CONTRACT LAW — UNCONSCIONABILITY DOCTRINE — SUPREME COURT OF CANADA TARGETS STANDARD FORM CONTRACTS. — *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. 4th 179 (Can.).

When does an agreement "drive[] too hard a bargain for a court of conscience to assist"?[1] Recently, in *Uber Technologies Inc. v. Heller*,[2] the Supreme Court of Canada confronted this question in the context of Uber's attempts to quash court proceedings brought by one of its drivers and compel arbitration in accordance with the contract he had signed. The Court rejected Uber's efforts after finding the arbitration clause unconscionable and, therefore, unenforceable — a predictable result in light of the steep upfront costs arbitration would have imposed on the driver. Yet the concurring and dissenting opinions raised important questions about the majority's wide-ranging denunciation of Uber's standard form contract. The Court justified its treatment of the contract in part by pointing to the presence of a link between standard form contracts and unconscionability in U.S. unconscionability doctrine. In doing so, however, it overlooked divergent approaches to such contracts within the United States, an omission that underscores criticisms that charge the majority with crafting an overbroad decision.

On January 19, 2017, David Heller, a thirty-five-year-old resident of Ontario who used the UberEats app to earn money delivering food, commenced a proposed class action against Uber,[3] alleging that it had violated Ontario's Employment Standards Act[4] by not recognizing its drivers as employees.[5] Heller, who worked forty to fifty hours a week using the app and earned CAD 400–600 a week doing so,[6] had entered into a driver services agreement with Uber in order to use the app.[7] The agreement was governed by the laws of the Netherlands and stated that any disputes would be subject to mediation and binding arbitration,[8] a process entailing upfront costs to Heller of USD 14,500.[9]

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[1] Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir. 1948).

[2] 2020 SCC 16, 447 D.L.R. 4th 179 (Can.).

[3] The named defendants in the suit were Uber Technologies Inc., Uber Canada, Inc., Uber B.V., and Rasier Operations B.V. They are collectively referred to as "Uber" because the distinctions between them are not relevant here.

[4] S.O. 2000, c 41 (Can.).

[5] Heller v. Uber Techs. Inc., 2018 ONSC 718, paras. 2, 26, 421 D.L.R. 4th 343 (Can. Ont. Sup. Ct. J.).

[6] *Id.* para. 29.

[7] *Id.* paras. 17–19, 27–28.

[8] Heller v. Uber Techs. Inc., 2019 ONCA 1, para. 11, 430 D.L.R. 4th 410 (Can. Ont. C.A.).

[9] *Id.* para. 15.

The Ontario Superior Court of Justice heard Heller's claim and granted Uber's request for a stay of proceedings in favor of arbitration.[10] The court explained that cases where an arbitrator prima facie has jurisdiction should be referred to the arbitral authority to determine "what, if anything," falls outside of her jurisdiction.[11] Turning to the exceptions in Ontario law from the rule on referring disputes to arbitration, the court found that the agreement was not unconscionable,[12] and thus not excepted from referral, because the court "[did] not see how it can be said that Uber preyed [on] or took advantage of Mr. Heller."[13]

The Court of Appeal for Ontario reversed the order.[14] The court expressed some uncertainty about the appropriate test for unconscionability but concluded that the arbitration clause was unconscionable under either the four-part test employed by Ontario courts[15] or the two-part test applied by the concurring and dissenting Justices in *Douez v. Facebook, Inc.*,[16] and that Uber "chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers."[17]

The Supreme Court of Canada upheld the court of appeal's decision. Writing for the majority, Justices Abella and Rowe[18] affirmed the unconscionability of the arbitration clause.[19] The Court, after determining which legislation governed the agreement,[20] examined the applicability of its prior holding in *Dell Computer Corp. v. Union des Consommateurs*[21] that challenges to arbitral authority should generally be resolved by arbitrators.[22] The Court reiterated that where only questions of fact are in dispute, courts should generally refer the case to arbitration, and that mixed questions of fact and law should be referred unless the issues can be resolved through a "superficial" consideration

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[10] *Heller*, 2018 ONSC 718, paras. 3–4.

[11] *Id.* para. 52.

[12] *Id.* para. 74.

[13] *Id.* para. 70.

[14] *Heller*, 2019 ONCA 1, para. 20.

[15] *Id.* para. 60 (describing the Ontario test as requiring "(1) a grossly unfair and improvident transaction; (2) a victim's lack of independent legal advice or other suitable advice; (3) an overwhelming imbalance in bargaining power caused by the victim's [disadvantaged position] . . .; and (4) the other party's knowingly taking advantage of this vulnerability").

[16] 2017 SCC 33, para. 115, [2017] 1 S.C.R. 751 (Can.) (Abella, J., concurring in the result) (requiring inequality of bargaining power and unfairness for unconscionability); *id.* para. 145 (McLachlin, C.J. & Moldaver & Côté, JJ., dissenting) (same); *see Heller*, 2019 ONCA 1, para. 61.

[17] *Heller*, 2019 ONCA 1, paras. 62, 68–69.

[18] They were joined by Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin, and Kasirer.

[19] *Heller*, 2020 SCC 16, para. 4.

[20] It found Ontario's Arbitration Act, S.O. 1991, c 17 (Can.), rather than the International Commercial Arbitration Act, S.O. 2017, c 2, sched. 5 (Can.), to be applicable because the dispute was "fundamentally about labour and employment." *Heller*, 2020 SCC 16, para. 19.

[21] 2007 SCC 34, [2007] 2 S.C.R. 801 (Can.).

[22] *Heller*, 2020 SCC 16, paras. 31–46.

of the record.[23] However, it added that Heller's case raised an issue of accessibility that justified a departure from that general rule of arbitral referral, which "did not contemplate a scenario wherein the matter would never be resolved if the stay were granted."[24] The Court thus established that a closer review of the record may be warranted where a bona fide challenge to arbitral jurisdiction exists and there is a "real prospect" that referral would leave the challenge unresolved.[25]

Turning to the merits of Heller's claim, the majority adopted a two-part test for unconscionability that "requires both an inequality of bargaining power and a resulting improvident bargain."[26] With respect to the first prong, the Court noted that the inequality in question need not adhere to "rigid limitations,"[27] but may result from "[d]ifferences in wealth, knowledge, or experience"[28] or "the presence of dense or difficult to understand terms" giving rise to "cognitive asymmetry."[29] With respect to the second prong, the Court noted that "[i]mprovidence must be assessed contextually."[30] Where the weaker party did not understand important terms in the contract, "the focus is on whether they have been unduly disadvantaged by [those terms]."[31] Finally, the Court emphasized that a finding of unconscionability need not rest on proof of one party knowingly taking advantage of the other.[32]

The Court then applied this standard to Heller's claim. In finding inequality of bargaining power, the majority pointed to the fact that Heller was powerless to negotiate the contract he signed, which was offered on a take-it-or-leave-it basis.[33] Though it noted that the presence of a standard form contract does not, "by itself, establish[] an inequality of bargaining power,"[34] the Court suggested that "[r]especting

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[23] *Id.* para. 32.

[24] *Id.* para. 38. In this case, the Court found that "staying the action in favour of arbitration would be tantamount to denying relief for the claim." *Id.* para. 39.

[25] *Id.* paras. 44, 46. It conceded that determining whether there was a "real prospect" of the challenge never being resolved would require "some limited assessment of evidence," *id.* para. 45, a level of scrutiny beyond the assessment of "facts that are either evident on the face of the record or undisputed," which the Court's precedent had associated with superficial review, *id.* para. 36, but warned that the assessment "must not devolve into a mini-trial," *id.* para. 45.

[26] *Id.* para. 65. In defining its test, the majority rejected Uber's suggestion that it adopt a four-part requirement similar to the prevailing test in Ontario courts. *Id.* para. 82.

[27] *Id.* para. 67 (quoting JOHN D. MCCAMUS, THE LAW OF CONTRACTS 429 (2d ed. 2012)).

[28] *Id.* (citing MITCHELL MCINNES, THE CANADIAN LAW OF UNJUST ENRICHMENT AND RESTITUTION 524–25 (2014)).

[29] *Id.* para. 71 (quoting STEPHEN A. SMITH, CONTRACT THEORY 343–44 (2004)).

[30] *Id.* para. 75 (citing MCINNES, *supra* note 28, at 528).

[31] *Id.* para. 77.

[32] *Id.* para. 84.

[33] *Id.* para. 93. The Court also made note of the "significant gulf in sophistication" between the two parties and the absence of any information regarding the costs of mediation and arbitration in the agreement. *Id.*

[34] *Id.* para. 88 (citing S.M. WADDAMS, THE LAW OF CONTRACTS 240 (7th ed. 2017)).

the doctrine of unconscionability has implications for boilerplate or standard form contracts"[35] because such contracts "can impair a party's ability to protect their interests[,] . . . mak[ing] them more vulnerable."[36] It also found that other qualities of standard form contracts render them susceptible to a finding of unconscionability, including that they are "drafted by one party without input from the other and . . . may contain provisions that are difficult to read or understand."[37] Characterizing its extension of the doctrine of unconscionability to standard form contracts as "not radical," the Court noted that the link between such contracts and unconscionability has been suggested in lower courts and in academia for some time, and has been present in American jurisprudence for decades.[38] The result, the Court found, was an improvident agreement with upfront costs that were roughly equal to Heller's annual income,[39] placing arbitration out of reach and rendering Heller's contractual rights "illusory"[40] and the agreement unconscionable.[41]

Justice Brown concurred in the finding that the arbitration clause was invalid, but on the basis of public policy.[42] Casting the agreement as one "*not* to arbitrate,"[43] Justice Brown found that it closed off access to the courts without providing a comparable measure of justice.[44] Underscoring the narrow nature of his opinion, he noted "[i]t will be the rare arbitration agreement that . . . acts as an effective bar to adjudication,"[45] given the Court's acceptance of reasonable limitations on access to justice and the efficiency advantages offered by most arbitration agreements.[46] Justice Brown suggested that the doctrine of unconscionability was ill-suited to resolve the dispute at hand because it was intended to redress significant procedural deficiencies in the contract formation process, and because the only procedural shortcomings uncovered by the majority related to the presence of a standard form

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[35] *Id.* para. 87.

[36] *Id.* para. 89. The Court here offered that some mitigating factors, such as the involvement of "sophisticated commercial parties" or "[s]ufficient explanations" that "offset uncertainty," could help standard form contracts survive unconscionability analysis. *Id.* para. 88.

[37] *Id.* para. 89 (citation omitted).

[38] *Id.* para. 90 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965)); *see also id.* para. 87 (discussing the perspective of the Uniform Commercial Code's (U.C.C.) primary drafter on standard form contracts).

[39] *Id.* para. 94.

[40] *Id.* para. 97.

[41] *Id.* para. 98.

[42] *Id.* para. 101 (Brown, J., concurring).

[43] *Id.* para. 102.

[44] *Id.* paras. 115–19. In these limited circumstances, Justice Brown suggested courts should be allowed to conduct more than a superficial review of the record, but disagreed with the majority's conclusion that a contested hearing on the issue was necessary or beneficial. *Id.* paras. 127–28.

[45] *Id.* para. 130.

[46] *Id.* paras. 129–30.

contract.[47] Finally, he cautioned that the absence of a knowledgeable-exploitation requirement in the majority's unconscionability test,[48] and its embrace of "subjective, even idiosyncratic"[49] analysis with respect to the improvident-transaction prong, would create significant commercial uncertainty in Canada.[50]

Justice Côté dissented, suggesting that Uber's request for a stay of proceedings should be granted provided that the company advance Heller the funds necessary to enter into arbitration,[51] and disagreeing in the first instance with the majority's derogation from the rule that challenges to arbitral tribunal jurisdiction should be decided by the tribunal itself.[52] Justice Côté criticized the majority for setting the threshold for inequality "so low as to be practically meaningless in the case of standard form contracts,"[53] while overestimating Heller's vulnerability and the degree to which the costs of arbitration amounted to a barrier as compared to those associated with judicial proceedings.[54]

The majority's finding that the arbitration agreement was unconscionable is perhaps unsurprising — the agreement presented a seemingly insurmountable obstacle to Heller's ability to vindicate his contractual rights. Yet in the Court's desire to shift its jurisprudence toward a "modern application" of the unconscionability doctrine to standard form contracts, where "the normative rationale for contract enforcement . . . [is] stretched beyond the breaking point,"[55] it painted with a broad brush, an approach that was the subject of compelling critiques from the concurrence and dissent. And while the majority was right to note that U.S. unconscionability doctrine generally recognizes a link between standard form contracts and unconscionability, it overlooked significant diversity in state approaches, an oversight that seems to accentuate the critiques leveled by the concurrence and dissent.

The majority framed the development of unconscionability doctrine in connection with standard form contracts as "not radical," disclaiming any attempt to issue a blanket opinion on standard form contracts.[56] Yet the concurring and dissenting Justices rightly observed that, in crafting its new standard, the majority lumped commonplace characteristics

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[47] *Id.* paras. 157–62.

[48] *Id.* para. 166.

[49] *Id.* para. 170.

[50] *Id.* paras. 164–67, 170.

[51] *Id.* para. 199 (Côté, J., dissenting).

[52] *Id.* para. 222. She also disagreed with the majority's conclusion regarding the applicability of the Arbitration Act. *Id.* para. 218.

[53] *Id.* para. 257.

[54] *Id.* paras. 257, 264, 282–86.

[55] *Id.* para. 90 (majority opinion) (alteration in original) (quoting Margaret Jane Radin, *Access to Justice and Abuses of Contract*, 33 WINDSOR Y.B. ACCESS TO JUST. 177, 179 (2016)).

[56] *Id.*

of standard form contracts, like the absence of negotiation and presence of dense language, into its doctrinal analysis.[57] The broad sweep of that approach was further amplified by the Court's "contextual[]" assessment of the improvident-transaction prong[58] and the seemingly ineffable quality of an inquiry into whether one party has been "unduly disadvantaged" by terms produced by unequal bargaining power.[59] The majority justified linking standard form contracts with unconscionability by pointing to developments in Canadian legal academia and in lower courts. While some commentators had indeed called for the Court to take a sterner approach to such contracts,[60] others were quick to criticize the move as lacking definitional clarity.[61] Nor was the Court's reliance on Canadian precedent immune to criticism: the majority's opinion seemed to go beyond both the framing of unconscionability relied on by the lower courts it cited[62] and the Court's own precedent.[63]

In explaining its decision to link standard form contracts with unconscionability, the Court noted that such a link "has also been present in the American jurisprudence for more than half a century."[64] U.S. jurisprudence made for a seemingly persuasive comparison: Canada and the United States share many of the same common law traditions that

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[57] The majority's decision to do so was made all the more puzzling by the presence of uncommonly pernicious contractual deficiencies unique to Uber's contract, like the exclusion of key contractual terms, which would seem to provide a narrower basis for a finding of unequal bargaining power in this case. *See supra* note 33 and accompanying text.

[58] *Heller*, 2020 SCC 16, para. 75.

[59] *Id.* para. 77.

[60] *See, e.g.*, Jean Braucher, *Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State*, 45 CAN. BUS. L.J. 382, 383 (2007). *But see* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1259 (2003) ("The suggestion by some courts that adhesive contracts are particularly prone to terms that are undesirable for buyers arises from a fundamental misunderstanding about how the market disciplines sellers.").

[61] *See* Jassmine Girgis, *The Expansion of Unconscionability — The Supreme Court's Uber Reach*, ABLAWG (July 23, 2020), https://ablawg.ca/2020/07/23/the-expansion-of-unconscionability-the-supreme-courts-uber-reach [https://perma.cc/P95E-LBEC].

[62] *See Heller*, 2020 SCC 16, para. 90 (citing Davidson v. Three Spruces Realty Ltd. (1977), 79 D.L.R. 3d 481, 493 (Can. B.C. S.C.) (assessing unconscionability by looking at six factors, in addition to the presence of a standard form contract, including whether the plaintiffs' attention was "drawn to the limitation clause . . . [and whether] representations [were] made which would lead an ordinary person to believe that the . . . clause did not apply")); *see also* Braucher, *supra* note 60, at 383–84 (noting Canadian unconscionability doctrine "require[d] a term to be both unusual and onerous, as well as poorly disclosed," and could therefore be "viewed by the judiciary as one to be invoked very sparingly and only against terms considered way beyond the pale," *id.* at 384).

[63] *See* Douez v. Facebook, Inc., 2017 SCC 33, paras. 47, 50–53, [2017] 1 S.C.R. 751 (Can.) (declining to apply unconscionability doctrine to invalidate forum selection clause in standard form contract); *see also Heller*, 2020 SCC 16, para. 162 (Brown, J., concurring) (criticizing the majority for relying on the *Douez* concurrence to justify its holding and noting that "[the] Court has never before accepted that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability").

[64] *Heller*, 2020 SCC 16, para. 90 (majority opinion).

underpin unconscionability doctrine, after all.[65] The comparison also had a claim to established pedigree. The Uniform Commercial Code (U.C.C.) represented the first formal codification of the unconscionability defense in U.S. contract law,[66] and standard form contracts were the focus of the principal drafter, Professor Karl Llewellyn, who "originally intended to . . . invalidate or weaken the force of many such contracts."[67] And since then, the doctrine of unconscionability has indeed been used to invalidate provisions in a wide variety of standard form contracts.[68]

Nevertheless, the Court's cursory reference to the link in U.S. doctrine between standard form contracts and unconscionability belied a more complicated reality. To speak of U.S. contract law, and unconscionability doctrine in particular, in a manner that suggests homogeneity is to overlook the fact that both largely grew out of state law and are thus necessarily heterogeneous across jurisdictions.[69] U.S. courts generally separate unconscionability into two elements: substantive and procedural.[70] At varying levels, U.S. courts do find that the presence of a standard form contract contributes to procedural unconscionability, but few would declare such a contract procedurally unconscionable only because it is a standard form one.[71] Instead, a vast array of extenuating and mitigating factors come into play.

Some courts, like the *Heller* majority, look to the presence of complex language beyond the ken of an ordinary consumer to determine whether procedural unconscionability exists.[72] Yet, even in those jurisdictions, factors extending beyond difficult-to-understand terms to elements such

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[65] *See* S.M. Waddams, *Unconscionability in Canadian Contract Law*, 14 LOY. L.A. INT'L & COMPAR. L.J. 541, 541 (1992).

[66] Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 792 (2016).

[67] *Id.* The *Heller* Court found this history to be significant. *See Heller*, 2020 SCC 16, para. 87 ("As [U.C.C. drafter] Karl N. Llewellyn . . . explained: 'Instead of thinking about "assent" to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all.'" (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960))). The U.C.C. provisions on unconscionability in the end did not reflect Llewellyn's desire to link the doctrine explicitly to standard form contracts. *See* McCullough, *supra* note 66, at 793.

[68] McCullough, *supra* note 66, at 795–96.

[69] *See* Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 758 (2014).

[70] *See* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 11 (2012). The *Heller* Court used the terms "inequality of bargaining power" and "improvident bargain" to describe an analogous test. *Heller*, 2020 SCC 16, para. 65.

[71] *See* McCullough, *supra* note 66, at 782; *see also* Korobkin, *supra* note 60, at 1258 n.201 (citing California, Montana, and Mississippi court decisions as examples equating standard form contracts with procedural unconscionability, but noting that "[t]he majority of courts, however, find that the fact that a contract is adhesive is not alone enough for a finding of procedural unconscionability").

[72] *See* McCullough, *supra* note 66, at 807.

as the time and opportunity available to read a contract are often taken into consideration.[73] And the list goes on: courts have considered, among other factors, the "take-it-or-leave-it nature" of the contract and the presence of economic compulsion,[74] unfair surprise,[75] grossly unequal bargaining power,[76] and monopoly power[77] in assessing unconscionability in standard form contracts. Even the District Court for the District of Columbia, applying the D.C. Circuit's archetypal consideration of unconscionability doctrine in a standard form contract setting relied upon by the *Heller* majority,[78] has interpreted the doctrine as requiring "something more," in the form of "greatly disparate" bargaining power, no negotiation, and great necessity.[79] To different lengths, then, U.S. jurisdictions share the Court's skepticism of verbiage in standard form contracts, but many look for more than a mere showing of difficult-to-read contractual language. Against this laundry list of contractual deficiencies, U.S. unconscionability analysis weighs "the practical utility and universality of [standard] form contracts," which supports enforceability.[80] Subjectivity is the norm in this jumbled landscape.[81]

The comparison drawn by the majority is therefore unlikely to inspire confidence in those who share the concerns of the concurrence and dissent that *Heller* "vastly expand[ed]" the scope of unconscionability doctrine[82] or pointed to the creation of an "illusory" standard[83] applicable to this extremely common species of contract.[84] More likely, the majority's casual reference to U.S. unconscionability doctrine will reinforce the concerns of those who worry that the opinion presages a shift in Canadian contract law back to a time "when equity was measured by the length of the Chancellor's foot,"[85] and further muddies the waters for courts of conscience trying to find the line between the hard bargain and the unconscionable.

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[73] *Id.*

[74] Quilloin v. Tenet Healthsystem Phila., Inc., 673 F.3d 221, 235–36 (3d Cir. 2012) (quoting Salley v. Option One Mortg. Corp., 925 A.2d 115, 125 (Pa. 2007)).

[75] *See, e.g.*, East Ford, Inc. v. Taylor, 826 So. 2d 709, 716–17 (Miss. 2002) (finding arbitration clause printed in miniscule fine print procedurally unconscionable).

[76] *See, e.g.*, Sun Tr. Bank v. Sun Int'l Hotels Ltd., 184 F. Supp. 2d 1246, 1261–62 (S.D. Fla. 2001) (finding forum selection clause presented to hotel guest at check-in unenforceable).

[77] *See, e.g.*, Entergy Miss., Inc., v. Burdette Gin Co., 726 So. 2d 1202, 1208 (Miss. 1998) (finding indemnity clause drafted by monopoly-holding energy supplier procedurally unconscionable).

[78] *See Heller*, 2020 SCC 16, para. 90 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).

[79] Samenow v. Citicorp Credit Servs., Inc., 253 F. Supp. 3d 197, 205 (D.D.C. 2017) (quoting Ruiz v. Millennium Square Residential Ass'n, 156 F. Supp. 3d 176, 181 (D.D.C. 2016)).

[80] Longegrass, *supra* note 70, at 10.

[81] *See* Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 192, 199–206 (2005–2006).

[82] *Heller*, 2020 SCC 16, para. 103 (Brown, J., concurring).

[83] *Id.* para. 257 (Côté, J., dissenting).

[84] *See, e.g.*, Korobkin, *supra* note 60, at 1203 ("[N]early all commercial and consumer sales contracts are form driven.").

[85] *Heller*, 2020 SCC 16, para. 153 (Brown, J., concurring).