposes of this article, it serves to accept the least strict view of what degree of knowledge was required; this will help emphasize the significance of the requirement's elimination, even on the most dilute view of what knowledge was formerly required. Following this approach, the knowledge need not have been actual; even constructive knowledge would satisfy the knowledge requirement.¹³ Thus, in order for a contract to be voidable for unconscionability, it had to have been the case that the stronger party was or ought to have been aware of its counterpart's impairment in deciding whether to enter the contract. Meanwhile, the impairment in question had to rise to the level of representing a risk of seriously interfering with the weaker party's exercise of its autonomy in deciding to make the contract.¹⁴ Examples of such impairments cited by leading traditional cases in Canada include "ignorance, need or distress,"¹⁵ "ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability."¹⁶ Though the impairment falls short of incapacity,¹⁷ in the circumstances it constitutes a defect in that party's consent, which was needed in order to validly form the contract.¹⁸ Because of this vice in consent, the transaction is voidable.¹⁹

This knowledge requirement is among the features that traditionally the Canadian doctrine shared with other doctrines of the same family, deriving from the English unconscionable bargains doctrine.²⁰

Unlike in various criminal offences, for example, the significance of the knowledge requirement in unconscionability does not lie in the knowledge itself, as a separate requirement from wrongful conduct.²¹ Rather, in unconscionability, the significance of the knowledge requirement is that it constitutes a minimum level of wrongful conduct: knowingly contracting with a party who was seriously impaired.²² The traditional doctrine of unconscionability, and its siblings elsewhere, are conventionally seen as concerned with

¹² McInnes, *supra* note 3 at 544. McInnes cites *Marshall v Canada Permanent Trust Co*, [1968] 69 DLR (2d) 260 (Alta QB) as one of the few cases possibly suggesting otherwise.

¹³ *Downer*, *supra* note 4 at paras 46–49; McCamus, *supra* note 5 at 431; McInnes, *ibid* at 545, 548; Chen-Wishart, *supra* note 7 at 364; Moore, "Denning's Lead Balloon," *supra* note 5 at 274, 277; Ayres, *supra* note 6; *Commercial Bank of Australia Ltd v Amadio*, [1983] 46 ALR 402 (HCA) at 416–18 [*Amadio*]; *Nichols v Jessup*, [1986] 1 NZLR 226 (CA).

¹⁴ Bigwood, "Antipodean Reflections," *supra* note 5 at 183–87, 194, 199–204; McInnes, *ibid* at 525–26; *Norberg v Wynrib*, [1992] 2 SCR 226 at 248–50 [*Norberg*]; *Morrison*, *supra* note 2 at 713; Chen-Wishart, *ibid* at 361; Moore, "Denning's Lead Balloon," *ibid* at 273–74, 279; *Lloyds Bank Ltd v Bundy*, [1975] 1 QB (CA) 326 at 339 [*Bundy*].

¹⁵ *Morrison*, *ibid*.

¹⁶ *Cain*, *supra* note 4 at para 32.

¹⁷ Bigwood, "Antipodean Reflections," *supra* note 5 at 185; McInnes, *supra* note 3 at 526.

¹⁸ *Ibid*; *supra* note 14; Bigwood, *ibid* at 211–14; Moore, "Denning's Lead Balloon," *supra* note 5 at 283; Cartwright, *supra* note 9; Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020) at 374; Chen-Wishart, *supra* note 7 at 204.

¹⁹ *Morrison*, *supra* note 2 at 713; McCamus, *supra* note 5 at 439; *Fry*, *supra* note 7 at 322; Beatson, Burrows & Cartwright, *ibid* at 399.

²⁰ See notes 5–11.

²¹ Rickett, *supra* note 6 at 78.

²² McInnes, *supra* note 3 at 537; Bigwood, "Antipodean Reflections," *supra* note 5 at 195; Moore, "Denning's Lead Balloon," *supra* note 5 at 273–74, 277–78; *Waters*, *supra* note 2 at para 59; *Downer*, *supra* note 4 at paras 44–49; *Hart*, *supra* note 6; *Chesterfield*, *supra* note 6 at 155; *Aylesford*, *supra* note 5 at 490–91; *Ayres*, *supra* note 6; Rickett, *ibid* at 78–80.

relieving exploitation of the disabled party.²³ As Mitchell McInnes encapsulates, “[t]he gist of the doctrine is the *exploitation* of vulnerability.”²⁴

It is true that the doctrines have been the subject of debate as to *how* wrongful the conduct of the stronger party must be in order to constitute exploitation, as the concern animating the doctrine.²⁵ Put differently, there had been debate as to whether a form of exploitation more active than knowledge was required, or again whether there was a requirement of wrongful behaviour as distinct from knowledge.²⁶ However, such debate did not go so far as to there being wide dispute of the claim that there was at least a knowledge requirement. The conventional view is that unconscionability required at least that the stronger party was or should have been aware that the weaker party was under an impairment that posed a risk of seriously interfering with the party’s ability to exercise its autonomy in the making of the contract.²⁷ If the stronger party had actual knowledge, its conduct was unconscientious in wrongfully disregarding this knowledge of its contracting partner’s disability. If the stronger party had only constructive knowledge, again it did not act conscientiously, as it wrongfully did not take the reasonable steps called for in the circumstances that would have made it aware of the impairment (and hence the need to have regard to it). A subject knows generally that it is expected by law to act reasonably where the interests of others may be affected; hence the party’s lack of more specific actual knowledge of the impairment is in that sense its own fault; and that includes the consequence of the advantage taken of the impairment. Representing in either case unconscientious conduct in a context of the other party’s disability, the conduct is exploitive.

Separate doctrines seen as having some relation to unconscionability, such as duress, undue influence, and incapacity, also generally include a knowledge requirement.²⁸

But the traditional doctrine of unconscionability in Canada underwent significant change in *Uber*.²⁹ The controversy underlying this high profile case was whether gig economy workers are employees or independent contractors for employment legislation. Uber is a large multinational commercial enterprise whose software app lets passengers book rides with registered drivers. The plaintiff started a class action representing Ontario drivers, suing for \$400 million in statutory benefits due employees.³⁰ Uber asserted an arbitration agreement, contained in its standard form contract with drivers, in order to refer the matter to arbitration — which would effectively thwart a collective judgment.³¹ In the Supreme

²³ See note 8.

²⁴ McInnes, *supra* note 3 at 537 [emphasis in original].

²⁵ *Ibid* at 537–43; Moore, “Denning’s Lead Balloon,” *supra* note 5 at 277.

²⁶ Alluded to in *Uber*, *supra* note 1 at paras 84–85.

²⁷ See note 22.

²⁸ On duress, see Mindy Chen-Wishart, “In Defence of Unjust Factors: A Study of Rescission for Duress, Fraud and Exploitation” (2000) 2 Oxford U Comparative L Forum; McCamus, *supra* note 5 at 400. On undue influence, see Armin Hadjijani, “Duress and Undue Influence in English and German Contract Law: A Comparative Study on Vitiating Factors in Common and Civil Law” (2002) Oxford U Comparative L Forum; *Bundy*, *supra* note 14 at 341; *Geffen v Goodman Estate*, [1991] 2 SCR 353. On incapacity, see Hugh Beale, ed, *Chitty on Contracts*, 33rd ed (London: Thomson Reuters, 2018) at 876; Stephen M Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 467 [Waddams, *Law of Contracts*]; *Dunhill v Burgin*, [2014] UKSC 18 at para 25.

²⁹ *Uber*, *supra* note 1.

³⁰ *Ibid* at para 188.

³¹ Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013).

Court of Canada, the drivers prevailed. Justices Abella and Rowe, along with five other justices, found the arbitration agreement unconscionable. A concurring opinion by Justice Brown would have ruled it unenforceable instead on the basis of public policy. Justice Côté, dissenting, ruled it enforceable. Both Justice Brown and Justice Côté objected to the majority's use of, and approach to, the doctrine of unconscionability as inconsistent with prior authority and scholarly understanding. Indeed, the judgment of the majority reimagined the traditional doctrine with a number of novel features. Although enumerating and appraising those is not the compass of this article, several are noted in Part IV below, insofar as they are relevant to understanding the significance of the change of eliminating unconscionability's knowledge requirement. The innovation of foregoing a knowledge requirement, as part of a reconceived doctrine of unconscionability, is the focus of this article.

The doctrine's traditional knowledge requirement was emphatically rejected by a seven-justice majority of the Supreme Court.³² It should be acknowledged that it is apparent that in arriving at this conclusion, the majority misconstrued the scholarly debate about whether unconscionability required wrongdoing as meaning *including knowledge*, failing to appreciate that the debate was about whether it required wrongdoing *beyond knowledge*.³³ As well, the majority referenced Stephen Waddams, who uses the term "unconscionability" to refer not just to the doctrine of that name, but "as a synonym for ... unfairness."³⁴ Thus, the majority may have conflated differing uses of the term, adding to its confusion. Certainly, the majority gave the impression that in rejecting a knowledge requirement, it was endorsing a position within an unsettled area of law, rather than reconstructing the doctrine's requirements from "whole cloth."³⁵

That said, it was also clear from the judgment of Justices Abella and Rowe that a knowledge requirement was considered not only unnecessary, but inconsistent with their vision of unconscionability.³⁶ As articulated, that vision was focused on "protection of the more vulnerable... [A] weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation."³⁷

Justice Brown vigorously opposed the knowledge requirement's elimination. Noting that "unconscionability is generally viewed as requiring the stronger party to have at least constructive knowledge of the weaker party's vulnerability,"³⁸ he argued that without this, the doctrine is no longer intelligible as about exploitation at all. Instead, it amounted to a "strict liability" conception of unconscionability.³⁹ Alluding to the significance of unconscionability's reconstruction without a knowledge requirement, as this article explores, he concluded that "[t]he wholesale shift in the law that my colleagues advance by removing

³² *Uber*, *supra* note 1 at paras 84–85.

³³ See notes 25–27. Admittedly, the terms of this debate are unnecessarily confusing.

³⁴ Waddams, *Law of Contracts*, *supra* note 28 at 377.

³⁵ *Uber*, *supra* note 1 at paras 84–85; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para 116.

³⁶ *Uber*, *ibid*.

³⁷ *Ibid* at para 85.

³⁸ *Ibid* at para 164 [citations omitted].

³⁹ *Ibid* at para 165.

knowledge as a requirement ... drastically expands the scope of unconscionability. It is neither supported by the jurisprudence nor counselled by academic commentary.⁴⁰

As the latter statement suggests, and as the present section of this article confirms, a preliminary reason the omission of a knowledge requirement is noteworthy is in breaking from long-standing precedent that a knowledge element was among the necessary conditions of the doctrine's application. And relatedly, as also adverted to in this section, it is notable in diverging from the Canadian doctrine's sister doctrines elsewhere within the same family derived from the English doctrine of unconscionable bargains.

However, the significance of the reimagining of the doctrine of unconscionability without a knowledge requirement goes beyond merely departing from the traditional position in Canada and current law in other Commonwealth jurisdictions. As the following section shows, the revised doctrine seems to produce results that from a conventional perspective seem unjust.

III. AN UNJUST RESPONSE TO THE SITUATION?

This is perhaps most apparent in contemplating situations in which the benefiting party lacked even constructive knowledge — the minimum needed to satisfy a knowledge requirement — that its counterpart was under an impairment that risked compromising its ability to exercise its autonomy in the making of the contract.

Let us consider firstly a scenario in which the disadvantaged party, for its part, *did* have at least constructive knowledge of this. For that party — thanks to the exclusion of a knowledge requirement — to nonetheless be able to get a court to rescind the contract is a striking result. And arguably, it is a result that is unjust. After all, this is a scenario in which, by definition, the benefiting party could not be expected to know there was a problem, whereas the disadvantaged party did know or ought to have known. Although operating under a weakness, the party had the capacity to enter the contract, and therefore could be held to it. Although impaired from freely deciding whether to join the contract, its capacity along with its knowledge of the problem also enabled it to signal the problem to the other party — in which case that party would have knowledge and hence reason to bear the risk of the contract being rescinded in the event of a claim of unconscionability. Conversely, for the party whose lack of even constructive knowledge of the problem gave it no ability to have that fact inform its conduct, it seems unjust that it should reasonably rely on the contract's validity, and yet suffer detriment through the law allowing the disadvantaged party to rescind the contract.

It is true that for an unconscionability claim to be made out, the substance of the contract must also be unfair. However, unless a party has knowledge that its counterpart is under a disability, it is normal and indeed perhaps appropriate according to the instrumental morality of the market for a party to pursue its own advantage.⁴¹ It is also true that, even without

⁴⁰ *Ibid* at para 167.

⁴¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 4th ed by Sálvio Marcelo Soares (Amsterdam: MetaLibri, 2007), online: <www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf>.

knowing of its counterpart's impairment, the stronger party in some cases might still obtain a substantive benefit that goes beyond a reasonable exchange of value. If it were possible to separate that which the stronger party receives as consideration for its own promises from that which is the result of the impairment of its counterpart, there might be an unjust enrichment to be restituted. However, given the practical difficulties of establishing causation, and the principle that the law does not inquire into the adequacy of consideration, this seems doubtful. More practically but no less controversially, the law could respond to such scenarios by reducing, on account of the impairment, the substantively unfair obligations.⁴² However, that would present concerns for party autonomy, private ordering, and certainty, and I do not mean to suggest here that resolution: such a legal response would itself be a significant change and a thorny proposition and would require evaluation in a separate reflection. My point here is simply that it would at least represent a more qualified and potentially commensurable response than a doctrine which makes the transaction voidable.

But no such nuanced position is taken by the law as it stands after *Uber*'s hewing of unconscionability's traditional knowledge requirement. The weaker party can, as noted, enter the contract with knowledge of its own impairment, thereby binding its counterpart, and yet later get out, although the other party had no knowledge of the impairment and thus no opportunity to prevent itself from suffering loss in reliance on the contract's apparent validity.

One wonders whether this might further create perverse incentives. For example, since the stronger party cannot avoid application of the doctrine even where it could not be expected to know of its counterpart's impairment, it is in the interests of the counterpart to conceal its impairment. Take for instance a situation like *Aylesford*, where a young aristocrat who was heavily indebted agreed to an exorbitant interest rate loan.⁴³ It is not hard to imagine a party in a similar situation concealing their indebtedness, particularly if the debt is say from street drugs or underground gambling, rather than a debt "on the books" that a lender can see. If the law then favours a party who concealed a problem at the expense of another who could not be expected to know of it, this would seem to add to the injustice of the doctrine's application without a knowledge requirement. Moreover, such concealment may increase the number of contracts being made in problematic circumstances, as concealment will make it difficult for the benefiting party to discover a problem, even by extra efforts. If there were still a knowledge requirement, the party with the drug or gambling debts would have to disclose them in order to be able to later avail of the doctrine, in which case the lender would likely decline to conclude the contract — the sort of contract that in this case, as in many cases of unconscionability, makes a bad situation worse.

Before moving on to consider the alternate overarching scenario in which neither party had knowledge of the impairment, I note further that it seems likely that the current scenario in which the weaker party did have knowledge is the scenario that would be more common. As will be discussed in the next section, the doctrine as reconstructed not only let go of a knowledge requirement but simultaneously underwent other alterations which greatly expand

⁴² This was the result for instance in *Aylesford*, *supra* note 5.

⁴³ *Ibid.*

its scope of application. These alterations include the doctrine's extension to standard form contracting in situations where the form-receiving party was uninformed about the terms.⁴⁴ To begin with, then, it will be the case in all *those* situations that the form-recipient *did* have knowledge of its position as what the doctrine, extended to this context, views as the weaker party. And further, this party had knowledge that it did not familiarize itself with the terms, as what the doctrine, extended to this context, views as that party's impairment. Given that standard form contracting is enormously prevalent as a mode of contracting,⁴⁵ and very often takes place under these conditions of the form-recipient being uninformed,⁴⁶ the scenario that the weaker party did have knowledge will be very common under the renovated and expanded doctrine. Further, in contracts made rather through a traditional negotiation process, one would also expect the party that unconscionability views as the weaker party to frequently have knowledge of its impairment. As will be discussed in the next section, one of the additional changes made to the doctrine was to dispense with using categories to assess whether a situation qualifies for application of the doctrine, and instead cast the qualifying circumstances in general terms simply as inequality of bargaining power. Nonetheless, that principle had previously been recognized as underlying the accepted categories; and many of those categories (necessity, distress, "ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability," and so on⁴⁷) describe circumstances which the party under the disability *would* be expected to know of. Some of them, such as distress, ignorance of business, or "senility" are cast without sufficient precision for the party to be expected to know whether its condition qualifies as a disability. However, in at least some of those circumstances, the party will have had knowledge of its impairment. All in all, given that the situations that unconscionability covers fall short of incapacity,⁴⁸ it will often be the case that the weaker party would be expected to know of its impairment.

Although the scenario in which the weaker party did have knowledge of its impairment may be more common, it is important to also consider the scenario in which it did *not*. That is, this second scenario is one where *neither* party had knowledge of the weaker party's impairment. Where such a scenario does materialize, it may still be unjust for the contract to be avoided as unconscionable. It is true once again that the substance of the contract must be unfair for the doctrine to apply; and to be sure, the law should do what it can to protect the vulnerable, by allowing them relief from unfair bargains they made under an impairment that they were not expected to be conscious of. That said, the vulnerable party's obligations are to another private party that could not be expected to know of the vulnerability either, and which itself was bound by its obligations to the vulnerable party. It therefore seems unjust to overlook the reciprocity of that relationship, despite the flaw in it, by granting the vulnerable party a mechanism to opt-out. Again, a more commensurate response would be for the court to be able to adjust a substantively unfair obligation to compensate for the impact of the impairment, and thus "cure" the flaw in the contract's reciprocity. However, such a response would obviously require a separate discussion of its own, on account of the

⁴⁴ The details of the doctrine's extension to this context are discussed in Part IV, below.

⁴⁵ W David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84:3 Harv L Rev 529.

⁴⁶ Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43:1 J Leg Stud 1.

⁴⁷ See notes 15–16.

⁴⁸ See note 17.

several concerns it raises around party autonomy, private ordering, and certainty, as mentioned earlier. But whether or not such a response is appropriate and practicable in light of those other concerns, its relevance here is to help show that making the contract voidable for unconscionability is by comparison not a commensurate response where the contract is not the product of an unconscientious abuse of power.

It may be wondered whether difficulties in proving what the benefiting party knew would effectively allow for parties under a disability to be induced into contracts through such unconscientious abuse of power. However, this is addressed by allowing for constructive knowledge, and is a reason why in my view, the knowledge requirement must include constructive knowledge. The stronger party should be responsible for the consequences of what it should have known. Regarding the concern about substantive unfairness, discussed above, I hasten to add that if the substantive unfairness of the contract is pronounced, this alone might be sufficient to say that the stronger party should have known that its counterpart was impaired in some way. Thus, it is perhaps in cases where the substantive unfairness is less significant that it seems most obviously unjust — in the absence of some sort of procedural impropriety — to grant the weaker party an opt-out of a relationship that is not just formally reciprocal, but substantively so, despite its imperfections. Without at least a minimum justification for loss-shifting, it would be least unjust to let the loss lie where it falls.

Of note, this view is also consistent with contract law's general tendency to favour the reasonable reliance of a second party over the volition of the first party. A party may have been impaired in exercising its autonomy over deciding whether to enter the contract. However, in the absence of even constructive knowledge of the impairment, it is reasonable for the other party to assume that the consent it receives is valid.

In sum, even where neither party can be expected to know of the problem, it seems unjust that the contract should be voidable for unconscionability. The discussion in this section reinforces the view that the traditional doctrine's incorporation of a knowledge requirement represented a minimum element of wrongful conduct on the part of the defendant of the unconscionability claim, which was needed in order to avert unjust results such as those discussed above. As John McCamus wrote, “[i]t would be surprising ... if a stronger party who lacked knowledge of the inequality and whose behaviour was circumspect would nonetheless be subject to a finding of unconscionability.”⁴⁹ Yet, that is what the reformed doctrine allows. Considering that the doctrine has traditionally been understood to avoid a contract in order to relieve exploitation, it is unsurprising that it seems to produce unjust results where it applies notwithstanding a lack of even the minimum wrongful conduct by the defendant.

Summarizing common views underlying the traditional position of including a knowledge requirement, Justice Brown explained in *Uber* that

equity's interest in protecting those who are vulnerable must be balanced against the countervailing interests of commercial certainty and transactional security.... Equity therefore demands an explanation as to why the

⁴⁹ McCamus, *supra* note 5 at 431.

defendant should suffer the consequences of the plaintiff's vulnerability.... Requiring knowledge on the part of the defendant makes it possible for *both* parties to know whether their agreement is enforceable at the time of contracting and provides a compelling reason for holding the stronger party accountable.⁵⁰

For example, on Peter Birks' view, the disadvantaged party's impaired volition provides a reason for restitution. However, since the party is not incapable, it is a relatively weak reason. On its own, it is outweighed by considerations of stability of contract and market certainty. Where the benefiting party knew of the impairment, and acted unconscientiously by procuring the benefit anyway, is what would flip the scales and justify the contract's rescission.⁵¹

A similar position, expressed on more purely theoretical grounds, is reached by Rick Bigwood. In his view, knowledge is necessary to establish exploitation, and exploitation is necessary to connect the benefit obtained by the defendant of the unconscionability claim to the disability of the plaintiff. From a corrective justice standpoint, there must be some "causal" and "culpable" connection between these, arising from "the peculiar power relation born of D's known position of special advantage over P":

To interfere with a transaction just because P did not [fully] "responsibly consent" on account of her special disability, which disability might have been innocently unknown to D at the time, would be too "one-sided".... It would take no account of D's own interest as an agent in freedom of action functioning within the liberal institution of contract.... [A]ny court purporting to disturb an objectively concluded bargain transaction on "justice" grounds cannot formulate appropriate criteria for interference ... without taking the expressions of human agency on *both* sides of the transaction fairly into account, justice by its nature being a *relational* concept.... [W]hile the special disadvantage of P makes her vulnerable to a loss of effective consent, it is the *exploitation* of that vulnerability by D that consummates the "non-consent," and gives P a legitimate "bilateral" justice claim against D for exculpation from an otherwise apparently valid transaction.⁵²

The unjust results of the doctrine's application without a knowledge requirement in the scenarios above confirm that the requirement was necessary in order to give at least minimum effect to background concerns and considerations of justice such as those described.

IV. PRACTICAL SIGNIFICANCE FOR THE LAW AND FOR THE MARKET

This section investigates the practical significance of the elimination of unconscionability's knowledge requirement, for the law and for the market. In assessing its significance in these respects, it is important to take account of other changes to the doctrine made in association with eliminating the knowledge requirement. These are covered below. Part IV.A covers general changes which served to greatly expand the doctrine's scope of application. Part IV.B then examines how certain changes create special difficulties for the use of standard form contracts.

⁵⁰ *Uber*, *supra* note 1 at para 166 [citations omitted, emphasis in original].

⁵¹ Peter Birks & Charles Mitchell, "Unjust Enrichment" in Peter Birks, ed, *English Private Law*, vol 2 (Oxford: Oxford University Press, 2000) 525.

⁵² Bigwood, "Antipodean Reflections," *supra* note 5 at 188 [footnotes omitted, emphasis in original].

**A. EXPANDED SCOPE OF APPLICATION
— AND THEREBY, SIGNIFICANCE**

In conjunction with eliminating a knowledge requirement, other associated alterations to the traditional doctrine of unconscionability have been made which serve to greatly expand its scope of application. Indeed, it is quite apparently the intent of those changes to liberalize the doctrine's scope of application, and so enhance its significance in the field, as a mechanism that can counter inequalities otherwise permitted by freedom of contract.⁵³ Constraining inequality is a worthy goal. However, whether the actual measures taken are helpful depends on whether they are the right choice of instrument.⁵⁴ A general assessment of that question must be left to discussion elsewhere. The particular focus of this article is on the significance for the law of contracts of unconscionability shunning a knowledge requirement — this being a novel and surprising stance.⁵⁵ However, the role of other associated alterations to the doctrine is in fact relevant to the discussion here in two related ways. First, by expanding the scope of application of unconscionability these alterations amplify the significance of the knowledge requirement's elimination. The impact of the knowledge requirement's ejection will as a result be felt across a wider spectrum of market transactions.⁵⁶ Second, some of the other changes surveyed in this section interact with the elimination of a knowledge requirement in ways that specifically increase its significance, as we will see.

Looking now at these other associated changes, one of them was to dispense with a need for the circumstances in which the contract was made to fall within (or be analogous to) certain recognized categories.⁵⁷ Examples of these categories, mentioned earlier, include necessity, distress, “ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability.”⁵⁸ Under the reformulated doctrine, the requisite circumstance is cast in general terms, as inequality of bargaining power.⁵⁹ Making the doctrine applicable not just in certain relatively defined situations, but wherever a more general condition is satisfied expands the doctrine's scope of application. Indeed, this is the intent, as reflected in the majority's statements that the categories “are intended to assist in organizing and understanding prior cases of unconscionability” “but inequality encompasses more than just those attributes.”⁶⁰ The significance of that is to increase the spectrum of transactions at risk of rescission for unconscionability despite the benefiting party lacking even constructive knowledge that the transaction was made in a circumstance which triggers the doctrine's application. For instance, “[a]ny 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

⁵³ *Uber*, *supra* note 1 at para 82.

⁵⁴ Economic Council of Canada, *The Choice of Governing Instrument*, by Michael J Trebilcock et al, Catalogue No EC22-101/1982E-PDF (Ottawa: Economic Council of Canada, 1982).

⁵⁵ See Parts II–III.

⁵⁶ It will also be felt at a deeper level, in relation to core understandings of Contract, discussed in Part V, below.

⁵⁷ *Uber*, *supra* note 1 at paras 62–72.

⁵⁸ See notes 15–16.

⁵⁹ *Uber*, *supra* note 1 at paras 62–68, 72.

⁶⁰ *Ibid* at paras 72, 67 [citations omitted].

no bargaining power.”⁶¹ These and other common circumstances of unknown inequality of bargaining power may now be unconscionable.

The significance of this is heightened by the fact that the role of the qualifying circumstances is to establish an element of “procedural unconscionability” required by the doctrine in addition to the “substantive unconscionability” of the imbalanced contract itself.⁶² Traditionally, contracting in such circumstances was procedurally unconscionable in the sense of constituting exploitation, considering the inequality and the stronger party’s knowledge of the inequality, which was required.⁶³ Under the reformulated doctrine, the reason for retaining such an element is inapparent, as it is puzzling to describe as “procedurally unconscionable” simply doing what a contracting party ordinarily does where it is not expected to know that there was a reason not to.

Noted earlier was the fact that dropping the knowledge requirement may encourage concealment of a disability by the party suffering from it. The other party’s difficulty in discovering the existence of a circumstance that triggers application of unconscionability, and that could result in the contract later being avoided, is exacerbated by the concomitant change discussed here of replacing a finite list of recognized disabilities with a generalized condition of inequality of bargaining power. It would no longer be even theoretically possible for a party to ascertain whether unconscionability is a risk by investigating the listed categories to see if any of them (or something analogous) applies; the limitless factors that could result in an inequality of bargaining power would be impossible to canvass. For the party whose reliance on the validity of the contract is upset by the contract’s later avoidance, the less opportunity it had to do anything that could have prevented this, the more unjust seems the result.

Moreover, while it is true that inequality of bargaining power is a principle that has been seen as underlying the categories, in describing what the doctrine actually required, it was traditionally qualified by modifiers such as “overwhelming” or “grievous.”⁶⁴ The weaker party had to be “seriously” constrained in the exercise of its decisional autonomy of whether to conclude the contract.⁶⁵ The inequality had to be of an unusual degree.⁶⁶ But in replacing the categories with a general principle, the qualifiers that made the principle one which would occur more unusually have also been rejected, and the opposite stance taken, that inequality of bargaining power simpliciter is enough.⁶⁷ This further enlarges unconscionability’s expansive new scope. Courts have sometimes observed that almost every contract is made in conditions of some degree of inequality of bargaining power.⁶⁸ If there remained a knowledge requirement, it might not be as often that the stronger party should know of the inequality of bargaining power, particularly if modest or minor. But without a

⁶¹ *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*, [1985] 1 WLR 173 (Eng (CA)) at 183 [*Alec Lobb (CA)*].

⁶² On the doctrine being seen as having procedural and substantive aspects, see e.g. S Smith, *supra* note 5 at 343.

⁶³ See notes 8–11.

⁶⁴ *Cain*, *supra* note 4; *Bundy*, *supra* note 14 at 339.

⁶⁵ *Downer*, *supra* note 4 at para 39; *Amadio*, *supra* note 13 at 462; Moore, “Denning’s Lead Balloon,” *supra* note 5 at 273–76, 279; *Floyd v Couture*, 2004 ABQB 238 at para 146 [*Floyd*].

⁶⁶ See note 14.

⁶⁷ *Uber*, *supra* note 1 at paras 81–82.

⁶⁸ See e.g. *Alec Lobb (CA)*, *supra* note 61 at 183; *Floyd*, *supra* note 65 at para 146.

knowledge requirement, if inequality of bargaining power is ubiquitous, the result is that almost every contract might be “procedurally unconscionable”; almost every contract might then be subject to avoidance based merely on a judge’s appraisal of its substantive fairness. Of course, judicial statements that virtually every contract is made under inequality of bargaining power could be exaggerations. If so, these consequences would be lessened — but only to the extent of the exaggeration. Either way, stability of contract is greatly diminished.

Other changes to unconscionability, made in conjunction with the knowledge requirement’s extirpation, are relevant principally to standard form contracts. These expand the doctrine’s scope of application still further — even beyond circumstances of inequality of bargaining power, at least under that phrase’s traditional meaning for the doctrine. Traditionally, consistent with the nature of the doctrine as an exception to the rule that consent binds a party to a contract, and consistent with the extreme consequence of allowing a transaction to be avoided, the sort of inequality of bargaining power contemplated was one stemming from special circumstances.⁶⁹ Or, as Stephen Smith puts it, the disability that created the inequality of bargaining power had to be “peculiar” to the party or transaction.⁷⁰ It did not cover common scenarios such as contracting by standard form where the form-recipient has not informed itself of the terms.⁷¹ Among the altered features of the reconceived Canadian doctrine is that this *does* count as the inequality of bargaining power necessitated by the doctrine, despite being a general phenomenon.⁷² The standard form contracting process alone is not enough: as the Supreme Court said, “[w]e do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power.”⁷³ More specifically, that inequality is considered to exist where the form-recipient is ignorant of the terms. This is evident from it being noted that controls would not apply, for instance, where: a sophisticated form-recipient was familiar with a form as common within an industry; or a form-recipient received explanations or advice that “offset uncertainty” about the terms; or the form “clearly and effectively communicate[d]” the meaning of surprising or onerous clauses.⁷⁴ As well, hope was expressed that this would “encourag[e] those drafting such contracts to make them more accessible to the other party.”⁷⁵ And in applying these principles in *Uber*, there was a considerable focus on what the form-recipient “could not be expected to appreciate.”⁷⁶ In short, a form-recipient’s ignorance of the terms qualifies as the disability required by the doctrine, despite being a typical rather than peculiar circumstance in contracting by this prevalent method. This change thus extends the scope of the doctrine to cover routine cases of standard form contracting, with the procedural unconscionability element comprising the form-recipient being unfamiliar with the terms.⁷⁷

⁶⁹ See note 5.

⁷⁰ S Smith, *supra* note 5 at 343–44.

⁷¹ The American doctrine of unconscionability does apply to standard form contracting. However, as will be discussed later, it is a distinct doctrine developed based on §2-302 of the *Uniform Commercial Code*, ULA UCC § 2-302 (Thomson Reuters 2022) [*UCC*]. Despite the shared name “unconscionability,” it is not part of the same family as the Canadian doctrine and others in the Commonwealth deriving from the English doctrine of unconscionable bargains: Capper, *supra* note 3.

⁷² *Uber*, *supra* note 1 at paras 88–89.

⁷³ *Ibid* at para 88 [citation omitted].

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at para 91.

⁷⁶ *Ibid* at para 93.

⁷⁷ *Ibid*.

In this vast new field of application for the doctrine, what significance does eschewing a knowledge requirement have? In standard form contracting, the drafting party typically does not know whether or not a form-receiving party really knew and understood the terms. The standard form contracting process often involves little or no party communication, other than the form-recipient's formal assent to the transaction, whose terms were preformulated, standardized, offered to the world, and non-negotiable. Because a form is presented on a take-or-leave basis, often in contexts in which the form-recipient has little real choice but to take it (or take a similar form on the same basis from a competing firm),⁷⁸ the assent by the form-recipient does not necessarily mean it knew and understood the terms.⁷⁹ Indeed, often despite this formal manifestation of assent, form-recipients do not know and understand the terms.⁸⁰ Yet, as mentioned, the question of whether or not the form-recipient was familiar with the terms is what under the new doctrine determines whether the procedural unconscionability requirement is met.⁸¹

The law could require form-recipients to inform themselves before assenting,⁸² or require drafters to verify that form-recipients really are informed of the terms, before the law treats a standard form contract as validly made. However, such measures would undercut one of the principal purposes of contracting by standard form: namely, for the parties to minimize informational transaction costs.⁸³ This aim includes avoiding a need for form-recipients to inform themselves of the terms or for form-drafters to verify that a form-recipient knew and understood what it consented to — both of which occur inherently where parties instead contract by a classical negotiation process. Recognizing the modern economy's need for parties to be able to contract via standard forms, the courts have long treated standard form contracts made under these low-information conditions as valid.⁸⁴

For the reasons above, the drafter cannot be expected to know whether the form-recipient in question really knew and understood the terms. Where the form-recipient did not inform itself of the terms, a knowledge requirement on the drafter is what might still stand in the way of concluding that the doctrine's procedural unconscionability element is established in all those cases. Because of the elimination of the knowledge requirement, there is nothing left in the way of that conclusion. Hence, beyond all the cases of unremarkable inequality of bargaining power in negotiated contracting as mentioned above, it will further be that in routine cases of standard form contracting the contract is procedurally unconscionable. An opinion that the contract itself is substantively unfair will then suffice for it to be rescinded.

⁷⁸ Friedrich Kessler, "Contracts of Adhesion — Some Thoughts About Freedom of Contract" (1943) 43:5 Colum L Rev 629; Marcus Moore, *Regulating Boilerplate: Resolving Imposition and Unfairness in Standard Form Contracts* (Bloomsbury) [forthcoming in 2022] [Moore, *Regulating Boilerplate*].
⁷⁹ *Suisse Atlantique v Rotterdamsche Kolen Centrale*, [1967] 1 AC 361 (HL (Eng)) at 406.

⁸⁰ See note 46.

⁸¹ See note 72.

⁸² As in medical decision-making, for example.

⁸³ Todd D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96:6 Harv L Rev 1173 at 1221; RH Coase, "The Nature of the Firm" (1937) 4:16 *Economica* 386; Moore, *Regulating Boilerplate*, *supra* note 78.

⁸⁴ *Parker v South Eastern Railway Co*, [1877] 2 CPD 416 (CA (Eng)).

This may well be an aim of the reimagined doctrine.⁸⁵ There is certainly a need for a control of unfairness in standard form contracts in common law Canada.⁸⁶ But there are problems with doing it through this reconception of the traditional doctrine of unconscionability. For one thing, the doctrine's normal operation is to avoid the transaction.⁸⁷ By contrast, in other places which have regulations addressing unfairness in standard form contracts as at least a somewhat general issue, only particular terms are in jeopardy, while the broader contract remains in force.⁸⁸ Such regulations may be seen as including the American doctrine of unconscionability, which, despite its shared use of the word unconscionability, is not closely related to the Canadian doctrine or its siblings.⁸⁹ Rather, the American doctrine is based on US state legislation implementing *UCC* §2-302.⁹⁰ Its normal operation is to decline enforcement to an "unconscionable clause"; and only exceptionally, where the unfairness of that term "permeate[s]" the contract as a whole, does it avoid the transaction.⁹¹ For controlling fairness in standard form contracts, a term-specific *modus operandi* would be essential, as avoiding a whole transaction is the sort of "all-or-nothing" approach unhelpful in that context: it deprives the form-recipient of the exchange need it was pursuing, and typically just leaves it having to accept a similarly shaped form from a rival firm.⁹² Additionally, standard form contracts are seen as essential in modern society, and therefore society would be disrupted by destabilizing such contracts as a whole.⁹³

Another problem with the renovated doctrine being extended for use in controlling fairness in standard form contracts is the question of what is served by the doctrine's procedural unconscionability element, which requires in this case that the form-recipient have been unfamiliar with the terms? Elsewhere, controls of fairness in standard form contracts (including the American unconscionability doctrine) are not conditioned on whether the form-recipient was familiar with the terms. They apply whether or not the form-recipient informed themselves of the standard form terms.⁹⁴ After all, form-recipients are said to be "rationally ignorant" of the terms.⁹⁵ As noted above, one of the purposes of this mode of contracting is the efficiency-savings of being able to transact without knowing and

⁸⁵ *Uber*, *supra* note 1 at paras 90–91.

⁸⁶ Canada's common law provinces are notable among comparable jurisdictions for their lack of a control of standard form terms of somewhat general application. Marcus Moore, "Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?" (2022) 55:2 *UBC L Rev* [Moore, "Controlling Fairness"].

⁸⁷ SM Waddams, "Unconscionability in Canadian Contract Law" (1992) 14:3 *Loy LA Intl & Comp LJ* 541 at 543 [Waddams, "Unconscionability"]; McCamus, *supra* note 5 at 440; McInnes, *supra* note 3 at 523; Beatson, Burrows & Cartwright, *supra* note 18 at 399; Morrison, *supra* note 2 at 713; Downer, *supra* note 4 at para 21. There was some suggestion in *Uber*, *supra* note 1, that the doctrine as reconceived could avoid severable portions of a contract. This is discussed in the next part.

⁸⁸ See e.g. *Consumer Rights Act 2015* (UK), c 15, Part 2 [CRA (UK)]; *Unfair Contract Terms Act 1977* (UK), c 50 [UCTA (UK)]; EC, *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, [1993] OJ, L 95/29; *The Australian Consumer Law*, being Schedule 2 to the *Competition and Consumer Act 2010*, ss 23–28 [ACL]; *Fair Trading Act 1986* (NZ), 1986/121, ss 26A, 46(H–M) [FTA (NZ)]; arts 1437–38 CCQ.

⁸⁹ See note 71.

⁹⁰ E Allan Farnsworth, *Contracts*, 4th ed (New York: Aspen, 2004) at 298.

⁹¹ *UCC*, *supra* note 71, §2-302, Comment 2.

⁹² Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960) at 365–66; Kessler, *supra* note 78.

⁹³ McCamus, *supra* note 5 at 185; Slawson, *supra* note 45 at 530.

⁹⁴ See e.g. CRA (UK), *supra* note 88, s 64; UCTA (UK), *supra* note 88, art 3; ACL, *supra* note 88, s 26; FTA (NZ), *supra* note 88, s 46K; UCC, *supra* note 71.

⁹⁵ Melvin Aron Eisenberg, "The Limits of Cognition and the Limits of Contract" (1995) 47:2 *Stan L Rev* 211 at 244, 247.

negotiating every term.⁹⁶ As well, even if a form-recipient did inform themselves of the terms, it still lacks a “meaningful choice” over them, as a result of the terms being preformulated and standardized to enable this method of contracting.⁹⁷ The form terms are seen as “dictated” by the drafting firm rather than consensually agreed.⁹⁸ If there is procedural unconscionability, it would be in the drafter’s knowledge that its unilateral determination of the terms is without any mechanism to protect the interests of form-recipients, such as there is in traditional negotiated contracting through the bargaining process. By contrast, for the reasons above, it is unclear why it should be procedurally unconscionable for a form-recipient not to be familiar with the terms in standard form contracting, that being part of the very logic of the practice.

Taking for granted the reimagined doctrine’s procedural focus, in the standard form contracting context, on whether the form-recipient was informed, an argument could at least be made that this really is unconscionable if the drafter was *presumed to know* that the form-recipient was not informed. A legal presumption would be more practical for controlling fairness in standard form contracts, as it would obviate a need for onerous factual inquiries as part of adjudication; on the other hand, it would be more difficult to reconcile with concern about unconscientiousness in cases where, for instance, a drafter brought home the terms to the form-recipient. A factual presumption would make for a less practical standard form fairness control by leaving room in litigation for potentially onerous factual inquiries; but it would better square with concern about whether conduct was conscientious as it would allow, for example, the drafter to escape the doctrine by showing that it brought home the content of the terms to the form-recipient.⁹⁹ But as it is, the doctrine does *not* presume knowledge (whether legally or factually) on the part of the drafter. As discussed throughout, the doctrine as reimagined expressly disclaims a knowledge requirement at all.¹⁰⁰ Thus, for example, if a form-recipient intentionally misled the drafter into believing that the form-recipient had informed itself of the terms when it had not, it would still be able to invoke this new vision of unconscionability, as the doctrine is not concerned with knowledge. Given the above observations, it is unclear what it means to frame a form-recipient’s unfamiliarity with the terms as procedural “unconscionability.”

The various dramatic liberalizations of the procedural conditions for unconscionability’s application discussed in this section, affecting both standard form and negotiated contracts, are accompanied by another concurrent change lowering the substantive threshold for a finding of unconscionability. Traditionally in Canada, and still in other places where doctrines exist of the same family of the English unconscionable bargains doctrine, the degree of substantive unfairness required is typically high. In a similar way as with the earlier-discussed procedural element, qualifiers such as “gross” or “substantial” are used to

⁹⁶ See note 83.

⁹⁷ *Williams v Walker-Thomas Furniture Co.*, 350 F2d 445 (DC Cir Ct App 1965) at 449.

⁹⁸ Kessler, *supra* note 78 at 632.

⁹⁹ Arguably, the Supreme Court left the door open to this in suggesting that provision of enhanced information might alleviate the doctrine’s application: *Uber*, *supra* note 1 at para 88. But, that door was closed in it expressly disclaiming a knowledge requirement. From a policy perspective, enhanced information is recognized as a failed strategy for control of unfairness in standard form contracts: American Law Institute, *Restatement of the Law: Consumer Contracts, Tentative Draft* (Philadelphia: ALI, 2019) at 35; Omri Ben-Shahar & Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014) at 14–32.

¹⁰⁰ See note 32.

convey the need for a high threshold of substantive unfairness to be surpassed for the doctrine to apply.¹⁰¹ But in the doctrine as reconstructed, this has been rejected as well. The opposite stance is endorsed: that an elevated threshold is inappropriate; unfairness *simpliciter* is enough.¹⁰² As with the other changes discussed in this section, this renovation of the doctrine vastly expands its scope of application. Many more contracts exceed this lower level of unfairness than the traditional high bar. Many more contracts are thus at risk of being avoided for unconscionability without the party wishing to uphold the contract having had even constructive knowledge of any flaw in its formation.

As well, because fairness is an assessment that is quite subjective and oft-contested,¹⁰³ it will be difficult to achieve consistency in adjudicating it to the fine degree entailed by a low standard.¹⁰⁴ Yet, whether or not a contract is unconscionable and subject to rescission turns on this. This unpredictability places the party who would wish to uphold the contract in a difficult predicament.

Consider firstly standard form contracts. Accepting the form-recipient's ignorance of the terms as a qualifying disability, and rejecting a knowledge requirement by the drafter, means, as discussed above, that many standard forms will be voidable based on an assessment of their substantive fairness. Using a low bar of unfairness, the unpredictability of the assessment makes it difficult to draft a standard form not at risk of rescission. As part of this redrawing of unconscionability, it was perhaps assumed that form-drafters could and should achieve the predictability they need by taking it upon themselves to err on the side of fairness toward form-recipients. But from a business perspective, this does not seem realistic. It might be feasible in portions of a standard form contract in which the parties have a common interest, or even portions in which at least they do not have an adverse interest. However, in portions in which the parties have opposing interests, for the firm to draft terms erring on the side of fairness to the other side will directly detract from its own business interests. Caution with respect to liability risks then becomes recklessness with respect to business risks. Under a low threshold of unfairness, it is not obvious how a drafter could readily mitigate these countervailing risks.

Now consider contracts made through a classical negotiation process. Without a requirement of even constructive knowledge, the stronger party lacks reason to know that it is strong and its counterpart weak. As a result, the party would be expected to pursue negotiations in the usual way, pushing its interests through the bargaining process, and counting on its counterpart to look to its own interests. But as a result of inferior bargaining by the impaired counterpart, the result is likely to be a bargain whose substance is at risk of being appraised as unfair. The contract will then be voidable for unconscionability. Conversely, if a party, not knowing whether it might be the stronger party, holds back in favour of the interests of its counterpart in areas where the parties' interests conflict, this will detract from its own business interests. Hence, for negotiated contracts also, the party who

¹⁰¹ *Cain*, *supra* note 4 at para 32; *Morrison*, *supra* note 2 at 713; Bigwood, "Antipodean Reflections," *supra* note 5 at 192, 194; *Floyd*, *supra* note 65 at para 150; *Bundy*, *supra* note 14 at 339; Moore, "Denning's Lead Balloon," *supra* note 5 at 274; Chen-Wishart, *supra* note 7 at 361.

¹⁰² *Uber*, *supra* note 1 at paras 81–82.

¹⁰³ Bigwood, "Antipodean Reflections," *supra* note 5 at 208–209.

¹⁰⁴ Colin S Diver, "The Optimal Precision of Administrative Rules" (1983) 93:1 Yale LJ 65.

would wish to uphold the contract faces, due to the lowered standard of unfairness, a difficult and perhaps intractable predicament of significant countervailing risks.

In sum, looking at the elimination of the knowledge requirement in the context of the associated other changes made concurrently with it, as surveyed in this section, reveals dimensions of larger significance. One aspect of this flows from the changes' tremendous expansion of the doctrine's scope of application: it means that many contracts across the market are now at risk of rescission for unconscionability, despite the benefiting party not being expected to know there was any issue with their formation. In this context, the meaning of the doctrine's "procedural unconscionability" element is unclear, as is its purpose. Marked liberalization of this requirement — supported by the lack of any knowledge requirement of the relevant procedural circumstances — makes the reconstructed unconscionability doctrine one preoccupied with substantive fairness. As these changes have been accompanied also by a lowering of the bar of substantive unfairness that qualifies as unconscionable, parties hoping to benefit from contracts and needing to conduct wider business planning in reliance on contractual stability will encounter difficulties under the revised doctrine.

B. SPECIAL DIFFICULTIES FOR STANDARD FORM CONTRACTS

The impacts examined in the preceding section of eliminating unconscionability's knowledge requirement in the context of other associated changes concurrently made to the doctrine were ones that pertained to contracting by any mode. Additional significant impacts apply specially to standard form contracting. Given the predominance of this mode of contracting in contemporary society,¹⁰⁵ this section investigates these further issues.

A change discussed in the last section was how the procedural unconscionability condition can now be established when contracting by standard form, based solely on whether the form-recipient was uninformed of the terms, without a knowledge requirement on the drafter. As this is often the case, all such contracts are now potentially voidable based on a judicial assessment of their substantive unfairness. This effectively creates a collateral change that impacts standard form contracts, to be considered here: the use of a generalized procedural criterion in place of the traditional party-or-transaction-specific criteria, along with the remaining focus on the substantive fairness of a standardized contract, brings the doctrine into close alignment with the criteria for certification of class actions. Class actions are considered inappropriate where there are particular issues, and appropriate where there are common issues across the class.¹⁰⁶ As a result, it will now be much easier to pursue a class action for unconscionability on behalf of recipients of a given form. This means that for standard form contracts in which the form-recipients are typically unfamiliar with the terms, it will not just be the contract with a given form-recipient at risk of being found unconscionable, but all instances of the same standard contract used across the market. Elsewhere, in regulations which address unfairness in standard form contracts, collective recourses are important in helping deal efficiently with unfairness that is not individualized

¹⁰⁵ See note 45.

¹⁰⁶ *Hollick v Toronto (City)*, 2001 SCC 68 at paras 18, 30.

but market-wide.¹⁰⁷ However, as noted in the preceding section, such regulation only jeopardizes particular terms viewed as unfair, leaving the rest of the contract intact. By contrast, the doctrine of unconscionability, as a vice of consent which was needed to validly form the contract, normally operates to avoid the whole transaction.¹⁰⁸ This is unhelpful in controlling fairness in standard form contracts.¹⁰⁹ Meanwhile, the mass avoidance of a standard form contract across all its instances market-wide may be quite destabilizing. In this way, the reimagined doctrine's impact of destabilizing contractual relations is multiplied exponentially as applied to standard form contracts.

In fact, the economic destabilization may be wider still: it is not uncommon for rival firms within an industry to employ similar forms.¹¹⁰ A finding of unconscionability could then effectively unravel a whole transaction-type. Further, because standard form contracts tend to form part of a network of contracts that in practice construct governance arrangements for an industry, including relationships with external but associated industries, their avoidance for unconscionability risks broad economic disruption.¹¹¹

What means do form-drafters have of mitigating this risk? If the forms are substantively fair, they would not be unconscionable. However, another of the associated changes discussed in the last section was that the threshold of unfairness required for unconscionability is lowered under the renovated doctrine. Given the subjectivity and contestability of assessments of substantive fairness, this made for an unpredictable standard that complicated the task of drafting. If a drafter erred on the side of fairness to form-recipients, wherever the parties' interests are opposed, this would damage its own business interests. In the context of standard form contracts, the business impact of this is again something that will be multiplied contract-by-contract across all instances of the same standard form's use on the scale of the firm's market. This could be perilous, even for large multinational corporations.¹¹² And not every business is big and wealthy; notably, small business also depends on standard form contracts.

Going that route will be all the more perilous for the business in that a firm invests in drafting a form and chances a take-or-leave posture on its acceptance in transaction-types where the costs of this approach are exceeded by a special interest it has in adhering to its terms as standards for that transaction-type.¹¹³ As a result, the transaction-types for which a firm drafts and relies on its standard form are those in which it is least likely to be able to afford liberality. Such transactions will obviously also be ones in which the countervailing risk of their rescission *en masse* for unconscionability will be especially damaging.

As well, the reconception of the doctrine may include another change which could effectively lower the threshold of unfairness required for unconscionability specifically for

¹⁰⁷ See e.g. *ACL*, *supra* note 88, s 232; *FTA (NZ)*, *supra* note 88, s 26A; *UCTA (UK)*, *supra* note 88, art 7(2); EC, *Directive (EU) 2020/1828 of the European Parliament and the Council of 25 November 2020 on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC*, [2020] OJ, L 409/1.

¹⁰⁸ See notes 87–88.

¹⁰⁹ See note 92; Moore, "Controlling Fairness," *supra* note 86.

¹¹⁰ Slawson, *supra* note 45 at 530.

¹¹¹ *Ibid.*

¹¹² The change having been made in a case involving such an enterprise: *Uber*, *supra* note 1.

¹¹³ Rakoff, *supra* note 83; Moore, *Regulating Boilerplate*, *supra* note 78.

standard form contracts. That is, beyond the lower standard of unfairness *simpliciter* versus gross unfairness already discussed, there was some suggestion it could be enough if even a single standard form term within the contract is unfair.¹¹⁴ Thus, the contract as a whole might be fair, but if there is a particular term within it that is unfair, this might suffice for a finding of unconscionability under the renovated doctrine. This was the result, for instance, in *Uber*: it was the employment contract's arbitration clause that was alleged to be unfair and that was the basis of the finding of unconscionability.

In that instance, only the term was invalidated.¹¹⁵ Such a result would be more practical for purposes of regulating unfairness in standard form contracts. As discussed earlier, declining enforcement only to an individual term is the *modus operandi* of controls elsewhere of fairness in standard form contracts.¹¹⁶ That includes the American doctrine of unconscionability, which is not part of the doctrinal family to which the Canadian doctrine belongs, but rather gives effect to *Uniform Commercial Code* §2-302.¹¹⁷ Invalidating an individual term is not a normal mode of operation for unconscionability doctrines of the family descended from the English doctrine of unconscionable bargains, including the Canadian doctrine.¹¹⁸ As well, the basis of the doctrine's effect is that it establishes a vice in the weaker party's consent, needed in order to form the contract. The consent was thus defective, affecting the validity of the agreement as a whole.¹¹⁹

The explanation given by the Supreme Court for invalidating only one term in *Uber* is actually consistent with the normal whole-agreement mode of operation of the doctrine. The judgment explains that the arbitration clause "constitutes a self-contained contract collateral or ancillary to the [main] agreement."¹²⁰ That explanation reconciles the unusual invalidation of just the term in that case with the doctrine's normal operation of invalidating agreements as a whole. That the invalidation of just the arbitration clause was framed as an instance of, rather than an exception to, the doctrine's established *modus operandi* of avoiding whole agreements reinforces that this is recognized as the doctrine's effect. Further, it is important to bear in mind that the issue here is not simply a matter of choosing between remedies of broader or narrower scope. Because the authority of the doctrine to place in question the validity of an agreement is that there was a defect in its formation, it follows that the whole agreement is affected.¹²¹ The explanation for invalidating only the arbitration clause in *Uber* reflects this, and there would have been no need for the Supreme Court to construct the term as a collateral contract if that was not the case.

While the doctrine normally should and does operate, then, to unwind transactions as a whole, there is no similar indication that under the revised doctrine the substantive unfairness that is the basis of the claim of unconscionability must ordinarily extend beyond a particular term. For example, the majority states that standard form "choice of law, forum selection,

¹¹⁴ *Uber*, *supra* note 1, n 8.

¹¹⁵ *Ibid* at para 98.

¹¹⁶ See note 88.

¹¹⁷ See notes 89–91.

¹¹⁸ See note 87.

¹¹⁹ See notes 18–19.

¹²⁰ *Uber*, *supra* note 1 at para 96, citing *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*, [1981] AC 909 (HL (Eng)) at 998.

¹²¹ See notes 18–19.

and arbitration clauses ... violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply."¹²² Justice Brown reads the majority opinion as holding even more broadly that "[i]nstead of examining the entire bargain, my colleagues assert that unconscionability can be alleged against specific provisions of a contract, rather than the contract as a whole."¹²³ One would expect that if the complaint is about a particular term, and the court evaluates the unconscionability only of that term, then only that term would be in jeopardy, and it would be clear that the rest of the contract remains in force. This, as mentioned, is how regimes of fairness control for standard form contracting operate.¹²⁴ However, Justices Abella and Rowe in *Uber* are distinctly unclear on this. Notably, they hold that "a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it."¹²⁵ This stance is presumably an attempt to emulate the apparent flexibility of the American doctrine of unconscionability, which Justices Abella and Rowe commend as more "modern."¹²⁶ The provision on which the American doctrine is based states, similarly:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause.¹²⁷

In practice, however, this was found not to provide useful flexibility, but problematic uncertainty. Thus, Farnsworth explains that as the American doctrine is distinct from unconscionability doctrines elsewhere in its prime motivation being to control unfair terms (elsewhere a task fulfilled by legislation),¹²⁸ "courts have usually confined their attention to unconscionable clauses themselves" without imperilling the whole contract.¹²⁹ There is no acknowledgment by the majority in *Uber* that it is aware of this practice, much less does it include a reassurance of agreement with it. On the contrary, and concerningly, Justices Abella and Rowe seem to see the issue of fairness in standard form contracting as undifferentiated from exploitive bargains, and both as issues of valid formation: "Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract."¹³⁰ Conceiving of an unfair term as an issue of consent, which goes to formation of the contract, and assimilating

¹²² *Uber*, *supra* note 1 at para 89.

¹²³ *Ibid* at para 173.

¹²⁴ See note 88.

¹²⁵ *Uber*, *supra* note 1, at para 96, n 8. The authorities cited in the footnote refer to a different doctrine of "unconscionability," found in the case-line headed by *Hunter Engineering Co v Syncrude*, [1989] 1 SCR 426 [*Hunter*]; and *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*]. The *Tercon* unconscionability doctrine is seen by some scholars as a Canadian version of the US doctrine of unconscionability, which controls unfair contract terms (see notes 89–91): see e.g. McCamus, *supra* note 5 at 440ff; Waddams, "Unconscionability," *supra* note 87 at 543. Read narrowly, it applies only to exclusion clauses, mirroring controls in the *UCTA* (UK), *supra* note 88, that as with these Canadian cases replaced the doctrine of fundamental breach. Either way, these authorities do not pertain to the doctrine of unconscionable bargains. See also *Uber*, *ibid* at para 173. Here, Justice Brown, explains that "use of the term 'unconscionability' in *Hunter Engineering* (and later in *Tercon*) is explained by the fact that unconscionability is often used loosely to refer to a number of different concepts."

¹²⁶ *Uber*, *ibid* at para 90.

¹²⁷ *UCC*, *supra* note 71.

¹²⁸ Farnsworth, *supra* note 90 at 298. See also note 88.

¹²⁹ Farnsworth, *ibid* at 306.

¹³⁰ *Uber*, *supra* note 1 at para 89.

unfair terms to unconscionable bargains, where the normal result is rescission, both reinforce concern that a single term found to be unconscionable is grounds for rescission.

If it does suffice for a finding of unconscionability that one standard form term within a contract is unfair, this will further multiply the new exposure of standard form contracts to rescission for unconscionability: to avert this, every term in the contract would have to stay inside the low threshold of unfairness discussed earlier. This is significant, as standard form contracts tend to contain lengthy sets of terms, and it is widely seen as being the case in standard form contracting that it is typically only a particular term that is unfair, while the contract as a whole is fair.¹³¹ Thus, given the stipulation that a lone unfair term now suffices for a finding of unconscionability, many more contracts will fall offside of the doctrine and be at risk of avoidance. The difficulty of complying term-by-term with a low and unpredictable standard of unfairness collaterally increases the spectre of disruptions to broader economic planning around standard form contracts, noted earlier. Considering the inherent unpredictability of assessing unfairness at the level of a low standard, a firm hoping to ensure the stability of its standard form would have to err on the side of drafting *contra se* every term in which it and form-recipients have opposing interests. The detrimental impact of this on its business would thus be felt not only contract-by-contract over mass use of the standard form on the scale of its market, but also term-by-term through the form itself. In short, the drafter's difficult predicament will be compounded by the additional alteration of the doctrine noted here.

All in all, the discussion in this part points to the reconstruction of the doctrine of unconscionability without a knowledge requirement along with the associated other changes surveyed above as presenting special difficulties for standard form contracting. And those difficulties are significant. An expansive and unpredictable doctrine of unconscionability threatens the large-scale ordering that standard form contracts are designed to, and do, effectuate.¹³² From the parties' perspectives, firms are caught between the risk of their standard form being voidable en masse for unconscionability, or the risk of drafting a form that is legally safe but unfavourable for business. If this predicament results in barriers to use of standard forms, this will not help the parties who are currently form-recipients: they share in the efficiency-savings of standard form contracts;¹³³ and in contemporary society "[I]f we would become almost impossible, if we had to ponder and inspect the risks every time we made a contract."¹³⁴ Hence, the reimagined doctrine of unconscionability's indiscriminate approach to policing contractual unfairness could, paradoxically, be socio-economically regressive by imposing crushing informational transaction costs on the parties whose vulnerability it seeks to protect.¹³⁵ This will happen if the doctrine's reformulation results in practice in these parties having to inform themselves of the terms and prove to the drafting firm that they have done so, or else have to obtain their exchange needs elsewhere through a classic negotiation process, at greatly added cost and trouble. As courts have realized since the industrial revolution, standard form contracts, despite their well-known flaws, are a

¹³¹ Llewellyn, *supra* note 92 at 366.

¹³² Slawson, *supra* note 45 at 530; Moore, *Regulating Boilerplate*, *supra* note 78.

¹³³ Kessler, *supra* note 78 at 632.

¹³⁴ Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) at 3.

¹³⁵ See notes 83–84.

socio-legal institution integral to the modern economy. The special difficulties that the new doctrine creates for their use could therefore cause significant economic disruption.

V. THEORETICAL SIGNIFICANCE FOR THE DOCTRINE AND FOR THE LAW OF CONTRACT

Discussed in Part IV was the practical significance for the law and for the market of the new incarnation of unconscionability. I now turn to the theoretical significance of this new conception of the doctrine, without a knowledge requirement, and with the associated other changes surveyed earlier. Part V.A below addresses the theoretical question of what idea the newly reimagined doctrine embodies, if without a knowledge requirement it should no longer be seen as about exploitation. Part V.B then considers the theoretical significance of this new basis for transactional relief in the context of broader ideas about the nature of contractual relations.

A. UNCONSCIONABILITY AS RELIEF FROM IMPROVIDENCE RATHER THAN EXPLOITATION

Theoretically, the significance of the knowledge requirement did not lie in the knowledge itself. Rather, it was in constituting the minimum conduct seen as wrongful in the face of the counterpart's disability.¹³⁶ This was crucial, given the theoretical conception of the traditional doctrine and its surviving siblings elsewhere as being about relieving exploitation.¹³⁷ As "unconscionability" referred to an unconscious abuse of power, it was necessary to be able to say that the strong party did not act conscientiously in respect of its counterpart's impairment.¹³⁸ If the stronger party had actual knowledge of the impairment, it did not act conscientiously in wrongfully disregarding this knowledge in the making of the contract. If it had only constructive knowledge, it still did not act conscientiously in wrongfully failing to take the steps it was reasonably expected to take which would have made it aware of the impairment (and hence the need to have regard to it). Fixed with or having that knowledge, the stronger party wrongfully proceeded nonetheless in concluding a contract disadvantageous to the impaired party.

The elimination of the doctrine's knowledge requirement, combined with the associated other alterations discussed earlier, yield a reconstructed doctrine that must fundamentally rest on a different idea in offering a disadvantaged party relief from a contract it has made. In that regard, it holds great significance. As the doctrine can apply whether or not the benefiting party knew or should have known of its counterpart's impairment, it cannot be about improperly taking advantage of such an impairment. It is oxymoronic to speak of

¹³⁶ See notes 21–22.

¹³⁷ See notes 8–9.

¹³⁸ See note 11.

“inadvertent exploitation.”¹³⁹ The reconceived doctrine is unconcerned with whether the benefiting party engaged in wrongdoing.¹⁴⁰

A requirement of “procedural unconscionability” was retained as an element of the revised doctrine. However, as noted earlier, it is inapparent in what sense the benefiting party’s procedural conduct could be described as “unconscionable” without that party having reason to know there was a procedural issue on account of which it should have acted differently. The word “unconscionability” in the requirement of procedural unconscionability is now nothing more than a reference to the name of the doctrine itself. Arguably, the term procedural unconscionability is still useful in distinguishing that element of the doctrine from its other element of substantive unconscionability. Procedural unconscionability requires either inequality of bargaining power or standard form contracting with a form-recipient ignorant of the terms; substantive unconscionability requires that the agreement was improvident for the complainant. The word “procedural” in procedural unconscionability properly denotes the former condition relating to the circumstances in which the contract was made as distinct from substantive unconscionability which is concerned with the exchange itself. However, as mentioned, without a knowledge requirement, the “unconscionable” aspect of procedural unconscionability lacks its traditional deeper meaning of conduct by the defendant that was unconscientious, wrongful, or exploitative in taking advantage of the counterpart’s disability. The change is therefore fundamental.

The reimagined doctrine is concerned instead only with the situation of the disadvantaged party.¹⁴¹ It offers relief to a party that made an improvident bargain while in an asymmetric position vis-à-vis the benefiting party. In negotiated contracting, the asymmetry is in power; in standard form contracting, it is in information. The singular focus on the position of the disadvantaged party gives the reinvented doctrine a distinct one-sided character. The one-sidedness of the new doctrine is both novel and notable.

It is true that the traditional doctrine and its siblings had been the subject of debate as to whether they were “defendant-sided” (focused on the benefiting party’s wrongdoing) or “plaintiff-sided” (focused on the other party’s disadvantage).¹⁴² However, that debate was about the *relative* emphasis of these elements within the doctrine. As discussed earlier, the conventional view was that besides one party’s disability, there was at least a knowledge requirement of it by the other party.¹⁴³ Thus, while the doctrine did not require that a more active form of exploitation had necessarily taken place, the knowledge requirement represented a minimum level of wrongdoing by the stronger party that justified upsetting its reliance on the validity of the contract.¹⁴⁴ It failed to act conscientiously, given the circumstances of its contracting partner’s impairment.¹⁴⁵ The Supreme Court’s implication

¹³⁹ *Uber*, *supra* note 1 at para 85.

¹⁴⁰ *Ibid* at para 84. Although this does then represent a “no fault” conception of unconscionability, I disagree with Justice Brown’s characterization of it as “strict liability,” as the doctrine of unconscionability is not a head of liability; rather, it is a basis for unwinding a transaction. While that could well result in a correlative transfer of wealth, the term “liability” is not normally used to describe this.

¹⁴¹ *Ibid* at para 85.

¹⁴² *McInnes*, *supra* note 3 at 537–44.

¹⁴³ See note 6.

¹⁴⁴ See notes 22–27.

¹⁴⁵ See notes 9, 11.

that it was simply endorsing the “plaintiff-sided” view in the debate about the doctrine’s relative emphasis therefore was incorrect, as discussed earlier.¹⁴⁶ In reality, the Supreme Court was introducing a radical new theory of unconscionability willing to rescind a contract without the benefiting party being blameworthy in any sense at all. This new doctrine finds it appropriate to rescind a contract looking at the situation solely from the perspective of the disadvantaged party — concerned simply to relieve that party of an improvident agreement it made from an unequal position.¹⁴⁷

Besides the novel one-sided character of the doctrine as reconceived, a second thing to note is its principal preoccupation with the substantive unfairness of a contract. Traditionally, the doctrine in Canada and its siblings elsewhere were in fact viewed as tilted towards procedural concerns.¹⁴⁸ This is reflected in the relatively narrow and exceptional circumstances in which the doctrine applied. With the liberalization of the procedural conditions of the doctrine’s application, it now applies in much wider circumstances. These include, as noted earlier, routine procedural circumstances such as parties of unequal bargaining power negotiating a contract or the party receiving a standard form contract being unfamiliar with the terms. Most contracts are made in such procedural circumstances. For all those contracts, in the absence of a knowledge requirement, unconscionability comes down to the substantive fairness of the contract itself. Beneath its evocative name, and despite the strict procedural requirements that characterized it traditionally and elsewhere, the crux of the doctrine in Canada now is simply whether the contract is fair. If a court concludes that it is not, it will be voidable for unconscionability.

The new substantive focus of the doctrine is greatly magnified by the associated change discussed earlier of lowering the threshold of substantive unfairness necessary for a finding of unconscionability. Previously and elsewhere, where a high degree of unfairness was required, the substantive unfairness of the contract was less a question than a reason for one: the unfairness was so blatant, it “call[ed] for explanation,”¹⁴⁹ leading to scrutiny of the procedural circumstances that normally is not called for.¹⁵⁰ However, under the new doctrine’s low threshold of unfairness *simpliciter*, substantive unconscionability is a question that will be relevant for many contracts, and perhaps even individual terms. And because the subjectivity of assessments of this makes for unpredictability, the risk is difficult for parties to alleviate. Were there a knowledge requirement, some stability could be had by acting conscientiously in the contracting process. But with the knowledge requirement discarded, the substantive question will constantly loom overhead. The lowered threshold of unfairness thus supports the concern of the new doctrine with allowing a disadvantaged party relief from an improvident agreement.

¹⁴⁶ *Uber*, *supra* note 1 at paras 84–85. See notes 32–35.

¹⁴⁷ The language of “plaintiff-sided” and “defendant-sided,” stripped of further contextual detail, is potentially misleading in that the plaintiff could in fact be the stronger party if, for example, it sued to enforce the contract.

¹⁴⁸ Bigwood, “Antipodean Reflections,” *supra* note 5 at 188–91, 204–207.

¹⁴⁹ Moore, “Denning’s Lead Balloon,” *supra* note 5 at 279; quoting *Royal Bank of Scotland v Etridge (No 2)*, [2002] 2 AC 773 (HL (Eng)).

¹⁵⁰ *Alec Lobb* (HC), *supra* note 7 at 95; *Morrison*, *supra* note 2 at 721; *Floyd*, *supra* note 65 at para 149; Bigwood, “Antipodean Reflections,” *supra* note 5 at 204; Moore, “Denning’s Lead Balloon,” *ibid* at 278.

The discussion above explained how the doctrine as reconceived embodies a fundamentally different idea of what provides a basis for relief from a contract than the traditional doctrine and its siblings. Accordingly, it would help to be able to set it apart from the traditional doctrine that we remember and its surviving relatives elsewhere. The name “unconscionability” reflects the conventional doctrines’ concern with knowingly taking advantage of a counterpart’s disability. It highlights the requirement of “exploitation” in that sense. By contrast, since exploitation and indeed conscience play no role in the new doctrine, as it eschews a knowledge requirement, it may be confusing or misleading to speak of it being a doctrine of unconscionability. As discussed in this section, the new doctrine distinguishes itself by its lack of concern for blameworthy conduct by the benefiting party, minimal concern with procedural problems (as the doctrine’s procedural conditions are satisfied in routine circumstances), but overriding aversion to holding a party that was weak (even just in some ordinary way) responsible for an agreement it made that was substantively improvident. With these as its distinguishing features, it could be seen as embodying the idea of absolution: a doctrine of Contractual Absolution. As an unofficial label, this serves at least to highlight its key contrasts from the traditional doctrine occupied with relieving exploitation.

B. THE DOCTRINE OF CONTRACTUAL ABSOLUTION

Within the grander picture of the law of contract, what ultimate significance does this doctrine of Contractual Absolution have? In other words, what is the significance of the revised doctrine allowing a party who made an improvident bargain, affected by merely “ordinary” frailties, to be absolved of the consequences, independent of any wrongful conduct by the other party in the making of the contract?

Although the Supreme Court has suggested that this is consistent with — and indeed gives better effect, to contract theory than the traditional doctrine — its fit seems to me much more uneasy.¹⁵¹ To a degree, the traditional doctrine of unconscionability fit uneasily with contract theory. Enforcing promises, protecting reliance, and maintaining stability are key values that help explain why the traditional doctrine was confined to a limited scope of application through restrictive procedural and substantive conditions, discussed earlier. However, on those conditions, the availability of the doctrine also protected key values, in its concern for one party’s decisional autonomy being seriously constrained¹⁵² and the other party — where the knowledge requirement was met — having exploited that.¹⁵³ In these regards, the traditional doctrine is seen as fitting with other established doctrines such as duress and undue influence that embody similar concerns at that broad level.¹⁵⁴ These, as noted, also include a knowledge requirement.¹⁵⁵ Without one, the new doctrine arguably falls in a different category. As the previous section considered, it is not concerned with whether the counterpart’s conduct was exploitive, or even with whether the disadvantaged party suffered

¹⁵¹ *Uber*, *supra* note 1 at paras 55ff.

¹⁵² See note 5.

¹⁵³ See notes 6, 8-11.

¹⁵⁴ *Bundy*, *supra* note 14 at 339; SM Waddams, “Unconscionability in Contracts” (1976) 39:4 Mod L Rev 369; Cartwright, *supra* note 9 at 214-20; Matthew DJ Conaglen, “Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh” (1999) 18:4 NZULR 509; Moore, “Denning’s Lead Balloon,” *supra* note 5.

¹⁵⁵ See note 28.

from an unusual impairment. Its overriding preoccupation is with substantive disadvantage residing in the contract itself. Looked at from various established points of view, the existence of such a doctrine seems surprising, as it challenges some basic understandings about contract law, going to the root of what a contract is and how it works.

As alluded to above, unlike the traditional doctrine, the new doctrine has a very expansive scope of application, with contracts made in routine circumstances meeting its liberalized procedural conditions. Also, the unpredictability of assessments of substantive unfairness under the low threshold for this required under the new doctrine would realistically make it difficult for a party to contract on terms that would be useful for business, yet safe from a risk of being voidable as unconscionable. It was further argued that in most cases in which the benefiting party lacked knowledge of its counterpart's impairment, the weaker party itself *will* have had at least constructive knowledge of its impairment. Besides being the most common scenario, this one is also perhaps the most striking in terms of whether it is reconcilable with conventional understandings of contracts. The discussion below therefore focuses on this scenario.

One conventional view is that a contract creates mutual obligations between parties. It could be argued that the doctrine of Contractual Absolution disrupts this basic understanding of contracts. By virtue of it, only one of the parties is obliged; the other party effectively is not, in that it can enter the contract, but later get itself absolved of its obligations. It can get itself released from the obligations independent of any fault by the other party having contributed to the making of those obligations. Thus, factoring in the new doctrine, a contract would instead of mutual obligations effectively create on one side obligations but not rights, and on the other side, rights but not obligations. This highlights how the one-sidedness of the new doctrine more broadly affects contractual relations in a way that undermines the idea of reciprocity often associated with contract law. In theory and in practice, the doctrine clashes with reciprocity in contractual relations. In consumer law terms, one might see the doctrine of Contractual Absolution as effectively providing the consumer, or weaker party of another type, a kind of eternal "cooling off period" during which it can cancel the contract even if there had been no exploitation by the other party.¹⁵⁶

Another conventional understanding of contracts is that they consist of an exchange of binding promises between parties. The doctrine of Contractual Absolution seems to challenge this basic conceptualization of contracts too. Accounting for the impact of the new doctrine, only one party is bound to its promises; the other party makes promises, but is effectively not bound to them, as it can get itself relieved of them through the doctrine. It can be released from its promises even if it was not in any way induced into making them by wrongful conduct by the other party. Relatedly, the intent to be legally bound is a conventional way of describing one of the conditions of the valid formation of a contract. However, given the doctrine of Contractual Absolution, a party aware of its status as the weaker party under the doctrine can intend to enter a contract, but not intend to be legally bound in that if it wishes it could later seek to be released from its promises through the new doctrine. Rather than

¹⁵⁶ Cooling off cancellation windows under regulation are typically confined by situation and duration. See e.g. Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 3rd ed (Oxford: Hart, 2012) at 199–212. See e.g. *Consumer Protection Act*, SO 2002, c 30, Schedule A, ss 28, 35, 43, 51.

speak of intent to be legally bound, one could use the alternate conventional phrasing of an intent to create legal relations. But this phrase would be stripped of much of its meaning in that it would no longer implicitly suggest the nature of those legal relations, captured by the phrasing that invokes binding promises. Under the new doctrine of Contractual Absolution, a weaker party aware of its status could intend to decide at some future point — after the contract is already in force — whether to legally bind itself to the promises it initially made. Legally, there might actually be no fixed point at which the party must form that intent; presumably, it could continue indefinitely to intend to decide later. It could wait until the contract is fully performed,¹⁵⁷ at which point it no longer contains future promises. Even then, the party could possibly still get the transaction rescinded.

Another conventional understanding of contracts sees them as protecting the reasonable expectations of a party based on the legal commitments it has exchanged.¹⁵⁸ This idea is not reflected in an obvious way in the doctrine of Contractual Absolution. The party not under the disability but also not expected to know of it reasonably expects that the contract is valid and that the specific commitments it received will be protected by law either through performance or equivalence. But these expectations will be disappointed by the new doctrine, which absolves the counterpart from having to fulfill its primary commitments and from a secondary requirement to compensate the party for not performing the primary commitments. In allowing the counterpart to back out of its commitments, the new doctrine is unconcerned with whether the reliant party's expectation that those commitments would be honoured specifically or by equivalence was reasonable in that the commitments were not affected by any wrongful action on its own part. The doctrine's lack of concern for making good the loss of expectancy suffered by the party that reasonably relied on the contract's validity also demonstrates how the doctrine of Contractual Absolution does not fit easily with commutative justice perspectives on contracts. The benefiting party committed no wrong that must be corrected.¹⁵⁹ Arguably, the doctrine is not based on a theory of justice at all, but on mercy.

Finally, one last conventional account of contracts is that they allocate or effectuate a compromise of risks between parties.¹⁶⁰ The doctrine of Contractual Absolution fits uneasily with this account as well. As a result of the new doctrine, only one party assumes risks; the other party does not, in the sense that if things go well, the party will retain the contract, but if things do not go well, they can get out using the new doctrine. From that standpoint, the doctrine enables this party to engage in risk-free contracting. The party enjoys the contract's opportunities, but is not burdened with its risks in that it can get the contract rescinded even though the risks it seemed to have assumed were not the result of any exploitation by the other party. In financial terms, one might see the doctrine of Contractual Absolution as providing the party a kind of unilateral option that the party can act on without having to exercise and thus commit itself to a course of action that it cannot later reverse by invoking the new doctrine.

¹⁵⁷ Provided none of the bars to rescission applies.

¹⁵⁸ Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis Canada, 2018) at 3; Arthur Linton Corbin, *Corbin on Contracts* (St. Paul, Minn: West, 1963) vol 1 at 2.

¹⁵⁹ See e.g. Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012).

¹⁶⁰ Chen-Wishart, *supra* note 7 at 414; Collins, *supra* note 134 at 172.

As the uneasy fit with these various conventional understandings of contracts show, the doctrine of Contractual Absolution is a remarkable development from the standpoint of our existing law of contract.

VI. CONCLUSION

As this article has shown, the omission of a knowledge requirement from the reimagined doctrine of unconscionability in Canada is a feature of considerable significance. That it departs from the traditional Canadian position and ongoing position of sister doctrines elsewhere in the Commonwealth is only the beginning of appreciating its full significance. The inclusion of a knowledge requirement in the traditional doctrine and its siblings was crucial in their giving effect to the idea that the doctrine serves to relieve exploitation. Knowledge, actual or constructive, represented a minimum level of conduct that could be considered wrongful, in the sense of knowingly taking advantage of a contracting partner's impairment in the making of a contract. With the knowledge requirement excised, the doctrine can apply without any misconduct by the defendant of the unconscionability claim. Unsurprisingly, this produces results that from a conventional perspective seem unjust.

Moreover, the absence of a knowledge requirement in the reinvented doctrine of unconscionability carries practical and theoretical significance worthy of scholarly reflection. Its practical significance is especially apparent in the context of the associated other changes made concurrently with it, which expand the scope of application of the doctrine as a measure which could counter inequalities produced by freedom of contract. Taken together, their vast expansion of the doctrine's scope of application make the new doctrine — including its omission of a knowledge requirement — of increased significance. Many contracts across a wide range of contexts, including routine instances of standard form contracting, are subject to the new doctrine and its capacity to avoid contracts without the defendant of the claim having had knowledge of any defect in the making of the contract. Various associated changes also interact with the elimination of the knowledge requirement in specific ways of additional significance. Notably, these include liberalization of the procedural circumstances serving as conditions of the doctrine's application, and intensification of the new doctrine's scrutiny of the substantive fairness of contracts.

Emerging from the reflection in this article is a reconceived doctrine that no longer gives effect to the idea of relieving exploitation, as did the traditional doctrine of unconscionability and its siblings elsewhere. Rather, the new doctrine is characterized by a one-sided focus on the position of the disadvantaged party. And further, as suggested, its principal concern in respect of that party is harshness if courts enforce the substantive disadvantage.¹⁶¹ The doctrine serves to relieve the disadvantaged party from a substantively improvident bargain.

It may therefore be argued that the reinvented doctrine no longer embodies an idea intelligible as unconscionability. Rather, it offers absolution to a party disadvantaged by an improvident contract. The new doctrine of Contractual Absolution is a remarkable development in the common law, and one which poses a challenge to conventionally-held fundamental understandings of the nature and effect of contracts.

¹⁶¹ *Uber*, *supra* note 1 at para 61.