Wright Henry LLP

National Academy of Arbitrators

Michael Wright | May 2022

DECISIONS

Cases
Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora, 2020 CanLII 16750 (ON LRB)
Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII)
Heller v. Uber Technologies Inc., 2021 ONSC 5518 (CanLII)
United Food and Commercial Workers International Union (UFCW Canada) v Uber Canada Inc., 2021 CanLII 39064 (ON LRB)

ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 1346-19-R
Certification (Industrial)

Canadian Union of Postal Workers, Applicant v Foodora Inc. d.b.a. Foodora, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - February 25, 2020

DATED: February 25, 2020

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

The Registrar
Ontario Labour Relations Board
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ONTARIO LABOUR RELATIONS BOARD

THIS IS AN OFFICIAL NOTICE OF THE BOARD

OFFICIAL NOTICES OF THE BOARD MUST NOT BE REMOVED, DEFACED OR DESTROYED

ALL NOTICES MUST IMMEDIATELY BE POSTED BY THE EMPLOYER (IN LOCATIONS WHERE THEY ARE MOST LIKELY TO COME TO THE ATTENTION OF EMPLOYEES OR OTHER INDIVIDUALS AFFECTED BY THE APPLICATION) NEXT TO THE APPLICATION, THE BOARD'S NOTICE TO EMPLOYEES OF APPLICATION, AND/OR THE BOARD'S DECISION

NOTICES MUST REMAIN POSTED FOR 45 BUSINESS DAYS

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1346-19-R**

Canadian Union of Postal Workers, Applicant v **Foodora Inc. d.b.a. Foodora**, Responding Party

BEFORE: Matthew R. Wilson, Alternate Chair

APPEARANCES: Ryan White, Amelia Philpott, Aaron Spires appearing for the applicant; Craig Lawrence, Karina Pylypczuk, David Albert, Sadie Weinstein, Alex Paterson appearing for the responding party

DECISION OF THE BOARD: February 25, 2020

1. When Professor Harry Arthurs introduced the notion of "dependent contractor" to Canadian legal lexicon in his seminal 1965 article[1] – a concept that was adopted by the Ontario Legislature in 1975 – he could not have envisioned that it would apply to couriers using electronic software application ("App") on a smart phone to deliver a customized meal assigned by an algorithm without any direct communication or direct payment with the customer. Foresight of technology was unnecessary because he contemplated a classification of worker to fill the void between an employee and an independent contractor that had sufficient elasticity to adapt to new workplaces and innovative modes of service delivery. Fifty-five years later, Professor Arthurs' proposal has withstood the test of time and made its way into what is colloquially known as "the gig economy".

2. This is an application for certification filed by Canadian Union of Postal Workers ("CUPW" or "the union") under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") seeking to be the exclusive bargaining agent for a group of couriers working in Toronto and Mississauga for Foodora Inc. ("Foodora" or "the employer").

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[1] H. W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16:1 UTLJ 89.

3. The Board conducted an electronic vote commencing on August 9, 2019 and the ballot box was sealed pursuant to the direction of the Board. The primary issue at this stage in the proceeding is whether the individuals subject to the application are dependent contractors (as argued by the union) or independent contractors (as argued by the employer). There is also an unfair labour practice complaint filed by CUPW (Board File No. 1376-19-U), which has been adjourned *sine die* on agreement of the parties.

THE EVIDENCE

4. The parties tendered an Agreed Statement of Facts that was supplemented by sworn declarations of the witnesses and *viva voce* evidence. CUPW called Houston Gonsalves, Ivan D. Ostos, Brice Sopher and Samuel Tyler, all couriers for Foodora that it considered to be representative witnesses. CUPW also called evidence from Dylan Boyko, a former dispatcher with Foodora who was a courier at the time of the hearing. Foodora called Alex Paterson, Head of Rider Management for Canada. I found all of the witnesses to be credible and forthright.

5. As will be apparent throughout this decision, the documentary evidence filed by the parties was very important to the overall analysis.

Overview of Foodora's operations

6. Foodora is a web services company that provides an online marketplace platform connecting consumers to restaurants. It established itself in the Canadian marketplace when it purchased Hurrier in 2015. The Board heard no evidence about Hurrier's operations. Couriers engaged by Foodora are granted access to the platform through the App. The App is owned by Foodora. Couriers use the App to access Foodora's dispatch system, allowing them to receive delivery opportunities.

7. Foodora charges restaurants and customers directly for its services, including accessing the App, marketing, and the services provided by the couriers. Foodora determines the rates charged to restaurants and customers. The restaurants and customers of Foodora do not have direct access to the couriers.

8. Couriers enter into written agreements with Foodora stipulating the terms and conditions of their engagement. These agreements expressly state that the couriers are independent contractors. These

contracts are amended by Foodora from time to time. Mr. Paterson explained that when Foodora purchased the company – Hurrier – it continued using the contract template for couriers. Over time, Foodora made amendments to those contracts in consultation with its lawyers. However, it did not revisit the contracts with existing couriers. The Board was not advised of the differences in the contracts.

9. Although Mr. Paterson testified that nothing prevented a courier from proposing his own amendments to the contracts, he conceded that Foodora did not offer to negotiate and that no courier had ever proposed to amend the contract. After reviewing the contract and considering the evidence of the witnesses, I find that there was no opportunity for a courier to negotiate or amend the contract.

The recruitment of couriers

10. Foodora recruits couriers through its website and uses an online registration system for retaining couriers. As part of this process, couriers are required to confirm that they are eligible to work in Canada, that they are over the age of 19, and must indicate their language preference and vehicle type.

11. Foodora does not conduct hiring interviews. Couriers may be asked to complete a short screening via telephone or SMS message – a type of text messaging using a smart phone. Foodora does not require reference checks, criminal background checks or other similar requirements.

The tools used by couriers

12. Couriers provide most of the tools to perform the work. These are as follows:

(a) Transportation (in the form of a bicycle or car) including covering all costs associated with ownership or leasing, vehicle insurance, maintenance and gas as applicable;

(b) Smart phone capable of operating the App, and covering all costs associated with maintaining an adequate data plan for such device;

(c) Insulated food delivery bag that is at least 14 inches by 14 inches with a flat base; and

(d) All safety equipment, including a bike helmet, bike lights, footwear, eyewear and high visibility garments as applicable.

13. Foodora does not inspect the tools of the couriers other than to ensure the food delivery bag is of sufficient size and condition to transport food. This is usually done by the courier sending a photo of the food delivery bag to Foodora. Mr. Tyler testified that after inspection by Foodora, he was asked to purchase a new courier bag.

14. Foodora does not prohibit couriers from utilizing tools or wearing clothing that are branded with its competitors' names, logos or similar identifiers while performing services on behalf of Foodora.

15. Couriers are responsible for repairs and maintenance to their bicycles and vehicles. Several of the couriers testified that they purchased new tires, brake pads, as well as other parts and paid for various maintenance services. Couriers also purchase helmets, locks, gloves and rain gear. Mr. Gonsalves, who drives a vehicle for Foodora in Mississauga, was responsible for maintaining his own insurance as well as regular vehicle maintenance.

The orientation of couriers

16. Couriers are given an orientation session by Foodora on how to use the App, which usually lasts for 30 minutes. Foodora does not provide any training on the use of courier-supplied tools or the performance of the work itself beyond the use of the App.

17. Foodora publishes a "Rider Guide" online, which sets out how to use the App and Foodora's delivery policies. In addition to the Rider Guide, Foodora uses different social media platforms to engage with couriers and the public. Foodora uses the Heymarket platform to communicate with couriers on shift through Foodora's dispatch using SMS messaging. In essence, Foodora's dispatchers can communicate with couriers using a text message software that is logged and tracked. The Board received many pages of text messages, which will be discussed in greater detail.

Shift schedules

18. Couriers are assigned shifts through the App. The software portion of the App is referred to as "Rooster". Foodora uses an algorithm to create a shift schedule based on anticipated demand. The lengths of the shifts vary and are set in geographic zones within the City of Toronto and the City of Mississauga.

19. The available shifts for the following week are released to couriers each Wednesday. Couriers can select shifts based on three prioritized selection tiers. Couriers who are ranked in the top 30% of total couriers are provided first priority to select shifts commencing at 10:00 a.m. each Wednesday. The remaining 70% of couriers are provided access to view and select shifts commencing at 11:00 a.m. each Wednesday. Couriers who have been idle and have not worked for four consecutive weeks are then provided access to select available shifts at 11:30 a.m. each Wednesday.

20. Additional shifts are added to the schedule by Foodora on an *ad hoc* basis based on anticipated customer demand. Couriers can log into the App to view and select these additional shifts.

21. Couriers are also free to message dispatch to ask if any additional couriers are needed. If dispatch determines, based on demand, that additional couriers are needed, a shift is created for the courier at the time. A courier cannot simply start working for Foodora without the approval of dispatch.

22. A courier may drop a shift with 24 hours' notice without consequence. If a courier wants to drop a shift within 24 hours' of the start of the shift, the courier may seek to swap the shift with a fellow courier. Under these circumstances, the shift exchange takes place through the App. It is not uncommon for couriers to discuss shift exchanges outside the App to ensure someone is willing to take the shift, or attempt to ensure that a friend is able to pick up the shift as soon as the courier releases it back on the App. However, a direct shift swap between couriers is not permitted.

23. If a shift swap is not possible, couriers may notify Foodora and provide an explanation for their inability to work the selected shift. If an explanation is provided to Foodora prior to the start of the shift (e.g. illness), then the courier will not be listed as a "no show". A "no show" is one of Foodora's rider performance metrics, and a courier's rate of

"no shows" will impact the courier's prioritization rate for shift selection, though it is not determinative of such rate.

Vehicles

24. Most of the evidence tendered before the Board dealt with couriers who use bicycles to deliver food. However, Foodora requires couriers working in some geographic zones (such as the west zone in Mississauga) to use a car due to the distance between deliveries. Mr. Paterson testified that Foodora would consider allowing couriers to use other modes of transportation such as electric bikes (or e-bikes) if the courier could satisfy Foodora that the courier could meet the service standard in a safe and lawful manner.

The delivery of food

25. The ordering and delivery process is as follows. A customer who is signed up for Foodora's service on the App is able to place an order through the App with a restaurant that is signed up with Foodora. That restaurant receives the order (on a separate handheld device provided by Foodora) through the App. The App then sends the delivery opportunity to the closest available courier (using an algorithm that takes into consideration certain metrics including proximity). The courier can either accept or decline the order. I will have more to say about Foodora's changing practice when a courier declines an order. If the courier accepts the order, the courier proceeds to the restaurant to pick the order up. The courier is advised the approximate time the order will be ready and the time promised for delivery to the customer. Once the order is ready, the courier takes the order to the customer's location using the most optimal route as determined by the App.

26. There are variations to the process. A large order or corporate order might be manually assigned to the courier by dispatch. A courier may arrive at the restaurant to discover the order is delayed or that a second order has been added by dispatch (the latter incident is referred to as stacking).

27. There is no specific training for the courier, nor are there prescribed standards other than the requirements of the delivery bag. There is no cash in the transaction as the customer pays online through the App, and Foodora, acting as the intermediary, transacts directly with the restaurant.

28. Issues that arise during delivery (e.g. a customer does not answer the door) may be resolved directly by the courier or may be reported to Foodora's dispatch. Although the parties agreed that Foodora encourages couriers to troubleshoot and resolve issues directly, and provides support through dispatch, there are limited options for a courier. The courier cannot alter the price to offer a discount for an issue, nor can the courier provide a coupon for a future delivery. On the other hand, couriers may contact the customer directly to inquire about a substitution at the same price if an issue arises at a restaurant. Any complaints by customers or restaurants may be expressed directly to couriers or to Foodora's customer support by the courier.

29. Where a delivery cannot be completed because a customer is not home or because of an incorrect address, couriers will often first attempt to contact the customer directly through the information made available on the App. If the courier is unable to contact the customer, the courier is expected to direct the issue to dispatch. If the customer cannot be reached, dispatch will ask that the courier keep the order with them and continue to their next order. If the customer is subsequently located, dispatch will inform the courier and the courier will complete delivery of the earlier order prior to accepting their next order.

30. Foodora determines which courier is offered orders based on its algorithm that takes into consideration the GPS location of the courier, the restaurant and the customer.

31. There are circumstances where multiple orders are placed at the same restaurant or nearby restaurants by customers who are in proximity. In these circumstances, Foodora will determine that the most efficient way to deliver the orders is for the assignment to be given to the same courier. This is referred to as "stacks" or "doubles" or "triples".

32. Delivering "stacks" is more lucrative for the courier because the courier is paid double for the same kilometers. While this is most often determined by Foodora without consulting the courier, there was at least one occasion where Mr. Tyler suggested to dispatch that "stacking" would be better.

33. Through the App, Foodora determines the most efficient route for the courier to take to complete the delivery. However, the evidence was that the courier could change the route, and with permission of the dispatcher, could re-arrange the order of delivery if the courier was "stacked".

Foodora deactivates couriers

34. According to the Agreed Facts, couriers are contractually obligated to provide services in an efficient, effective, competent and professional manner. Should a courier fail to meet such standards, whether through complaints, no shows, late logins for selected shifts, or similar issues, Foodora retains discretion to take appropriate action. Such action may include a discussion with the courier, changing a courier's scheduling priority or available shift zones for scheduling, or deactivation of their engagement.

35. Foodora has the discretion to activate or deactivate couriers, in accordance with the terms of their agreement. This occurs in several ways. If a courier does not sign up for a shift over a substantial period – the evidence was anywhere from four to six weeks – the courier is deactivated, but not before being given advanced notice. If a courier responds and indicates that they intend to resume services in the future, their account may not be deactivated. Furthermore, if a courier's account has been deactivated for non-use and the courier wishes to resume providing services, the courier may notify Foodora of such and their account may be reactivated at Foodora's discretion. Mr. Paterson also testified that the list of couriers is reviewed on an annual basis to ensure there has been activity. Couriers are deactivated if they were not active during the winter months. This allows Foodora to ensure that there are enough shifts in the summer months when it is less busy.

Compensation

36. Compensation is determined by Foodora in accordance with the contract.

37. Couriers typically receive $4.50 per order, plus $1.00 per km between pickup and drop off, as well as any tips or applicable incentives. Couriers may request and negotiate adjustments to kilometer calculations to reflect route challenges or changes, changes to drop off locations, and similar issues. This might occur where there are parades, large outdoor events, or severe weather conditions.

Guarantee Zones and Boosts

38. In order to incentivize couriers in designated zones with lower customer demand, Foodora offers a base level guarantee of compensation equal to $16.00 per hour, subject to the courier meeting

established performance metrics (e.g. completing shift, commencing shift on time, completing all deliveries offered while on shift). In such circumstances, Foodora conducts a weekly reconciliation of actual compensation received by the courier (inclusive of tips) against the hours of work performed by the courier at a rate of $16.00 per hour. Foodora then provides a "top up" payment to ensure that the courier has received compensation equal to a rate of $16.00 per hour. If a courier fails to meet the required performance metrics, then the courier receives their normal rate without any "top up" payment.

39. Mr. Gonsalves testified that he was permitted to decline orders, but that this would disentitle him from the guarantee of $16.00 per hour.

40. Occasionally, Foodora offers "boosts" whereby a courier can make more money per delivery should they pick up a shift during peak periods. These premiums are used to try to ensure that Foodora has enough couriers to cover all shifts. The amount and timing of these boosts are solely determined by Foodora.

No deductions from couriers

41. Foodora makes no deductions from courier compensation for tax, employment insurance or Canada Pension Plan purposes. Payment to couriers is processed and transferred through a third-party payment system, VersaPay, on a weekly basis. Couriers are required to maintain a VersaPay account, and payments are accessed by couriers through such a third party.

42. Couriers are not enrolled in any Foodora-sponsored group health benefits. Couriers access WSIB through Foodora. If a courier is injured, they are requested to report their injury to Foodora, however, not all couriers do this. There was no evidence tendered by the parties about access to WSIB benefits or claims that have been made.

Spills

43. Spills are tracked by Foodora via "Spill Reports", which couriers are requested to fill out where an order they are tasked with has spilled. Foodora uses this data to advocate for better containers with restaurants with whom it has a contractual relationship. The parties stipulated the following fact:

> On February 5, 2019, Foodora sent the following weekly announcement to all couriers:

> SPILLS: In the battle against spilled drinks, we are keeping track of orders that contain leaky containers and spills. By doing this we're hoping to gather enough data to help encourage vendors to use leakproof containers.
>
> TO COMPLETE A SPILL REPORT: Take a picture of the spill and send a message along with the order code to Dispatch

Delays in orders

44. When an order is not ready for pick up at the expected time, Foodora provides a $5.00 payment to the courier for each period of twenty minutes the courier waits past the agreed restaurant pick up time. Foodora charges restaurants a penalty for excessive wait times as a disincentive for future delays. The $5.00 payment provided to couriers is a portion of the penalty imposed by Foodora against the restaurant in question. Couriers are provided with the $5.00 compensation regardless of whether the restaurant at issue pays any penalty. Dispatch must approve the payment of any compensation and couriers may be required to provide information proving that they are entitled to the compensation.

Other employees of Foodora

45. Foodora employs employees in a variety of positions, including account managers and customer service employees to perform a host of duties including managing relationships with restaurants, marketing and supporting courier functions through dispatch. Foodora has a team of employees tasked with recruiting new restaurants and a team of employees who are responsible for maintaining relationships with the existing roster of restaurants.

46. The Board heard brief evidence about a pilot project in Ottawa whereby couriers deliver alcohol to customers. The Board was advised that these couriers are treated as employees of Foodora.

Office hours of Foodora

47. Foodora operates office hours for its Toronto office, during which couriers can attend to ask questions or pick up Foodora branded material. The evidence was that Foodora created the office hours to

provide enough support to couriers at specified times. However, couriers are free to come to the office at any time.

The evidence about couriers performing other work

48. The parties narrowed the evidence of the couriers to four couriers as it was impractical and unnecessary to call numerous couriers as witnesses. Through these witnesses the Board heard some evidence about their dependency on Foodora for income and economic wellbeing.

49. All four couriers who testified acknowledged that they worked for other courier delivery services and performed other services. It was also apparent from a chart prepared by Foodora that the four witnesses worked on average more shifts for Foodora than other couriers.

50. Mr. Gonsalves worked approximately five shifts per week and earned $9,595.24 from December 31, 2018 to July 31, 2019. He also worked as a courier for Skip-the-Dishes (a competitor of Foodora) ("Skip") and delivering newspapers for Metroland Media Group. He earned $7,405.31 from Skip in 2018 and $2,007.66 from January 1, 2019 to July 31, 2019. He earned $640.72 from May 9, 2019 to August 12, 2019 delivering newspapers.

51. Mr. Ostos also delivers for DoorDash and UberEats (both competitors of Foodora), in addition to working as a musician. As of July 31, 2019, he had only worked one shift for DoorDash (earning $28.16). From April 2018 to the end of August 2018, Mr. Ostos earned $1,1718.15 from UberEats and was unable to work the rest of the year due to an injury. From January 1, 2019 to July 31, 2019, he earned $3,677.21 from UberEats. During this same period, he earned $7,063.58 from Foodora, and earned $19,290.56 from January 1, 2018 to September 2018.

52. Mr. Sopher also delivers for UberEats and earns some income (approximately $10,000 in each of 2018 and 2019) from his work as a musician/DJ. From March 15, 2019 to August 4, 2019, he earned $4,361.11 from UberEats. From Foodora, he earned $16,499 in 2018 and $5,134.19 from January 1 to August 4, 2019.

53. Mr. Tyler also delivers for Skip and UberEats as well as working at a café. From January 1, 2019 to August 5, 2019, he earned $1,910.89 from UberEats and had not worked for Skip by July 31, 2019. In 2018, he earned $8,469.47 from the café and $3,160.90 between

January 1, 2019 and July 31, 2019. From Foodora, he earned $20,190.96 between January 1, 2019 and August 4, 2019.

54. The four representative witnesses all earned an honorarium of $20.00 per hour from CUPW for time spent during the organizing campaign.

Breaks

55. Couriers can take a break at any time in their shift by advising dispatch that the courier needs a break. Upon request and approval, the courier is taken offline by dispatch. The Board was shown numerous examples of couriers asking for (and always being granted) breaks for issues with a bike or personal issues. Although some witnesses such as Mr. Tyler suggested that he has been denied a break request, I was not shown any example of the communications with dispatch where this occurred. There does not appear to be a limit on the number of breaks or the duration of breaks taken by couriers. However, in order to be on break and not subject to delivery assignments, the dispatcher must approve the break and put the courier offline.

56. Couriers were also put on break by dispatch if the courier declined an order. While the couriers believed that this was a punitive measure to deter declining orders, Mr. Paterson testified that there was an operational reason for placing the courier on break. He explained that by placing the courier on break, it removed the courier from the queue and therefore avoided a situation where the system reassigned the same order to the courier. At some point, Foodora reduced the mandatory break period from five minutes to one minute.

Couriers can ask to be re-dispatched

57. There were numerous examples of couriers asking dispatch to be reassigned or re-dispatched for various reasons that included both personal reasons (e.g. personal preference) or operational (e.g. courier felt it was more efficient to not end shift or delivery in a particular area) Similarly, if a courier did not want to work in a particular area, or did not want to make a delivery to a particular area, the courier can make such a request to dispatch. The evidence was that such requests were usually, if not always, granted. However, the couriers who testified were consistent in their understanding that they needed permission from dispatch to not work in specific areas or deliver to specific areas. They were not permitted to ignore assignment of deliveries.

Changes to start times, end times and new shifts

58. As explained earlier, couriers select shifts to work based on the shift schedule provided by Foodora. Once a courier signs up for a shift, the courier is expected to work the shift or find a substitute. If the courier wishes to start early, start late, leave early or work late on the shift, the courier must secure permission from dispatch.

59. The Board was shown numerous examples where the couriers made such requests to dispatch and were provided with a response to their request. It seems apparent that the response from dispatch was based on demand, anticipated or actual, at the time the request was made. Similarly, there were times when the dispatcher invited the courier to work longer than the stipulated shift and the courier was free to accept or decline without repercussion.

60. On the occasion when the courier sought to end their shift early, dispatch almost always granted the request. While dispatch might encourage the courier to stay, it was clear that the courier's request would almost always be granted. However, Mr. Tyler explained that he rarely asked to leave early or to create a shift for him unless he knew the circumstances allowed for such a request.

Strike notices

61. Dispatchers record problems with couriers in a Rider Feedback Form that was also referred to as a Strike Log. The Rider Management Team reviews the Strike Log and follows up with the courier when deemed necessary. Such issues include refusal to accept an order, refusal or repeated failure to indicate on the App that a delivery was complete, being late for shift, or engaging in inappropriate communications.

62. The expectations for how and when dispatchers record strikes are set out in the Logistics Guide. The Logistics Guide was described by Mr. Boyko as a "training guide" or "best practices guide" that is available online for dispatchers. Mr. Boyko authored parts of the Logistics Guide and explained that it was approved by his superiors.

63. There are three types of strikes: Low, Medium and High. I will briefly set out the types of strikes that are available for dispatchers to issue against couriers. I will go into greater detail when I explain how this demonstrates the level of control Foodora has over the couriers.

64. A low strike is to be issued in the following circumstances: App mis-clicks (a mistake by the courier) that are not immediately reported to dispatch; unreasonable re-dispatches (when the courier asks for an order to be reassigned); leaving in the middle of a shift without asking; poor food handling; purposely delaying order; poor conduct with dispatch; signing in as the wrong vehicle type; wrong order delivered/picked up.

65. Couriers are advised to issue medium strikes in "…situations that are severe enough that is clearly a courier not following procedure and negatively impacting [an] order". This applies when blame can be attributed to the courier, not the restaurant or customer. These situations are listed as follows: "Not following a reasonable unreachable procedure and severely impacting delivery; refusing order after pick-up; disappear mid-shift in understaff/key zone with zero explanation; obvious pickup of incorrect food; inappropriate communication with customer; spillage (obvious negligence); attempting to work without adequate equipment; refusing orders/to move locations within a guarantee zone; signing in then immediately being unable to work; refusing to accept or decline an order".

66. The Logistics Guide states that High Strikes are "…reserved for situations which require immediate follow up from Rider Management and will result in some form of RM feedback to the courier". These are described as follows: criminal issues (e.g. assault, thefts); threatening dispatch; severe negligence and refusal to do due diligence; harassment; and refusing an order after pickup – repeat occurrence. The Guide further directs a dispatcher to assign a high strike to the courier when the following circumstances are present "…took food, never gave to customer; disappearing mid-shift for closing shift or high-leverage hours; GPS spoofing to avoid receiving orders; completely unexplained delays of 30+ minutes or more on an order; running multiple delivery platforms where the quality of Foodora orders is negatively impacted."

67. Couriers who received strikes jeopardized their priority status and thus their access to preferred shifts.

68. There were times (albeit few) when dispatch unilaterally ended a courier's shift before it was scheduled to end. Mr. Tyler's declaration indicates that this occurred to him.

Dual apping

69. There was extensive, albeit inconsistent, evidence about dual apping. Dual apping occurs when a courier is working for Foodora and simultaneously logs in with UberEats, for example, to make deliveries. The courier is essentially juggling both delivery services at the same time.

70. For some time, Foodora prohibited dual apping. However, in spring 2019 it changed its position to allow dual apping provided it did not interfere with the service delivery standards of the couriers on shift.

71. As was apparent from the evidence, it is to the couriers' advantage to dual app since the courier, while on shift with Foodora, can easily log on to UberEats to see what that service is paying for deliveries. The Board heard evidence that other delivery services occasionally paid more than Foodora, and thus made deliveries for the other service more attractive.

72. Mr. Tyler testified that he was unaware that he was permitted to engage in dual apping. He acknowledged that he engaged in the practice, but was careful not to alert dispatch. It was his understanding that dispatch monitored his movements and would be able to detect a travel pattern that suggested that he was delivering for another service. There was one example when he told dispatch he was checking the UberEats App, but he explained that he did so to check his internet connection. Mr. Tyler's evidence was that he was uncomfortable telling Foodora that he was working for both Foodora and UberEats at the same time.

73. Mr. Ostos acknowledged that he engaged in dual apping, but kept this practice secret from Foodora out of fear of consequences. During cross-examination, Mr. Ostos candidly acknowledged if a restaurant preparing a Foodora order was delayed for 20 minutes or more (for which he earned a $5.00 payment), he would occasionally make deliveries for UberEats during the waiting period. He was presented with a comparison of Foodora and UberEats delivery records showing this practice. Mr. Ostos testified that if he was caught by Foodora he believed that he would be disciplined. However, as an experienced courier, he understood what he could deliver for UberEats in a short timeframe and avoid detection from Foodora.

ANALYSIS

74. The Board is tasked with determining whether Foodora couriers are dependent contractors within the meaning of the Act.

75. In their submissions, the parties made reference to the following authorities: *Abdo Contracting Company Ltd*., 1977 CanLII 422 (ON LRB); *Nelson Crushed Stone*, 1977 CanLII 409 (ON LRB); *Indusmin Limited*, 1977 CanLII 520 (ON LRB); *Canadian Fuel Marketers Group, Inc.*, 1978 CanLII 593 (ON LRB); *Blue Line Taxi Co. Limited*, 1979 CanLII 950 (ON LRB); *A. Cupido Haulage Limited*, 1980 CanLII 748 (ON LRB); *Niagara Veteran Taxi*, 1981 CanLII 958 (ON LRB); *Algonquin Tavern*, 1981 CanLII 812 (ON LRB); *Journal LeDroit*, 1985 CanLII 1047 (ON LRB); *Cradleship Creche of Metropolitan Toronto*, 1986 CanLII 1397 (ON LRB); *Hamilton Yellow Cab Company Limited*, 1987 CanLII 3130 (ON LRB); *Carpino Carpentry Ltd*., 1991 CanLII 6081 (ON LRB); *Diamond Taxicab Association (Toronto) Limited*, 1992 CanLII 6786 (ON LRB); *Huntsville District Memorial Hospital (Algonquin Health Services)*, 1998 CanLII 18261 (ON LRB); *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC); *Toronto Star Newspapers Ltd.*, 2001 CanLII 6537 (ON LRB); *Ian Dejordan c.o.b. IDM Refinishing*, 2003 CanLII 6526 (ON LRB); *Excel Forest Products Ltd*., 2004 CanLII 3224 (ON LRB); *Gateway Delivery Ltd*., 2004 CanLII 33775 (ON LRB); *Torbear Contracting Inc*., 2005 CanLII 35124 (ON LRB); *Greater Essex County District School Board*, 2010 CanLII 47130 (ON LRB); *Hamilton Cab*, 2011.CanLII 7282 (ON LRB); *Blue Line Transportation Ltd*., 2012 CanLII 38608 (ON LRB); *Royal Tek Stucco Ltd*., 2012 CanLII 4761 (ON LRB); *Timothy Ronald Spicer o/a T&R Construction*, 2017 CanLII 14550 (ON LRB); *Gates of Humber Ridge Inc*., 2017 CanLII 60996 (ON LRB); *Superior Sand, Gravel & Supplies Ltd*., 1978 CanLII 467 (ON LRB); *Sherman Sand and Gravel Ltd*., 1978 CanLII 563 (ON LRB); *Egg Films Inc*, 2012 NSLB 120 (CanLII); *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33 (CanLII); Peter Barnacle, Michael Lynk & Roderick Wood, *Employment Law in Canada*, 4th ed, vol 1, loose-leaf (Markham, Ont: LexisNexis Canada, 2005); Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed (LexisNexis Canada Inc., 1999); *Canada Post Corporation v Canadian Union of Postal Workers*, 2016 CanLII 79621 (CA LA); *Canada Post Corporation v. Canadian Union of Postal Workers*, 2019 ONCA 476 (CanLII); *Craftwood Construction Co. Ltd*., 1980 CanLII 940; *The Citizen*, 1985 CanLII 990; *Atway Transport Inc*., 1989 CanLII 3245; *Ajax/Pickering News Advertiser*, 1993 CanLII 7838; *Thurston v Ontario (Children's Lawyer)*, 2019 ONCA 640 (CanLII).

76. As I observed at the outset of this decision, the origin of "dependent contractor" in Canadian legal scholarship can be traced to a scholarly article written by Professor Harry Arthurs (see footnote 1) where he proposed the category of "dependent contractor" as an intermediary between, at one end of the spectrum, an employee, and at the other end, the independent contractor. Professor Arthurs argued that dependent contractors ought to have access to the collective bargaining regime.

77. Ultimately, the concept of dependent contractor was adopted and defined by the Ontario Legislature in 1975, in what is now section 1(1) of the Act. That section reads as follows:

> "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

78. It is clear from this definition that individuals *may* be entitled to collective bargaining even if they are not employed under a contract of employment – that is, even if they would not be considered employees at common law.

79. The Act stipulates that an employee under the Act includes a dependent contractor:

> "employee" includes a dependent contractor

80. The Board's historical analysis of dependent contractor status was set out in *Toronto Star, supra*. It is not necessary to reproduce that jurisprudence in this decision. Suffice it to say that the Board has examined iterations of work relationships to determine whether the individuals look more like employees or independent contractors. While the industries have varied (e.g. trucking, couriers, taxi drivers, construction), the essential question for the Board has always been: do these individuals more closely resemble the relationship of an employee or that of an independent contractor? This is a comparative analysis

that focuses on a range of factors in the labour relations context. It has always been, and continues to be, a factual determination.

81. The seminal case, which was the focus of the parties' arguments is *Algonquin Tavern, supra*. In that case, the Board had to determine whether burlesque entertainers were dependent contractors. After reviewing the various frameworks used by the courts and tribunals in Canada and the United States to make such a determination, the Board identified relevant factors that were useful to the analysis, none of which were determinative and all of which had surfaced, at some point, in the Canadian and American jurisprudence. The Board has consistently returned to these factors when examining whether an individual or group of individuals are acting as dependent contractors or independent contractors.

82. Over the years, the Board has observed that the factors set out in *Algonquin Tavern, supra* often overlap. No single factor is determinative and not all factors are applicable in every case. In this respect, it is very much a fact-based inquiry.

83. As the parties focused their arguments on these factors, I find it helpful to analyze the evidence of this case along this framework.

The use of, or right to use substitutes

84. As the Board has said in previous decisions, it is inconsistent with an employment relationship if the individual is able to fulfill the work obligation with someone else's labour and skill.

85. Couriers do not use substitutes. The evidence of the representative witnesses was consistent in that substitutes were not used, nor were they permitted.

86. The evidence of Mr. Paterson was that Foodora required couriers to sign up with Foodora through the App for safety and security purposes. He explained that the company was concerned about releasing addresses, buzz codes, and other personal information of its customers to individuals who were strangers to Foodora. He also explained that when dealing with the safety of its couriers, Foodora needed to know who was on the road and making deliveries for the company in case there were accidents or incidents on the road. Mr. Paterson tried to temper this evidence by suggesting there could be an occasion where he might approve the use of the substitute. However,

it was uncontested that this had never occurred, and Mr. Paterson could not be specific about circumstances when this might occur.

87. The contract prepared by Foodora does not contemplate the use of substitutes. Moreover, Foodora's business is not structured in a way that allows a courier to subcontract the delivery services to substitutes. The use of the App is personalized to the registered user.

88. There were two emails entered as exhibits that terminated a courier's services for using substitutes. In an email dated May 9, 2017, Mr. Paterson informed a courier that "…It's inappropriate to share accounts to setup a person for deliveries who has not first been screened and approved by our recruiting team." In an email dated May 10, 2019, a Rider Fleet Manager terminated a courier's services for, among other things, account fraud. When the courier asked for clarification, the manager wrote, "After completing an order, you sent an inappropriate text message to the customer. The number used to text message the customer was connected to another account under the name of Dorian Pergjoka."

89. Another element to the use of substitutes is the ability to give away shifts. Foodora does not allow direct swaps of shifts. According to the Rider Guide, if a courier provides more than 24 hours' notice that the individual cannot make a shift, that shift goes into a shift pool for other couriers to accept. If the courier requests a shift swap with less than 24 hours' notice and that shift is not picked up by another courier, it is treated by Foodora as a "no show". The courier also has an option of providing reasons to the manager with a request to not count the missed shift as a "no show". The manager has the discretion to grant the request. I will explain the consequences of a "no show" in greater detail later.

90. Several conclusions flow from the evidence about the prohibition against using substitutes. First, it is apparent that the identity of the courier is important to Foodora's business. For reasons of safety and security of its customers and couriers, Foodora needs to know who is delivering food to its customers. Second, Foodora has a system of controls – scheduling, restrictions on shift swaps, processes for requesting absences – to ensure that it knows which couriers are delivering to its customers, the precise time of those deliveries, and any reason for disruption. The deliveries are not mere economic units that can be passed on to friends, subordinates or family members (as was the case in *Toronto Star, supra*). Rather, the reliable and timely delivery

of the food is so important to Foodora's business that it must closely monitor the actions of the couriers and cannot risk losing such control through the use of substitutes.

91. The restrictions on the use of substitutes strongly resembles an employment relationship rather than an independent contractor relationship. Unlike a plumber or electrician, for example, who might use a helper or a substitute to lighten the workload or increase profitability, the courier is limited by Foodora to his own skill and labour, much like an employee is limited in a traditional employment relationship. Thus, this factor favours a conclusion that Foodora couriers are working as dependent contractors.

Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials

92. The statutory definition stipulates that a person can be a dependent contractor even if he owns the tools used to perform the work. Typically, in construction cases, individuals who have been found to be dependent contractors have owned such tools as a van. Thus, the ownership of tools is not a significant factor in the analysis, although it is a factor to be considered.

93. Foodora couriers provide some tools without any input by Foodora: bicycles, helmets, and in some cases, cars. The courier is responsible for the maintenance and repair of these tools.

94. Several tools are provided by the courier, but under specific instruction by Foodora: a delivery bag that must meet specific dimensions; a smart phone that is GPS enabled with a data plan. Foodora argued that, along with the maintenance and repair costs, these tools constituted an investment by the couriers into the business.

95. An important tool provided by Foodora is the App (and the software and algorithms that support the App), which is regularly updated by Foodora.

96. Foodora argued that the Board has not prioritized the value of tools in other cases. I am not persuaded by this point. First, there was no evidence about whether the couriers purchased the bicycle and smart phone for the sole purpose of making deliveries. It seems highly unlikely that these items were purchased exclusively for Foodora work or courier work in general. But, I need not draw any conclusion about those "tools" since the most significant tool is the App. The Board cannot ignore the

significant disparity in the importance of the tools to the delivery of food. Just as the Board would not treat a shovel brought by the employee to the job site as equivalent to the backhoe provided by the contractor, the Board cannot treat the App as an equivalent to the bicycle and smart phone.

97. The software developed and owned by Foodora in the form of an App is the lynchpin in the process to deliver food. It is the mechanism that allows a customer to place an order, for the restaurant to receive the order, and for an algorithm to assign the delivery to the courier. Through the App, Foodora controls payment by the customer, makes payment to the restaurant, and calculates the amount earned (including tips) by the courier.

98. The App also allows Foodora (not the courier) to generate customer lists and information; an inventory of restaurant customers; and goodwill and brand recognition. The App as a tool enables Foodora to continually develop and grow its business. This is not available to the courier who performs the service as determined by Foodora through the App.

99. While the courier must invest in some of these tools by deciding how much to spend on a bicycle or car, the investment need for the App is the single most important part of the system. If Foodora makes a decision about the App – whether it is to make an improvement or find an efficiency – that decision can directly impact the profit/loss of the enterprise. While the tools used to make deliveries are supplied by both the courier and Foodora, the importance of the App cannot be ignored. It is the single most important part of the delivery process and is a tool owned and controlled by Foodora. If the App was software that could be licensed or sold to the courier (e.g. accounting software, a website) for the courier's entrepreneurial activity, the analysis might lead to a different conclusion. But as the evidence made clear, the App is exclusively owned and developed by Foodora. In this respect, the courier more closely resembles an employee who is permitted to use the company's software than an independent contractor.

Evidence of entrepreneurial activity

100. In *Algonquin Tavern, supra*, the Board described this factor as follows:

> *This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business*

> *cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.*

101. When looking at entrepreneurial activity, the Board has said this is a qualitative analysis, not a quantitative measurement (See *Comfort Guard Services*, *supra* at para 14). That is, the focus is on the opportunity or chance of profit/loss by virtue of the individual's entrepreneurial acumen. It is not a measurement of how much revenue is made relative to other factors.

102. Within the Foodora App, couriers can make more money by working harder. That is, an efficient courier delivering food at a fast pace at key times and thus increasing the volume of deliveries will make more money than a courier who does not work as hard. But, this is not entrepreneurial activity. It is no different than an effective salesperson who is paid commission or a person who works more than one job or a worker who produces more on a piece-work compensation scheme.

103. Outside of the App, there was evidence of couriers performing services for more than one App, referred to as dual apping. This arose in two contexts. First, while on shift for Foodora, a courier might make deliveries for UberEats. Second, a courier might make two deliveries for different companies at the same time. In either circumstance, by virtue of the courier's hard work the courier might increase his earnings.

104. This is not entrepreneurial activity. This is not "…*acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking*". It is hard work. And hard work must not be mistaken for entrepreneurial activity. The courier is confined to the rules and restrictions imposed by Foodora and is only permitted to increase his earnings subject to Foodora's rules. For example, Mr. Ostos testified that he could deliver for UberEats while on shift with Foodora so long as it did not impede the Foodora delivery. Mr. Sopher was taken to numerous examples where he asked Foodora to place him on break when the UberEats records indicate that he continued to make deliveries, the implication being that he was dishonest with Foodora in order to take advantage of the surge rates offered by UberEats at peak times. Mr. Paterson acknowledged that Foodora allowed its couriers to dual app provided it did not impact Foodora's delivery standards.

105. Important to this analysis are the restrictions imposed by Foodora on the courier's ability to make a profit. A courier cannot advertise or promote his service, skill or ability. A courier cannot develop individual relationships with customers or restaurants in a way that allows for individual selection or request of that particular courier. A courier could not offer a coupon, discount or incentive to a customer in hopes of gaining loyalty. Other than a tip, a courier cannot be paid any more money than Foodora allows and the entire transaction (other than when a customer gives a cash tip) occurs through the App. The reality is that a courier cannot improve their chance to make profit through the customary entrepreneurial tools.

106. The existence of Foodora's team dedicated to marketing to new restaurants as well as a dedicated team focused on existing relationships with over 4000 restaurants is the type of entrepreneurial activity that couriers have no access to nor are they permitted to engage in.

107. The risk of loss for the courier is minimal since the compensation scheme, as determined by Foodora, entitles the courier to be paid regardless of issues with the restaurant, the customer or the delivery. Foodora bears the risk that if the restaurant makes a mistake or the customer cannot be located. Foodora bears the ultimate risk that when it determines to make changes to the App (e.g. it often pushes out updates); changes its delivery rules (e.g. reducing the time it places couriers on a break following a declined order); or introduces new delivery options (e.g. it recently introduced new deliveries of alcohol in certain regions), that it will result in a loss or profit. It is Foodora that decides whether to introduce such changes based on its own profit/loss strategy and assessment of the marketplace. In circumstances where there is a spill or accident, Foodora arranges for a new delivery and the courier is still paid, occasionally a prorated amount for the portion of the courier's travel. The courier is a mere cog in the wheel that is powered by Foodora.

108. At most, the risk of loss arises because of the couriers' expenses with respect to gas (if the courier operates a vehicle), maintenance, cellular data plan or smart phone. While it is conceivable that a courier might incur more expenses than they make delivering food for Foodora, such risk is remote in the circumstances and was certainly not made out in the evidence.

109. The limitations on entrepreneurial activity are similar to the facts in *Toronto Star, supra*. In that case, the newspaper courier could

deliver papers for a competitor or simultaneously deliver flyers for compensation while delivering the Toronto Star newspaper. The Board found that the newspaper couriers had no entrepreneurial activity:

> 102. This opportunity for entrepreneurial activity by the more enterprising carriers does not alter the relationship of the carrier to The Star. It says merely that carriers are capable of pursuing other ventures, particularly outside of the time they spend delivering papers, and to some limited extent while doing that.

110. The Board went on to say that working multiple jobs was not evidence of entrepreneurial activity. To the contrary, it lends itself more favourably to a conclusion that there is economic dependence on different employers. The Board stated as follows:

> 103. In our view a person working a second or third job does not necessarily imply that they are entrepreneurial or, more exactly for the purposes of a proper analysis of this issue, that they are running their own business. They may just be employees of two or three separate employers or they may be entrepreneurs in respect of some activities and employees in respect of others. While the provision of services to more than one employer may suggest entrepreneurial activity, it may equally suggest economic dependence upon different employers. In any event, as stated above, the important consideration is not whether the carrier is personally economically independent of The Star or an entrepreneur in a successful (other) business, but whether the structure of the relationship between the individual carrier and The Star is such as to draw the conclusion of economic dependence. The position of carrier is what is evaluated and that evaluation occurs in relation to The Star. The economic circumstance of the individual carrier is not the critical indicator. The determination of economic dependence or independence must be made *in the context of the relationship with The Star*.

111. Foodora couriers are able to make more money if they work harder, either through doing more Foodora deliveries or dual apping. But, this is akin to working multiple part-time or casual jobs where the employee decides the most desirable place to work at a particular time. If a salesperson opts to work on a Saturday because commissions will be higher, it is not considered entrepreneurial activity. If a bartender wants to work at night because there are more tips, it would not influence the classification of the bartender as an employee. Foodora

couriers do not have the opportunity to increase their compensation through anything other than their labour and skill. A close examination of this factor supports the conclusion that couriers are dependent contractors.

The selling of one's services to the market generally

112. When examining this factor, the Board considers whether the individual sells his services to multiple purchasers that are diverse in nature. If the individual has a long-standing relationship with one or a limited number of purchasers, he is more likely to be considered a dependent contractor. As explained by the Board in *Algonquin Tavern, supra*, the factor favours the conclusion of dependent contractor if the circumstances or contractual relationship limit the individual's opportunity to utilize his skill with other purchasers or where his primary customer is given a priority.

113. The evidence was clear that when a Foodora courier accepts a shift, he is expected to give priority to Foodora. A courier cannot sit dormant for the entire shift. A courier cannot repeatedly decline orders. A courier cannot simply disappear for the shift or not show up. This was the evidence of the representative witnesses but also matched by Foodora's Logistics Guide. Although couriers may deliver for other courier services (or have other jobs), it is Foodora's policy that its service standards must be given priority. A failure to do so will result in a strike against the courier or, as evident with Darren Whiteley, termination of services.

114. It is also not accurate to say that couriers "sell" their services to other purchasers. Couriers might perform deliveries for compensation, but there is not a packaged skill set or knowledge that is for sale. This is not an akin to a skilled trade performing work on an *ad hoc* basis when the customer needs the service. As already explained, a courier is not able to sell courier services directly to the customer or restaurant. This factor leans more in favour of an employment relationship rather than an independent contractor relationship.

Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes

115. The level of dependence is to be measured from what flows from the terms and conditions of the relationship between the parties (*Blue*

Line Transportation Ltd. *supra*; *The Citizen, supra*). In *The Citizen, supra*, the Board explained:

> 20. It may well be that an individual is "dependent" on more than one person: see *Craftwood Construction Co. Ltd.,* 1980 OLRB Rep. Nov. 1613. [Dependence upon more than one person, however, must be distinguished from dependence upon an industry: *Algonquin Tavern, supra.*] The Board is of the view, though, that the economic dependence necessary under the definition in section l(l)(h) of the Act must flow from the terms and conditions of the relationship between the parties. In the instant case, it is true that the witness stated (and it is to be assumed true) that his only source of income was the company. In that sense, he is in a position of economic dependence. That dependence, however, does not flow from the terms and conditions of the relationship. There is nothing explicitly restricting the drivers from seeking the income (no PCV restrictions, no prohibition against dealing with competitors, etc). Nor are there any implicit restrictions (identification with the company through logos or uniforms, an "on-call" situation for the working day or obligation to serve the respondent first, etc.). ….

116. Flowing from the statutory definition of dependent contractor, the Board's analysis is not directed at the level of dependence on the industry as a whole. Rather, the inquiry is about whether the individual is economically dependent on another person. Chairman Donald Carter described the analysis in *Adbo Contracting, supra*, as follows:

> 27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

117. Moreover, as stated in *IDM Refinishing, supra*, at paragraph 30 the statutory definition does not require an absolute standard of economic dependence, but rather one "more closely resembling the relationship of an employee than that of an independent contractor".

118. Foodora spent considerable time arguing about the significance of the financial earnings of the witnesses and the fact that the representative witnesses worked significantly more than other couriers. Mr. Paterson prepared a document showing, among other things, that the union's witnesses had worked more frequently and earned more money than the average and median number of couriers in a 30-week period in 2019. Foodora relied on this document to argue that couriers had greater independence.

119. It further argued that the evidence of the witnesses' work for other employers demonstrates that the majority of their income was not earned from Foodora. On this basis, it argues that there is no economic dependence on Foodora.

120. The Board accepts that the frequency of work and earnings of the union's witnesses were on the higher end of the scale. The evidence was that Mr. Sopher earned $4,955.34, Mr. Gonsalves earned $9,558.44, Mr. Ostos earned $7,007.59 and Mr. Tyler earned $18,409.83 in the 30-week period in 2019. These witnesses earned a weekly average of $439.34. During this same period, the average earnings for all couriers who worked in that period was $245.07[2]. The union did not shy away from this evidence as very little can be gleaned from these statistics.

121. As explained in *Toronto Star, supra*, the Board has not confined its analysis to simply a numerical measurement of dependence. The focus has been contextual, taking into consideration the terms and conditions of the relationship and the duration of the relationship. The Board explained as follows:

> 22. In *The Citizen*, the Board expressed the view (at 832 ¶20) that actual economic dependence upon the employer is not the critical determinant of whether a person rendering services is a dependent contractor, rather the economic dependence must flow from the terms and conditions of the relationship. This, in our view, is an important distinction. Even if a person who renders services is actually financially

[2] If all couriers are included in the calculation, including those who did not work in that period, the average dropped $192.64.

> independent to an extent which means that he or she is not economically dependent upon the employer, or, by contrast, even if he or she is actually economically dependent upon the employer, that does not mean that he or she is respectively an independent contractor or a dependent contractor. What is important is not the actual economic circumstances of the individual rendering the service or services, but whether the structure of the relationship between that individual and the employer is such as to draw the conclusion that the terms and conditions of the relationship renders the individual economically dependent upon the employer. Of importance is the kind of dependence of the contractor in relation to the employer.
>
> 23. The duration of the relationship of dependence in an employment or service arrangement may be a relevant consideration: whether the dependence is on-going, or not. This factor may assist in determining whether a contractor is dependent or independent. Generally, if the relation of dependence is on-going, that would suggest economic dependence. So, those whose services to the employer are for a limited and specific task, definable in time, usually have an independent contractor relationship. Despite a temporary reliance upon the work provided by the employer, the overall relationship is one in which the service provider, the contractor, is engaged for only a limited period of time by the employer, and hence is not typically dependent. In contrast, those whose economic dependence is on-going and of indefinite duration suggests a relationship of economic dependence. The kind of dependence is the central consideration. Can the individual contractor be said to be dependent upon the employer for the means of his or her livelihood. If so, then he or she is akin to an employee and so a dependent contractor. Another factor which may be relevant is whether the service provider serves only one customer. This factor may suggest a relationship of economic dependence.

122. The portability of the App (couriers are not physically linked to a worksite) and the nature of the business allows couriers flexibility in the performance of the work. The evidence showed that couriers are able to make deliveries for more than one company provided they do not compromise Foodora's service standards. However, much of the couriers' work is controlled by the App using an algorithm developed, owned and controlled by Foodora for the sole purpose of advancing Foodora's business interests.

123. Foodora argues that couriers have little to no dependence on Foodora as couriers are free to (and often do) work for other food courier companies. It points to its drop-in orientation session, lack of specific on-the-job training, and the numerous ways couriers can choose to work for Foodora as examples of the independence of the couriers. However, this fails to take into account that Foodora has a network of incentives and prohibitions to steer and control the behaviour of the couriers. The union pointed to three specific examples.

124. First, Foodora controls the structure of shifts, when shifts are offered, how many people can work, the length of shifts, and the geographical zones. Access to the scheduled shifts is based on the courier's rating as determined by Foodora. Access to *ad hoc* shifts (at either the request of the courier or Foodora) is closely controlled by Foodora to ensure that service delivery needs are met and also that there is sufficient work for the scheduled couriers. There were also examples where a dispatcher contacted the courier if the courier was late signing in for his shift.

125. Second, once a courier accepts a shift, Foodora controls how that shift can be swapped, returned back to the scheduling system or removed from the courier's obligation without penalty. There is no need to repeat what I have already described about Foodora's rules in the Rider Guide. It is also possible for a dispatcher to end a courier's shift if the courier engages in misconduct during his shift. Foodora must also grant permission (through a dispatcher) to a courier who wants to work an unscheduled shift or stay later. Such permission is often granted, but is dependent on customer demand and service levels. Couriers are not free to work whenever they want to.

126. Foodora also "thins" its list of couriers on an annual basis by removing couriers who have not performed services for Foodora. Mr. Paterson explained that a separate "thinning" process occurs when couriers who have not registered for a shift for an eight-week period are de-registered from the App. Thus, a courier is required to take shifts in order to remain registered with the App. Unlike an independent contractor who may move from client to client, the courier must maintain an ongoing relationship with Foodora.

127. Finally, once a courier is assigned an order, he is expected to accept it and make the delivery. Foodora tendered evidence that its previous practice of tracking the rate of declines by a courier has ended. While that may be true, it is indisputable that couriers on shift are

expected to accept deliveries on the App when they are assigned. The business of Foodora would suffer, if not fail, if there were widespread declines of orders. A courier could not simply decline all orders for an entire shift or transfer orders to another courier. To the contrary, the courier is expected to make a request if he wants a break or to leave early. The dispatch logs presented before the Board contain many such examples. While Foodora argues that such requests are so routinely granted that it is tantamount to a notification as opposed to a request, this does not change the fact that a courier is required to make a request to dispatch for all interruptions of service.

128. Other restrictions on mobility exist. A courier who wishes to utilize the Guarantee Zone must meet the stipulated criteria. The Rider Feedback Report is replete with strikes against couriers for being unresponsive (otherwise referred to as "ghosting"), refusing orders after accepting them, making a late delivery, or failing to indicate on the App that the delivery was completed. Dispatch can also close a zone at any time, thus limiting a courier's ability to work in that area. Mr. Boyko testified that this occurs during parades, road closures or large events, such as a Toronto Raptors game.

129. The fact that couriers had other sources of income is not necessarily indicative of economic independence. It is not uncommon for individuals to have multiple part-time jobs. Individuals may work at one part-time job more frequently than another. This does not deprive them of their employment status, nor does it suggest that they are economically independent. In the Board's view, the evidence of the couriers reflects the common challenges faced by workers with multiple part-time jobs. The only difference is that couriers are on-call for work through sophisticated technology and utilize their downtime to work a second job. The technology allows Foodora to call upon the courier when customer demand is present in real time.

130. There is a risk in placing too much emphasis on measuring economic dependence by way of a numerical threshold as urged by the employer (e.g. the percentage of work performed by an individual for a particular entity versus other entities). This is especially true for employees who work multiple part-time jobs. While some cases may lend themselves to that analysis (see for example *Blue Line Transportation*, *supra* where taxis could not be used for any other income), it will not be appropriate in sectors where services are performed on a part-time basis. Certainly, the statutory definition that governs the Board's analysis does not call for a numerical measurement.

131. Foodora filed a recent decision of the Ontario Court Appeal in *Thurston, supra*. Although Foodora made no submissions about this case, I will briefly address why it is distinguishable from the instant matter as Foodora made reference to the case in its opening statement. The case arose in the context of a wrongful dismissal action filed by a lawyer who had provided legal services to the Office of the Children's Lawyer for over 13 years. When her retainer was not renewed, she brought a claim alleging that she was a dependent contractor and entitled to 20 months' notice of termination. The Court applied the traditional common law test for dependent contractor and found that the Plaintiff had only earned 39.9% of earnings from the Defendant and therefore could not be considered dependent at law.

132. The decision in *Thurston, supra* does not impact the Board's analysis for several reasons. The primary reason is that the Board is confined to the statutory definition of dependent contractor, which does not place an emphasis on an economic measurement of dependency with a numerical threshold. The analysis in *Thurston, supra* was with respect to the common law tests for determining dependent contractor status. Additionally, for more than three decades, the Board's jurisprudence has examined the nature and context of the relationship, whether that relationship arises in the construction sector, the trucking industry, the taxi service or with couriers. In each of these cases, evidence was tendered about levels of control, entrepreneurial activity and independence with a focus on the fundamental question: does the individual look more like an employee or an independent contractor. Finally, Foodora's submissions were focused on the application of the Board's jurisprudence with specific attention to the factors in *Algonquin Tavern, supra*. Again, other than filing a copy of the case, *Thurston, supra* was not mentioned as a supporting authority for Foodora's case.

133. The Board was referred to numerous cases where dependent contractors had multiple sources of income: *Toronto Star, supra*; *Cradleship Creche, supra*; *Journal Le Droit, supra*; *Huntsville District Memorial Hospital, supra*. This is particularly common in the construction industry where skilled trades will perform work for more than one company: *Carpino Carpentry, supra; Royal Tek Stucco, supra*; and *Gates of Humber, supra*. In these cases, the Board found that the individuals had no real ability to generate their own customers or line of business. The same conclusion applies to couriers working for Foodora (see also *Toronto Star, supra* at para 103).

134. The duration of the relationship is part of the analysis with a longer relationship demonstrating a stronger case of economic dependence. As a relatively new company, it is understandable that Foodora's couriers would not have a long tenure. Mr. Gonsalves has been a courier since November 2018; Mr. Ostos since 2016; Mr. Sopher since 2015; and Mr. Tyler since 2019. On a continuing and weekly basis, they signed up for shifts or picked up shifts. While I accept the employer's point that the representative witnesses disproportionately worked more frequently than other couriers, their tenure and regular service for Foodora looks more like an employment relationship than an independent contractor.

135. The Board was advised in closing submissions that of the 1191 couriers (including those that were challenged), 23% of the couriers had more than 19 months of service as of January, 2018. While this certainly indicates a high degree of turnover, it also indicates a substantial number of couriers have tenure with Foodora. On its own, it is difficult to draw a conclusion. But, when considered with Foodora's insistence that its couriers remain active, and Foodora's practice of "thinning" its list, the tenure of the couriers resembles a part-time or casual workforce.

136. The evidence must be considered in the context of the work environment. These couriers do not report to a specific worksite. They do not have a single supervisor. They may never know their work colleagues. There is no opportunity for job promotion, skill enhancement, or development. The traditional factors that support job tenure are not present in this work environment. This says nothing about the couriers' commitment to Foodora when performing the work. But, it does help explain why tenure may not be as important a factor in this type of work environment.

137. After carefully considering the evidence with respect to mobility and independence, the Board is convinced that this factor weighs in favour of the conclusion that the couriers are dependent contractors. There is a complex system of incentives and restrictions that limit the choices of the courier. It has the hallmarks of the type of employment relationship the Board often sees in the form of an on-call employee or elect-to-work employee.

Evidence of some variation in the fees charged for the services rendered

138. The ability to negotiate or alter fees is indicative of independent contractor status. The corollary is also true – the inability to alter fees or the presence of a uniform fee structure suggests employee status. However, where the services and fees are standardized, or the market is competitive, this factor may be neutral.

139. All Foodora couriers share the same terms and conditions as determined by Foodora subject to Foodora's practice of allowing longer service couriers to continue work under the terms and conditions of their pre-existing contracts. This practice has no impact on the uniform fee schedule charged by Foodora to its customers. Although Mr. Paterson testified that it is conceivable for a courier to propose a change to the contract, it has never occurred and there does not appear to be an opportunity to negotiate with Foodora. The couriers who testified described a similar scenario of being presented with the terms and conditions as determined by Foodora with the requirement that the courier sign the contract before being allowed to register on the App.

140. The rates are not standardized in the market. UberEats pays a different fee structure than Foodora that is based on supply and demand. While Foodora's fees have some variance, its fee structure for delays and corporate orders is prescribed by Foodora. Mr. Boyko testified that dispatch may manually adjust compensation for travel if there are road closures. But a courier is unable to unilaterally adjust those rates.

141. A Foodora courier has no independent opportunity to vary his rate. A courier cannot, for example, charge more because of poor weather or less because of good road conditions. A courier cannot vary the fee depending on demand from customers or supply of couriers at a particular time. Moreover, there is no ability to negotiate with the customer or the restaurant to vary the rate. Even when a courier is delivering a corporate order, the gratuity is prescribed by Foodora.

142. The inability to vary the fee charged by the courier makes the courier more like an employee who receives a standard wage rate (or piece rate) rather than an independent contractor who has the ability to vary his fees to suit his needs or the environment.

The extent, if any, of integration

143. It bears repeating that the Board's experience in applying these factors is that there is considerable overlap and to some extent interdependence among the factors. With respect to integration, the Board, in *Algonquin Tavern, supra,* explained the following at paragraph 64:

> Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization.

144. Couriers are heavily, if not entirely, integrated, into Foodora's business. Foodora's revenue depends entirely on the reliable and timely delivery service of the couriers. In turn, the couriers rely solely on Foodora's App – an instrument that facilitates relationships, as well as payment, with customers and restaurants. With the exception of a layer of supervisors and the dispatchers (who might be supervisors, but that is not a conclusion I need to make), couriers are the service side of the business.

145. The level of integration is even greater than the Board found in *Toronto Star, supra*, which was described as follows:

> 49. A significant portion, in excess of 60%, of The Star's revenue is derived from its home delivery business. The Star's economic success depends measurably upon the effectiveness and reliability of its home delivery operation. The Star's business needs an effective distribution system. The carriers must perform their work properly and punctually for the profitable success of the paper.

146. In *Toronto Star, supra*, couriers could identify themselves to the customer and give a Christmas Calendar, provided by the Toronto Star, with their name and phone number. This does not exist with Foodora couriers who have little or no interaction with the customer other than to deliver the food. It would only be by coincidence that a courier might encounter the customer on more than one occasion.

147. There is no opportunity, nor reason, for the Foodora courier to develop any type of relationship with the customer or restaurant. In

every practical sense, Foodora ensures the relationship is between itself, the customer and the restaurant. The courier is a cog in the economic wheel – an integrated component to the financial transaction. This is a relationship that is more often seen with employees rather than independent contractors.

148. Foodora argued that the Board should be concerned with how the couriers identify themselves. It points to an exchange between Mr. Tyler and dispatch when Mr. Tyler identified himself as an "independent contractor" in an attempt to enforce his rights to decline an order. Foodora relies on *Journal LeDroit, supra,* at para 21 where the Board said that the parties' perspectives are useful. It also referred to *Ajax/Pickering News Advertiser, supra,* where the Board noted that the couriers had treated themselves for tax purposes as independent contractors.

149. A single incident by a courier sending an SMS message to a dispatcher in the heat of a moment to assert independence is not persuasive evidence of the couriers' perspective about their status. It sheds no light on how couriers perceive their relationship with Foodora or how they declare their relationship with Foodora for tax purposes or other purposes. It could just as easily be interpreted as nothing more than Mr. Tyler reminding dispatch what he has been told by Foodora, that he is an independent contractor. It is not persuasive evidence of his status nor his perception of status.

150. The Board concludes that when examining the level of integration, the couriers more closely resemble employees rather than independent contractors.

The degree of specialization, skill, expertise or creativity involved

151. The parties agreed that this factor was non-existent in this matter as there was no specific degree of specialization. The factor is neutral.

Control of the manner and means of performing the work

152. As I have explained throughout this decision, Foodora has implemented numerous controls on the generation and flow of work, whether it be from developing relationships with restaurants, to the exclusive utilization of the App, to the scheduling and control of the couriers' work.

153. In addition to tracking and reporting issues with couriers, and investigating issues, the use of Global Positioning System ("GPS") technology is an additional layer of control. The dispatch logs reveal questions from dispatchers to couriers about their location. It would be unwieldly to go through all of these examples. A few will suffice. On January 6, 2019 Mr. Gonsalves was told by the dispatcher that he was going the wrong way and "Return to St. Clair to complete your order!". On January 8, 2019 he was told to "…go back to the zone please". On January 26, 2019, Mr. Gonsalves received the following message: "your GPS hasn't moved for a while, where are you right now?"

154. The GPS tracking was not restricted to Mr. Gonsalves. The following is an exchange with Mr. Sopher and a dispatcher on July 7, 2018:

Dispatcher:	Hey Brice, it looks like your GPS has not moved since you accepted the order. is everything OK?
Sopher:	What you're seeing is wrong as I definitely am on my way
Dispatcher:	now I see youve moved towards the pickup
Dispatcher:	either way order was accepted 20 minutes ago, from dovercourt and bloor it shoudnt take 20 minutes cycling to Christie and dupont.
Dispatcher:	thats walking pace
Sopher:	It really depend on an individual when it comes to walking and biking pace in my experience. It's best not to generalize.
Dispatcher:	if on average it will take you over 20 minutes to travel 1.7 kilometers then you wont make a lot of money on this job Brice.

155. I accept the evidence of Mr. Paterson that interactions between dispatchers and couriers are minimal, perhaps as low as 5% or even lower. I also accept the evidence that dispatchers are not actively monitoring the GPS coordinates of couriers. But, the focus is not on the frequency of exercising control. Rather, it is about the right and ability of the company to control how the work is performed that lends more

favourably to a conclusion that the individuals are dependent contractors. The evidence, as described under the various factors, shows that Foodora couriers might work independently, but always within the parameters unilaterally established by Foodora and under the watchful eye of dispatch. Mr. Boyko testified that dispatchers can monitor the location of the courier and send a message to the courier if there is an issue with their location. Mr. Boyko said that his personal rule as a dispatcher was to only reach out to a courier if he saw no activity for 10 minutes.

156. Moreover, the advancement of technology – algorithms, GPS, automated alerts, SMS communications – allows Foodora to control the operation with minimal human interaction. This does not mean Foodora does not closely supervise the couriers. It is not as though Foodora sends the courier out to make deliveries and hopes the courier reaches the customer. To the contrary, the sophisticated technological advancements permit Foodora to closely monitor every move of the courier to ensure its service standards are met.

157. Such level of control is apparent from reviewing the Rider Feedback Log where dispatchers reported to Rider Management about issues with couriers. These reports were often described as strikes (as described earlier, strikes are issued for undesirable behaviour that is detailed in the Logistics Guide) and recorded when a courier inappropriately declined an order, was unresponsive, was late without explanation, or could not be tracked by dispatch (described by dispatch as MIA).

158. A review of the strike list in the Logistics Guide illustrates the extent of control Foodora has over the couriers. Dispatchers are told to issue a low strike if a courier "mis-clicks" on the App and does not immediately report it to Dispatch. But, Dispatch is also told not to issue a strike if the courier reports the "mis-click immediately" as "…all damage can be mitigated, save for a quick text or call to the customer affected". Another low strike for "Wrong order delivered/picked up" illustrates the same level of control, where the instructions are as follows:

> If the bag has no receipt, or the courier says the restaurant confirmed the code, or if the bag is sealed, you can avoid striking the courier; use your discretion and consider whether the courier is reliable when making your final determination.

159. At its simplest, the dispatcher has the discretion to issue low level strikes against a courier if the courier engages in undesirable behaviour. Whether the objective is to curb the behaviour through punishment or communication is irrelevant since it clearly illustrates that Foodora is monitoring the conduct of couriers and following up with the courier when it feels necessary.

160. The evidence about what constitutes a medium strike further illustrates the persistent monitoring of courier behaviour and enforcement of Foodora expectations. For example, despite Foodora's argument that couriers are free to not work, a medium strike is issued for disappearing in understaffed zones or when a courier's negligence causes a spill. It is apparent that GPS monitoring is involved in this supervision based on the following description [reproduced verbatim]:

> Signing in then immediately being unable to work – the courier logs in to avoid a late, but then needs a break to gather, fix a tire, etc. – also applies if a courier signs in from home and then fails to move towards a pick up

161. This level of monitoring and supervision is what is commonly seen in an employment relationship whereby supervisors are told about the types of behaviour that warrant employee discipline.

162. Much like progressive discipline in an employment relationship, the Logistics Guide calls for escalation of strikes for more serious behaviour. The type of listed behaviours supports the union's contention that couriers have very little choice once on the shift. While the courier might be able to decline an order, the courier must be responsive in a way that conforms with Foodora's expectations. Otherwise the courier will be issued a high strike for repeatedly refusing an order after pick up, disappearing during a high-leverage shift, or GPS spoofing to avoid receiving orders. The point being that once on a shift, a courier is expected to work. This is consistent with the evidence tendered by the representative witnesses.

163. While Mr. Paterson testified that there was minimal follow up with couriers, and often times no follow up, the evidence presented by the union showed examples of severe consequences. In an email dated October 23, 2017, a courier's services were terminated by an email from Oliver Wheller, Courier Growth Manager for "purposeful order delays as a result of you working with another delivery company". Similarly, in an email dated May 28, 2019, William DeSouza, Rider Fleet Manager, terminated a courier's services for "excessive delays" and "consistent

late logins". There were terminations for sharing accounts as well as account fraud and unprofessional behaviour involving a customer.

164. The frequency of interactions with dispatchers is undoubtedly limited because the software (e.g. the App) is so effective at monitoring the delivery process. In as much as Mr. Paterson testified to the minimal interactions with dispatchers, it also demonstrated that Foodora controls the delivery process through the App with minimal human interaction. It is an automated system guided by an algorithm.

165. These two documents – the Logistics Guide and the Rider Guide - set out how the services are to be performed, Foodora's expectations of the couriers, and the consequences of non-compliance with those expectations. When read in the context of the dispatch communications, the Rider Feedback Report, and the evidence of the couriers, these two documents are the type of policy manuals that apply in the traditional employment context. Put simply, the two documents explain how Foodora expects to operate its business.

166. When examining the evidence under this factor, the relationship between couriers and Foodora more closely resembles an employment relationship.

The magnitude of the contract amount, terms and manner of payment

167. The Board has no comparative evidence to measure the magnitude of the contract amount. The sums paid to the couriers are obviously significant enough to motivate them to perform services. At times, couriers are motivated to work for other delivery services or not work at all. It really cannot be said that the magnitude of the contract amount is a relevant factor in the Board's analysis. The parties said as much in their submissions.

168. The terms and manner of payment are more closely aligned with what one might see in an employment relationship. The couriers are paid on a weekly basis by way of direct deposit to their bank account based on the previous weeks' earnings. Through an online system, couriers can access the details of their payment.

169. However, it is conceivable that such an arrangement might also exist with an independent contractor. As such, the Board finds this factor to be neutral to the overall analysis.

Whether the individual renders services or works under conditions which are similar to persons who are clearly employees

170. The parties did not make submissions with respect to this factor. That is likely because their submissions substantially covered this factor under other headings.

CONCLUSION

171. The Board has carefully reviewed the evidence called by the parties using the factors historically considered by the Board from *Algonquin Tavern, supra* in the interpretation of the statutory definition of dependent contractor. The couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora's standards. In a very real sense, the couriers work for Foodora, and not themselves.

172. This is the Board's first decision with respect to workers in what has been described by the parties and the media as "the gig economy". However, the services performed by Foodora couriers are nothing new to the Board and in many ways are similar to the circumstances of the Board's older cases. This is not the Board's first case examining the relationship of couriers. The Board has been tasked with the same questions about dependent contractors in various sectors including transportation and construction. Such cases have always been fact-based inquiries that require a balancing of factors. This case is no different in many respects.

173. For the foregoing reasons, the Board finds that Foodora couriers are dependent contractors and must be treated as such under the Act. As the evidence bears out, couriers more closely resemble employees than independent contractors.

174. There remain outstanding issues between these parties about the eligible voters on the list. The matter is referred to the Manager, Field Services.

175. I remain seized.

"Matthew R. Wilson"
for the Board

APPENDIX A

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Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII)

Date:	2020-06-26
File number:	38534
Other citations:	[2020] SCJ No 16 (QL) — 447 DLR (4th) 179
Citation:	Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII), <https://canlii.ca/t/j8dvf>, retrieved on 2022-03-31
Most recent unfavourable mention:	Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency), 2021 FC 36 (CanLII) [...] [33] Finally, the Respondent submits that **Uber is distinguishable** from the case at hand. [...]

SUPREME COURT OF CANADA

Citation: Uber Technologies Inc. *v.* Heller, 2020 SCC 16

Appeal Heard: November 6, 2019
Judgment Rendered: June 26, 2020
Docket: 38534

Between:

Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V.
Appellants

and

David Heller
Respondent

- and -

Attorney General of Ontario, Young Canadian Arbitration Practitioners, Arbitration Place, Don Valley Community Legal Services, Canadian Federation of Independent Business, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Income Security Advocacy Centre, Parkdale Community Legal Services, United Food and Commercial Workers Canada, Workers' Health and Safety Legal Clinic, Montreal Economic Institute, Canadian American Bar Association, Chartered Institute of Arbitrators (Canada) Inc., Toronto Commercial Arbitration Society, Canadian Chamber of Commerce, International Chamber of Commerce, Consumers Council of Canada, Community Legal Assistance Society and ADR Chambers Inc.
Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Joint Reasons for Judgment: (paras. 1 to 100)	Abella and Rowe JJ. (Wagner C.J. and Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)
Concurring Reasons: (paras. 101 to 176)	Brown J.
Dissenting Reasons: (paras. 177 to 338)	Côté J.

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UBER TECHNOLOGIES INC. *v.* HELLER

Uber Technologies Inc.,
Uber Canada, Inc.,
Uber B.V. and
Rasier Operations B.V. *Appellants*

v.

David Heller *Respondent*

and

Attorney General of Ontario,
Young Canadian Arbitration Practitioners,
Arbitration Place,
Don Valley Community Legal Services,
Canadian Federation of Independent Business,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Income Security Advocacy Centre,
Parkdale Community Legal Services,
United Food and Commercial Workers Canada,
Workers' Health and Safety Legal Clinic,
Montreal Economic Institute,
Canadian American Bar Association,
Chartered Institute of Arbitrators (Canada) Inc.,
Toronto Commercial Arbitration Society,
Canadian Chamber of Commerce,
International Chamber of Commerce,
Consumers Council of Canada,

Community Legal Assistance Society and ADR Chambers Inc. *Interveners*

Indexed as: Uber Technologies Inc. *v.* Heller

2020 SCC 16

File No.: 38534.

2019: November 6; 2020: June 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Contracts of adhesion — Arbitration clause — Validity — Unconscionability — Mandatory clause in standard form contract between driver and multinational corporation requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings — Driver commencing action in Ontario court against corporation — Corporation seeking stay of proceedings based on arbitration clause — Whether action should be stayed — Whether validity of arbitration agreement should be decided by court or arbitrator — Whether arbitration agreement unconscionable — Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(2).

H provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income.

In 2017, H started a class proceeding against Uber in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with H. H argued that the arbitration clause was unconscionable and therefore invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction. The Court of Appeal allowed H's appeal and set aside the motion judge's order. It concluded that H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Abella**, Moldaver, Karakatsanis, **Rowe**, Martin and Kasirer JJ.: Because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, H's challenge to the validity of the arbitration agreement may never be resolved. The validity of the arbitration agreement must therefore be resolved by the court. H's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and H because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US$14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid.

The parties disagreed on the arbitration statute applicable to their dispute. Uber argued that the Ontario *International Commercial Arbitration Act* applies and H argued that the Ontario *Arbitration Act* applies. Whether the *International Commercial Arbitration Act* governs depends on whether the arbitration agreement is international and commercial. That the agreement here is international is not in dispute. Labour or employment disputes are not the type that the *International Commercial Arbitration Act* is intended to govern. The *Arbitration Act* therefore governs.

The Court set out a framework in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 (CanLII), [2007] 2 S.C.R. 801, and *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (CanLII), [2011] 1 S.C.R. 531, for when a court should decide if an arbitrator has jurisdiction over a dispute instead of referring that question to the arbitrator. That framework applies to Ontario's *Arbitration Act*. According to that framework, a court should refer all challenges to an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record — that is, if the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties.

In addition to the two exceptions to arbitral referral in *Dell* and *Seidel*, a court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. Such a situation raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay. One way in which the validity of an arbitration agreement may not be determined is when an arbitration agreement is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for all claims made under the agreement. The arbitration agreement would, in effect, be insulated from meaningful challenge.

Accordingly, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. To determine whether only a court can resolve the challenge to arbitral jurisdiction, the court must first determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator. While this second question requires some limited assessment of the evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. If there is a real prospect that referring a challenge to an arbitrator's jurisdiction to the arbitrator would result in the challenge never being resolved, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record. The Court, therefore, should resolve the arguments H has raised.

Unconscionability is an equitable doctrine that is used to set aside unfair agreements that resulted from an inequality of bargaining power. When the traditional assumptions underlying contract enforcement lose their justificatory authority, this doctrine provides relief from improvident contracts. The purpose of unconscionability is the protection of those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made.

Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect its own interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and must be assessed contextually. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.

The doctrine of unconscionability has particular implications for standard form contracts. The potential for such contracts to create an inequality of bargaining power is clear, as is the potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate a party's reasonable expectations by depriving them of remedies.

Applying the unconscionability doctrine in this case, there was clearly inequality of bargaining power between Uber and H. The arbitration agreement was part of a standard form contract and a person in H's position could not be expected to understand that the arbitration clause imposed a US$14,500 hurdle to relief. The improvidence of the arbitration clause is also clear because these fees are close to H's annual income and are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into.

Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. In this case, the arbitration clause is the only way H is permitted to vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

Based on both the financial and logistic disadvantages faced by H in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

Per **Brown** J.: There is agreement with the majority that the appeal should be dismissed. There is also agreement with the majority that the mandatory arbitration requirement is invalid, but there is disagreement with respect to the majority's reliance upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution — as the arbitration agreement in this case does — are unenforceable not because they are unconscionable, but because they undermine the rule of law by denying access to justice. They are therefore contrary to public policy.

The majority vastly expands the scope of the doctrine of unconscionability's application. This is unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. It is also undesirable, because it drastically expands the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

The public policy doctrine is fundamental to Canadian contract law and provides grounds for setting aside specific types of contractual provisions including those that harm the integrity of the justice system. This head of public policy applies when a provision penalizes or prohibits one party from enforcing the terms of their agreement, which serves to uphold the rule of law. At a minimum, the rule of law guarantees Canadian citizens and residents a stable, predictable and ordered society in which to conduct their affairs. Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. There is therefore no good reason to distinguish between a clause that expressly blocks access to a legally determined resolution and one that has the ultimate effect of doing so. While public policy does not require access to a court of law in all circumstances, any means of dispute resolution that serves as a final resort for contracting parties must be just. Arbitration is an acceptable alternative to civil litigation because it can provide a resolution according to law, but where a clause expressly provides for arbitration while simultaneously having the effect of precluding it, the considerations which promote curial respect for arbitration dissolve. This is where the public policy principle preventing an ouster of court jurisdiction operates.

In evaluating a clause that limits access to a legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. A court must show due respect for arbitration agreements, particularly in the commercial setting. It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship and the possibility for timely resolution but that one party simply regrets in hindsight.

To decide whether a limitation on dispute resolution imposes undue hardship, the first factor to consider is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a

claim is disproportionate to the quantum of likely disputes arising from the agreement, this suggests the possibility of undue hardship. Courts should also consider the relative bargaining positions of the parties. However, to be clear, an imbalance in bargaining power is not required to find that a provision bars access to dispute resolution. Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Here, the arbitration agreement effectively bars any claim that H might have against Uber and is disproportionate in the context of the parties' relationship. This form of limitation on legally determined dispute resolution undermines the rule of law and is contrary to public policy.

While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms or effects, bars access to that very arbitrator. It therefore falls to courts to do so. While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral — where a clause effectively prevents access to arbitration — is necessary to preserve the public legitimacy of the law in general, and arbitration in particular.

Per **Côté** J. (dissenting): The appeal should be allowed and a stay of proceedings should be granted on the condition that Uber advances the funds needed to initiate the arbitration proceedings. One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement. Party autonomy and freedom of contract inform the policy choices embodied in the *Arbitration Act, 1991* and the *International Commercial Arbitration Act* ("*International Act*"), one of which is that the parties to a valid arbitration agreement should abide by their agreement. The parties to the agreement in this case have bound themselves to settle any disputes arising under it through arbitration. The *Arbitration Act*, the *International Act*, the Court's jurisprudence and compelling considerations of public policy require the Court to respect the parties' commitment to submit disputes to arbitration.

The *International Act*, not the *Arbitration Act*, governs Uber's motion for a stay. However, neither the analysis that follows nor the ultimate conclusions would change if the *Arbitration Act* applied. The *International Act* applies to arbitrations which are international and commercial. The arbitration in this case is international because the parties have their residences or places of business in different countries, so the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being commercial in nature. A court should approach this issue by analyzing the nature of the parties' relationship on the basis of a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings. Focussing the analysis on the nature of the relationship created by the transaction is consistent with the weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law. In this case, a superficial review of the documentary evidence reveals that the underlying transaction between Uber and H is commercial in nature. The service agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, a type of transaction identified as coming within the scope of the UNCITRAL Model Law.

A motion for a stay and for referral to arbitration may be dismissed if the arbitration agreement is found to be null and void under the UNCITRAL Model Law or invalid under the *Arbitration Act*. The validity of the arbitration clause in this case should be determined by an arbitral tribunal. There is a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. This is the rule of systematic referral. A court may depart from the rule of systematic referral only if the jurisdictional challenge is based solely on a question of law or a question of mixed law and fact that requires only a superficial review of the documentary evidence, is not a delaying tactic, and will not unduly impair the conduct of the arbitration proceeding. A review is not superficial if the court is required to review testimonial evidence.

H's arguments challenging the validity of the arbitration clause require more than a superficial review of the documentary evidence: H's arguments are dependent upon testimonial evidence regarding his financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the arbitration clause applies.

The Court should not create an exception to the rule of systematic referral. An exception that would apply where an arbitration agreement is deemed to be too costly or otherwise inaccessible is inappropriate for several reasons. First, the rule of systematic referral is the product of an exercise of statutory interpretation, so any exception to it must also be a product of statutory interpretation. The policy considerations relied on by the majority cannot be used to make the *Arbitration Act* or the UNCITRAL Model Law say something they do not say. Second, the Court has already declined to allow courts discretion to fully entertain a challenge to an arbitration agreement's

validity. Third, it has also decided that delaying tactics should be counteracted by confining the scope of review on a motion for a stay to the documentary evidence. Fourth, the ordinary operation of the rule of systematic referral under an agreement governed by a foreign choice of law clause is not a loophole, and there is no basis in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not. Fifth, there is no basis for concluding that the mandatory fees for the administration of mediation and arbitration proceedings under the International Chamber of Commerce's ("ICC") *Arbitration Rules, Mediation Rules* ("ICC Rules") are significant relative to H's claim, given that the amount of the claim is unknown and no explanation is given by the majority for concluding that H will be unable to reach the physical location of the arbitration. Furthermore, there is disagreement with Brown J. that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*. Legislation which facilitates the enforcement of agreements to submit disputes to arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction. Courts retain an oversight role throughout the arbitration process and afterwards as proceedings commenced in contravention of an arbitration agreement are stayed, not dismissed, and as the stay may set conditions specifying how the parties are to proceed to arbitration.

The issues as to the doctrine of unconscionability, the *Employment Standards Act, 2000* ("*ESA*"), and public policy raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that documentary evidence and, if the Court could consider the testimonial evidence in the record, it is insufficient to support a finding that the arbitration clause is unconscionable, inconsistent with the *ESA*, or contrary to public policy.

There is agreement with Brown J. with respect to the unconscionability doctrine in the general law of contracts. The unconscionability doctrine applies where there is (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and where (3) the stronger party knows of the weaker party's vulnerability. The key question in relation to the significant inequality of bargaining power is whether the weaker party had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests, thereby undermining the premise of freedom of contract. The majority's claim that vulnerability in the contracting process may arise from provisions in standard form contracts which are dense or difficult to read or understand sets the threshold so low as to be both practically meaningless and open to abuse. This sweeping restriction on arbitration clauses in standard form contracts would be best left to the legislature, especially since the sharing economy — a vital and growing sector of Canada's economy which depends on standard form contracts that are agreed to electronically — could be stifled if a reduced threshold for inequality of bargaining power is adopted.

H's claim that the bargain was improvident rests on three propositions: (1) the place of arbitration clause requires him to travel to Amsterdam at his own expense, (2) the choice of law clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment of fees which he alleges are disproportionately high. As to the place of arbitration clause, the place of arbitration is a legal concept which denotes the parties' selection of a particular jurisdiction whose arbitration law governs proceedings, and under whose law the arbitral award is made. There is no obligation to actually conduct the arbitration at the place of arbitration. As to the choice of law clause, arguments directed at the alleged unfairness of having the service agreement governed by foreign law are analytically distinct from those concerning alleged unfairness arising from the arbitration clause itself. The separability doctrine holds that arbitration clauses embedded in contracts should be treated as independent agreements that are ancillary or collateral to the underlying contract. The result is that the alleged invalidity of the choice of law clause on the basis that it is unconscionable does not affect the validity of the arbitration clause. As to the selection of the ICC Rules, arbitration agreements involve a mutuality of exchange, so mandatory fees which apply to disputes initiated by either party would make pursuing a claim for a small amount just as uneconomic for Uber as for H. Therefore, if unfairness results from the imposition of the ICC fees on hypothetical claims for small amounts, the unfairness is mutual. In any event, the actual amount of H's claim is unknown, and establishing that a dispute over a small amount is likely would require the production and review of testimonial evidence. The proportionality of the ICC fees to H's ability to finance a larger claim must be measured as of the time the contract is formed, and the Court has no evidence regarding his financial position at that time.

The evidence does not support a finding that Uber had constructive knowledge of H's alleged peculiar vulnerability. It would have been impossible for Uber to be aware of H's specific income and education level when he decided to become an Uber driver, or that he intended to use the Driver App as his primary source of income. In any event, such questions would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

The arbitration clause is not invalid under the *ESA*. The ability to file a complaint under the *ESA* is not an employment standard since the relevant section does not require an employer to do or not do anything. As such, the arbitration clause does not unlawfully contract out of an employment standard. In any event, a court cannot determine that an arbitration agreement is invalid pursuant to the *ESA* without first finding that the parties involved are an employer and an employee. Whether H is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of a superficial review of the documentary evidence. The rule of systematic referral applies, and the parties should be referred to arbitration.

The arbitration clause is also not invalid under public policy. The Court should not create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy. The *Arbitration Act* and the *International Act* are strong statements of public policy which favour enforcing arbitration agreements. When considering whether, or how, to refashion old common law doctrines regarding arbitration, the Court should continue to embrace a more modern approach to arbitration law which views arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. The Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered by the courts, as they are instead matters for the elected policy-makers who sit in the legislature.

The pro-arbitration stance taken by legislatures across Canada and by the Court supports a generous approach to remedial options which will facilitate the arbitration process. Two such options include ordering a conditional stay of proceedings and applying the doctrine of severance. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. Courts should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal, but a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration. In addition, compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be unenforceable.

In light of the evidence that H cannot afford the ICC fees, Uber should be required to advance the filing fees to enable him to initiate arbitration proceedings. In addition, if the arbitration clause were unconscionable or contrary to public policy, the selection of the ICC Rules and the place of arbitration clause could be severed. The majority does not explain why they have chosen not to address severance in their reasons. Defeating the parties' commitment to submit disputes to arbitration based on a hypothetical case would be commercially impractical and, given that the dispute actually before the Court concerns a proposed class proceeding for CAN$400,000,000 and that the amount of H's individual claim is as yet unknown, absurd. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their operations. The arbitration clause should be upheld.

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Aspen Insurance UK Limited*, 2018 ABQB 207, 17 C.P.C. (8th) 81; *Houston v. Exigen (Canada) Inc.*, 2006 NBQB 29, 296 N.B.R. (2d) 112; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986; *Williams v. Amazon.com, Inc.*, 2020 BCSC 300; *In re Estate of Millar (Charles), Deceased*, 1937 CanLII 10 (SCC), [1938] S.C.R. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540; *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Shafron v. 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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Pardu and Nordheimer JJ.A.), 2019 ONCA 1, 145 O.R. (3d) 81, 430 D.L.R. (4th) 410, 31 C.P.C. (8th) 1, 52 C.C.E.L. (4th) 10, 85 B.L.R. (5th) 1, 2019 CLLC ¶210-027, [2019] O.J. No. 1 (QL), 2019 CarswellOnt 1 (WL Can.), setting aside a decision of Perell J., 2018 ONSC 718, 421 D.L.R. (4th) 343, 17 C.P.C. (8th) 342, 79 B.L.R. (5th) 136, [2018] O.J. No. 502 (QL), 2018 CarswellOnt 1090 (WL Can.). Appeal dismissed, Côté J. dissenting.

Linda M. Plumpton, *Lisa Talbot* and *Sarah Whitmore*, for the appellants.

Michael Wright, *Lior Samfiru* and *Danielle Stampley*, for the respondent.

Christopher P. Thompson and *Paul Sheridan*, for the intervener the Attorney General of Ontario.

John Siwiec, for the intervener the Young Canadian Arbitration Practitioners.

Robert Deane and *Craig Chiasson*, for the intervener the Arbitration Place.

Alexandra Monkhouse and *Andrew Monkhouse*, for the intervener Don Valley Community Legal Services.

Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

Marina Pavlovic and *Johann Kwan*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Nabila F. Qureshi and *Karin Baqi*, for the interveners the Income Security Advocacy Centre and Parkdale Community Legal Services.

Steven Barrett and *Joshua Mandryk*, for the intervener the United Food and Commercial Workers Canada.

Kevin Simms and *John Bartolomeo*, for the intervener the Workers' Health and Safety Legal Clinic.

Robert Carson and *Lauren Harper*, for the intervener the Montreal Economic Institute.

Alyssa Tomkins and *James Plotkin*, for the intervener the Canadian American Bar Association.

Joseph C. McArthur and *Rahat Godil*, for the interveners the Chartered Institute of Arbitrators (Canada) Inc. and the Toronto Commercial Arbitration Society.

Matthew Milne-Smith and *Chantelle Cseh*, for the intervener the Canadian Chamber of Commerce.

Andres C. Garin and *Alison FitzGerald*, for the intervener the International Chamber of Commerce.

Mohsen Seddigh and *David Sterns*, for the intervener the Consumers Council of Canada.

Wes McMillan and *Greg J. Allen*, for the intervener the Community Legal Assistance Society.

Andrew D. Little and *Ranjan K. Agarwal*, for the intervener ADR Chambers Inc.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ. was delivered by

ABELLA AND ROWE JJ. —

[1] In this appeal, the Court determines who has authority to decide whether an Uber driver is or is not an "employee" within the meaning of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"): the courts of Ontario or an arbitrator in the Netherlands, as provided for in the contracts of adhesion between Uber and its drivers?

[2] David Heller provides food delivery services in Toronto using Uber's software applications.[1] To become a driver for Uber, Mr. Heller had to accept, without negotiation, the terms of Uber's standard form services agreement. Under the terms of the agreement, Mr. Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. Mr. Heller earns between $400-$600 a week. The fees represent most of his annual income.

[3] Mr. Heller started a class proceeding against Uber in 2017 for violations of the *ESA*. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands. In response, Mr. Heller took the position that the arbitration clause[2] in Uber's services agreements is invalid, both because it is unconscionable and because it contracts out of mandatory provisions of the *ESA*. The motion judge held that he did not have the authority to decide whether the arbitration agreement was valid and stayed Mr. Heller's proceeding (2018 ONSC 718, 421 D.L.R. (4th) 343). The Court of Appeal reversed this order, determining, among other things, that the arbitration agreement was unconscionable based on the inequality of bargaining power between the parties and the improvident cost of arbitration (2019 ONCA 1, 430 D.L.R. (4th) 410).

[4] We agree with the Court of Appeal. This is an arbitration agreement that makes it impossible for one party to arbitrate. It is a classic case of unconscionability.

Background

[5] Uber operates a global business in more than 600 cities and 77 countries, with a customer base of millions of people and businesses. The company has been operating in Ontario for eight years.

[6] Uber's software applications are widely used to arrange personal transportation (the Rider and Driver Apps) and food delivery (the UberEATS App). Customers and drivers can download Uber's Apps onto their smartphones. Customers use the Apps to place requests for transportation or food delivery. Drivers use the Apps to view and respond to customer requests. Payment between the customers and drivers is facilitated through Uber's Apps, and Uber takes a share of the drivers' payments.

[7] The first time drivers log on to an Uber App, they are presented with a standard form services agreement of around 14 pages. To accept the agreement, the driver must click "I agree" twice. Once the driver does so, the Uber App is activated and the services agreement is uploaded to a "Driver Portal", accessible to the driver through an online account. The parties to the services agreement are the driver and Uber subsidiaries incorporated in the Netherlands with offices in Amsterdam.

[8] The services agreement includes mandatory arbitration and choice of law clauses, which state:

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws . . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") . . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands . . . .
>
> (C.A. reasons, at para. 11)

[9] The choice of law clause requires the agreement to be "governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws". The arbitration clause requires all disputes to be submitted first to mandatory mediation and, if that fails, then to arbitration, both

according to the International Chamber of Commerce ("ICC")'s Rules. The place of the arbitration is to be in Amsterdam.

[10] The up-front cost to begin an arbitration at the ICC according to the ICC Rules amounts to about US$14,500. The fees do not include legal fees, lost wages and other costs of participation. The services agreement provides no information about the cost of mediation and arbitration.

[11] Mr. Heller is an Ontario resident who entered into contracts with corporations that are part of the Uber enterprise to be a driver.[3] He earns approximately $400-$600 per week based on 40 to 50 hours of work, or $20,800-$31,200 per year, before taxes and expenses. The costs to arbitrate a claim against Uber equal all or most of the gross annual income he would earn working full-time as an Uber driver.

[12] Mr. Heller started this proposed class action against Uber in 2017. He seeks relief for four claims in this proceeding: a claim for breach of the *ESA*, a claim for breach of contract based on either implied terms or the duty of good faith, a claim for negligence, and a claim for unjust enrichment. All of these claims, however, depend on the *ESA* for their success. The essence of Mr. Heller's position is that he is an employee within the meaning of the *ESA*.

[13] Uber, relying on the arbitration clause in its services agreement with Mr. Heller, sought a stay of proceedings in favour of arbitration in the Netherlands.[4] Mr. Heller argued that the arbitration clause was invalid on two grounds: it was unconscionable, and it contracted out of mandatory *ESA* protections.

[14] The motion judge stayed the proceeding in favour of arbitration in the Netherlands. He began his analysis by determining which arbitration legislation applied: the *Arbitration Act, 1991*, S.O. 1991, c. 17 ("*AA*" or "*Arbitration Act*") or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 ("*ICAA*"). The *ICAA* applies to arbitration agreements that are "international" and "commercial". The motion judge proceeded on the basis that the *ICAA* applied because Mr. Heller and the contracting Uber companies were based in different jurisdictions, and because there was, in the motion judge's view, a *prima facie* case that the agreement was a commercial licensing arrangement.

[15] He then determined that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction (the "competence-competence" principle). In the alternative, the motion judge held that the arbitration clause was not invalid due to unconscionability or because it contracted out of the *ESA*. He accordingly stayed the proceeding in favour of arbitration in the Netherlands.

[16] The Court of Appeal allowed Mr. Heller's appeal, finding that the arbitration clause was void both because it was unconscionable and because it contracted out of the *ESA*. Writing for a unanimous court, Nordheimer J.A. concluded that Mr. Heller's objections to the arbitration agreement did not need to be referred to an arbitrator in the Netherlands and could be dealt with by a court in Ontario. He declined to resolve whether the *AA* or the *ICAA* applied, holding that the result would be the same under either statute. He found the arbitration clause to be unconscionable because it was an unfair bargain and resulted from significant inequality of bargaining power between Mr. Heller and Uber. He further noted that there was minimal chance of Mr. Heller having received legal advice and that it was safe to infer that Uber knowingly and intentionally chose this "Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber". The court also found the arbitration clause void because it contracted out of the *ESA*.

[17] As a result, the Court of Appeal allowed Mr. Heller's appeal, and set aside the order of the motion judge granting Uber's motion to stay.

Analysis

[18] Throughout these proceedings, the parties have disagreed on the arbitration statute applicable to their dispute. Uber argued that the *ICAA* applies and Mr. Heller argued that the applicable legislation is the *AA*.

[19] We agree with Mr. Heller. The parties' dispute is fundamentally about labour and employment. The *ICAA* was not meant to apply to such cases.[5]

[20] The *ICAA* and *AA* are exclusive. If the *ICAA* governs this agreement, the *AA* does not, and vice versa (*AA*, s. 2(1)(b)). As the Superior Court correctly identified, whether the *ICAA* governs depends on whether the arbitration agreement is "international" and "commercial". That the agreement here is international is not in dispute. Whether the agreement is commercial is contested. To answer this question, one must understand the legislative scheme of the *ICAA*.

[21] The *ICAA* implements two international instruments: the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 ("*Convention*") and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended by the United Nations Commission on International Trade Law on July 7, 2006 ("*Model Law*"). Only the *Model Law* is relevant here.

[22] Section 5(3) of the *ICAA* states that the *Model Law* applies to "international commercial arbitration agreements and awards made in international commercial arbitrations". The meaning of "commercial" in this section of the *ICAA* must be the same as the meaning of "commercial" under the *Model Law*, as the latter states that it "applies to international commercial arbitration" (art. 1(1)).

[23] While the *Model Law* does not define the term "commercial", a footnote to art. 1(1) provides some guidance:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.
>
> (*Model Law*, art. 1(1), fn. 2)

[24] The *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* further explains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business":

> Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. *Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business*.
>
> (United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at p. 10 (emphasis added); see also p. 11.)

[25] Two points emerge from this commentary. First, a court must determine whether the *ICAA* applies by examining the nature of the parties' dispute, not by making findings about their relationship. A court can more readily decide whether the *ICAA* applies (or an arbitrator can more readily decide whether the *Model Law* applies) by analysing pleadings than by making findings of fact as to the nature of the relationship. Characterising a dispute requires the decision-maker to examine only the pleadings; characterising a relationship requires the decision-maker to consider a variety of circumstances in order to make findings of fact. If an intensive fact-finding

inquiry were needed to decide if the *ICAA* or the *Model Law* applies, it would slow the wheels of an arbitration, if not grind them to a halt.

[26] The second point to draw is that an employment dispute is not covered by the word "commercial". The question of whether someone is an employee is the most fundamental of employment disputes. It follows that if an employment dispute is excluded from the application of the *Model Law*, then a dispute over whether Mr. Heller is an employee is similarly excluded. This is not the type of dispute that the *Model Law* is intended to govern, and thus it is not the type of dispute that the *ICAA* is intended to govern.

[27] This result is consistent with what courts have held (*Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at paras. 11-13; *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 1994 CanLII 9026 (AB QB), 158 A.R. 213 (Q.B.); *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, 56 C.C.E.L. (4th) 125, at para. 27; *Ross v. Christian & Timbers Inc.* (2002), 2002 CanLII 49619 (ON SC), 23 B.L.R. (3d) 297 (Ont. S.C.J.), at para. 11). It is also consistent with the *Model Law*'s reference to "trade" transactions, which, as Gary B. Born observes, "arguably connot[es] involvement by traders or merchants, as distinguished from consumers or employees" (*International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309). Further, one could draw a negative inference from the definition's omission of "employment" relations (p. 309, fn. 454). It seems unlikely to us that the drafters of the *Model Law* would have included such a thorough list of included commercial relationships and not considered whether to include "employment".

[28] Employment disputes, in sum, are not covered by the *ICAA*. The *AA* therefore governs.

[29] The *AA* directs courts, on motion of a party, to stay judicial proceedings when there is an applicable arbitration agreement:

> **Stay**
>
> **7** (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[30] But a court has discretion to retain jurisdiction and decline to stay proceedings in five circumstances enumerated in s. 7(2):

> **Exceptions**
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. *The arbitration agreement is invalid.*
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment.

The only relevant exception here is para. 2 of s. 7(2), which gives a court discretion to refuse to grant a stay if the court determines that the arbitration agreement is invalid.

[31] The *AA* is silent on what principles courts should consider in exercising their discretion to determine the validity of an arbitration agreement under s. 7(2). But some criteria were set out in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 (CanLII), [2007] 2 S.C.R. 801 and *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (CanLII), [2011] 1 S.C.R. 531, which interpreted similar arbitration regimes in Quebec and British Columbia. In those decisions, this Court set out a framework for when a court should decide if

an arbitrator has jurisdiction, instead of referring that question to the arbitrator out of respect for the competence-competence principle.

[32] Under the *Dell* framework, the degree to which courts are permitted to analyse the evidentiary record depends on the nature of the jurisdictional challenge. Where pure questions of law are in dispute, the court is free to resolve the issue of jurisdiction (para. 84). Where questions of fact alone are in dispute, the court must "normally" refer the case to arbitration (para. 85). Where questions of mixed fact and law are in dispute, the court must refer the case to arbitration unless the relevant factual questions require "only superficial consideration of the documentary evidence in the record" (para. 85).

[33] In setting out this framework, *Dell* adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the "*prima facie*" analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must "refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable" (para. 75). To be so manifestly tainted, the invalidity must be "incontestable", such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, "Compétence arbitrale", in *Juris-classeur Procédure civile* (loose-leaf), fasc. 1034, at No. 105). Rather than adopting these standards literally, *Dell* gave practical effect to what was set out in the arbitration literature by creating a test whereby a court refers all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).

[34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (CanLII), [2007] 2 S.C.R. 921, at para. 11:

> The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[35] The parties agree that the framework from *Dell* and *Seidel* applies to Ontario's *Arbitration Act*. We agree, based on the similarities between the arbitration regimes in Ontario, British Columbia and Quebec. The two exceptions to arbitral referral in *Dell* and *Seidel* therefore apply in Ontario. This case, according to Mr. Heller, engages one of those exceptions because it requires at most only a superficial review of the record.

[36] Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc.*, 2019 ABQB 800, at para. 23 (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).

[37] Although it is possible to resolve the validity of Uber's arbitration agreement through a superficial review of the record, we are of the view that this case also raises an issue of accessibility that was not raised on the facts in *Dell* and justifies departing from the general rule of arbitral referral. As *Dell* itself acknowledged, the rule of systematic referral of challenges to jurisdiction requiring a review of factual evidence applies "normally" (para. 85; see also *Muroff*, at para. 11). This is one of those abnormal times.

[38] The underlying assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. As *Dell* says, the matter "must be resolved first by the arbitrator" (para. 84). *Dell* did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. This raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay.

[39] One way (among others) in which the validity of an arbitration agreement may not be determined is when an arbitration is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. Another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for the claim. The arbitration agreement would, in effect, be insulated from meaningful challenge (see Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 *McGill L.J.* 693; Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12; Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 *N.C. L. Rev.* 679).

[40] These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will.

[41] Against these real risks of staying an action in favour of an invalid arbitration, one could pit the risk of a plaintiff seeking to obstruct an arbitration by advancing spurious arguments against the validity of the arbitration. This concern animated *Dell* (see paras. 84, 86).

[42] In our view, there are ways to mitigate this concern that make the overall calculus favour departing from the general rule of referring the matter to the arbitrator in these situations. Courts have many ways of preventing the misuse of court processes for improper ends. Proceedings that appear vexatious can be handled by requiring security for costs and by suitable awards of costs. In England, courts have awarded full indemnity costs where a party improperly ignored arbitral jurisdiction (Hugh Beale, ed., *Chitty on Contracts* (33rd ed. 2018), vol. II, *Specific Contracts*, at para. 32-065; *A. v. B. (No.2)*, [2007] EWHC 54 (Comm.), [2007] 1 All E.R. (Comm.) 633, at para. 15; *Kyrgyz Mobil Tel Limited v. Fellowes International Holdings Limited* [2005] EWHC 1329, 2005 WL 6514129 (Q.B.), at paras. 43-44). Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate (Beale, at para. 32-052; *West Tankers Inc. v. Allianz SpA*, [2012] EWHC 854 (Comm.), [2012] 2 All E.R. (Comm.) 395, at para. 77).

[43] Moreover, *Dell* itself makes clear that courts may refer a challenge to arbitral jurisdiction to the arbitrator if it is "a delaying tactic", or would unduly impair the conduct of the arbitration proceeding (para. 86). This provides an additional safeguard against validity challenges that are not *bona fide*.

[44] How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

[45] While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains narrowly focused (*Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must remain alert to "the danger that a party will obstruct the process by manipulating procedural rules" and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).

[46] As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[47] Turning to the appeal before us, we would first observe that Mr. Heller has made a genuine challenge to the validity of the arbitration agreement. The clause is said to be void because it imposes prohibitive fees for initiating arbitration and these fees are embedded by reference in the fine print of a contract of adhesion. Second, there is a real prospect that if a stay is granted and the question of the validity of the Uber arbitration agreement is left to arbitration, then Mr. Heller's genuine challenge may never be resolved. The fees impose a brick

wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller's contention without those — possibly unconscionable — fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.

[48] We would therefore resolve the arguments Mr. Heller has raised against the validity of Uber's arbitration agreement rather than refer those arguments to arbitration in the Netherlands.

[49] We observe, incidentally, that departing from the general rule of arbitral referral in these circumstances has beneficial consequences. It will prevent contractual drafters from evading the result of this case through a choice of law clause. A choice of law clause could convert a jurisdictional question that would be one of law (and which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings as to the content of foreign law, something that one would not ordinarily contemplate in a superficial review of the record.

[50] This is a significant loophole for contractual drafters to exploit. Indeed, Uber's contract here includes a foreign choice of law clause. As the intervener Canadian Federation of Independent Business ("CFIB") submitted, this Court should presume that Dutch law governs the question of whether the arbitration agreement is unconscionable because the contracts have a choice of law clause indicating Dutch law (I.F., at para. 34; see also *Vita Food Products, Inc. v. Unus Shipping Co.*, 1939 CanLII 269 (UK JCPC), [1939] A.C. 277 (P.C.), at pp. 289-91). Neither party, however, chose to lead evidence of Dutch unconscionability law. Since the parties chose not to lead evidence of Dutch law, this Court must address the issue of unconscionability according to Ontario law (see *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, at pp. 853-54; *Das v. George Weston Limited*, 2017 ONSC 4129, at para. 215 (CanLII)). If Uber had adduced evidence of Dutch law, then under the two exceptions to arbitral referral recognized in *Dell*, this Court would have had to grant the stay in favour of an arbitrator determining the unconscionability argument.

[51] As well, even though *this* case could have been resolved based on undisputed facts, such an approach may not be sustainable in future cases. An approach to arbitral referral that depends on undisputed facts would invite parties to dispute facts. Were that standard to apply, unreasonably disputing facts would allow a party to evade any review of the merits, by use of an arbitration clause. There would be no negative consequence, in this context, to a party unreasonably disputing facts if it meant the stay in favour of arbitration would be granted. This differs significantly from the standard civil litigation context, wherein unreasonable disputes as to facts can be deterred by costs awards.

[52] We turn finally to the validity of the arbitration agreement. As mentioned, Mr. Heller raised two independent arguments as to why the arbitration agreement with Uber is invalid: first, the clause is void for unconscionability; and, second, the clause is void because it contracts out of the *ESA*.

[53] We agree with Mr. Heller that the arbitration agreement is unconscionable. The parties and interveners focused their submissions on unconscionability in accordance with this Court's direction in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (CanLII), [2019] 2 S.C.R. 144, at para. 85, that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability".

[54] Unconscionability is an equitable doctrine that is used to set aside "unfair agreements [that] resulted from an inequality of bargaining power" (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the "poor and ignorant" from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence (Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 521; see also pp. 520-24; Bradley E. Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 *Can. Bar Rev.* 142, at p. 143). This development has been described as "one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness" (Peter Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 925).

[55] Unconscionability is widely accepted in Canadian contract law, but some questions remain about the content of the doctrine, and it has been applied inconsistently by the lower courts (see, among others,

Morrison v. Coast Finance Ltd. (1965), 1965 CanLII 493 (BC CA), 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 1978 CanLII 393 (BC CA), 9 B.C.L.R. 166 (C.A.), at p. 177, per Lambert J.A.; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at para. 20; *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387; *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 263 D.L.R. (4th) 368; *Titus v. William F. Cooke Enterprises Inc.,* 2007 ONCA 573, 284 D.L.R. (4th) 734; *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809, 305 D.L.R. (4th) 64; see also Swan, Adamski and Na, at p. 982; McInnes, at pp. 518-19). These questions require examining underlying contractual theory (Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005), 84 *Can. Bar Rev.* 171, at p. 173).

[56] The classic paradigm underlying freedom of contract is the "freely negotiated bargain or exchange" between "autonomous and self-interested parties" (McCamus, at p. 24; see also Swan, Adamski and Na, at pp. 922-23; P. S. Atiyah, *Essays on Contract* (1986), at p. 140). At the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process (Atiyah, at pp. 146-48; Bigwood, at pp. 199-200; Alan Brudner, "Reconstructing contracts" (1993), 43 *U.T.L.J.* 1, at pp. 2-3). It also presumes equality between the contracting parties and that "the contract is *negotiated*, *freely agreed*, and therefore *fair*" (Mindy Chen-Wishart, *Contract Law* (6th ed. 2018), at p. 12 (emphasis in original)).

[57] In cases where these assumptions align with reality, the arguments for enforcing contracts carry their greatest weight (Melvin Aron Eisenberg, "The Bargain Principle and Its Limits" (1982), 95 *Harv. L. Rev.* 741, at pp. 746-48). But these arguments "may speak more or less forcefully depending on the context" (*Wellman*, at para. 53; see also B. J. Reiter, "Unconscionability: Is There a Choice? A Reply to Professor Hasson" (1980), 4 *Can. Bus .L.J.* 403, at pp. 405-6). As Professor Atiyah has noted:

> The proposition that a person is always the best judge of his own interests is a good starting-point for laws and institutional arrangements, but as an *infallible empirical proposition* it is an outrage to human experience. The parallel moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill.
> [Emphasis added; p. 148]

[58] Courts have never been required to take the ideal assumptions of contract theory as "infallible empirical proposition[s]". Equitable doctrines have long allowed judges to "respond to the individual requirements of particular circumstances . . . . humaniz[ing] and contextualiz[ing] the law's otherwise antiseptic nature" (Leonard I. Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016), 2 *C.J.C.C.L.* 497, at pp. 503-4). Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests. The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984); the ship captain stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447) — these and similar scenarios bear little resemblance to the operative assumptions on which the classic contract model is constructed.

[59] In these kinds of circumstances, where the traditional assumptions underlying contract enforcement lose their justificatory authority, the doctrine of unconscionability provides relief from improvident contracts. When unfair bargains cannot be linked to fair bargaining — when they cannot be attributed to one party's "donative intent or assumed risk", as Professor Benson puts it — courts can avoid the inequitable effects of enforcement without endangering the core values on which freedom of contract is based (p. 182; see also Eisenberg, at pp. 799-801; S.M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 *J.C.L.* 55, at p. 60). This explains how unconscionability lines up with traditional accounts of contract theory while recognizing the doctrine's historical roots in equity, which has long operated as a "corrective to the harshness of the common law" (McCamus, at p. 10; see also Rotman, at pp. 503-4).

[60] This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others (*Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at pp. 405 and 412; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426, at p. 462, per Dickson C.J., and p. 516, per Wilson J.; *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226, at

p. 247; see also *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII), [2014] 3 S.C.R. 494, at para. 43). We agree. Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made (see Mindy Chen-Wishart, *Unconscionable Bargains* (1989), at p. 109; see also James Gordley, "Equality in Exchange" (1981), 69 *Cal. L. Rev.* 1587, at pp. 1629-34; *Birch*, at para. 44). Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing "islands of intervention" so that the "clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions . . . will disappear" (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 378).

[61] Openly recognizing a doctrine of unconscionability also promotes fairness and transparency in contract law (Swan, Adamski and Na, at p. 925; McCamus, at p. 438; Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (2019), at p. 225). There is value in recognizing that "judges are and always will be concerned with unfairness, with arrangements that work harshly and with conduct that is oppressive" (Swan, Adamski and Na, at p. 925). The unconscionability doctrine allows courts to "focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties" (*Hunter*, at p. 462). As Dickson C.J. observed in *Hunter*:

> In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong. . . . There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. [p. 462]

[62] Most scholars appear to agree that the Canadian doctrine of unconscionability has two elements: "an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and . . . an improvident transaction" (McInnes, at p. 524 (emphasis deleted); see also Swan, Adamski and Na, at p. 986; McCamus, at pp. 424 and 426-27; Benson, at p. 167; Waddams (2017), at p. 379; Stephanie Ben-Ishai and David R. Percy, eds., *Contracts: Cases and Commentaries* (10th ed. 2018), at p. 719).

[63] This Court has long endorsed this duality. In *Hunter*, Wilson J. observed that

> [t]he availability of a plea of unconscionability in circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century ago . . . . [Emphasis in original; p. 512; see also p. 462, per Dickson C.J.]

[64] In *Norberg*, La Forest J. described proving the elements of unconscionability as "a two-step process", involving "(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain" (p. 256). The concurring judgment in *Douez v. Facebook Inc.*, 2017 SCC 33 (CanLII), [2017] 1 S.C.R. 751, followed a similar approach in a case involving a standard form consumer contract[6]:

> Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:
>
> > . . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis deleted; para. 115.]

(See also *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, 347 D.L.R. (4th) 591, at paras. 29-31; *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, 345 D.L.R. (4th) 323, at para. 29; *McNeill v. Vandenberg*, 2010 BCCA 583, at para. 15 (CanLII); *Kreutziger*, at p. 173; *Morrison*, at p. 713)

[65] We see no reason to depart from the approach to unconscionability endorsed in *Hunter*, *Norberg* and in *Douez*. That approach requires both an inequality of bargaining power and a resulting improvident bargain.

[66] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see McCamus, at pp. 426-27 and 429; Crawford, at p. 143; Chen-Wishart (1989), at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R (4th) 60, at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (H.C.A.), at p. 392; *Commercial Bank of Australia*, at pp. 462-63, and 477-78; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601, at para. 166).

[67] There are no "rigid limitations" on the types of inequality that fit this description (McCamus, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (McInnes, at p. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:

> Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be *personal* (*i.e.*, characteristics of the claimant generally) or *circumstantial* (*i.e.*, vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment". [Emphasis in original; footnotes omitted; p. 525.]

(See also Chen-Wishart (2018), at p. 363.)

These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract (Chen-Wishart (2018), at p. 340; see also McInnes, at pp. 525-26).

[68] In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both (see Stephen A. Smith, *Contract Theory* (2004), at pp. 343-44; John R. Peden, *The Law of Unjust Contracts: Including the Contracts Review Act 1980 (NSW) With Detailed Annotations Procedure and Pleadings* (1982), at p. 36; Andrew Burrows, *A Restatement of the English Law of Contract* (2016), at p. 210; *Downer*, at para. 54; McInnes, at p. 525).

[69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation. As the Privy Council has said, "as a matter of common fairness, 'it [is] not right that the strong should be allowed to push the weak to the wall'" (*Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17, at p. 6 (BAILII), quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, [1985] 1 W.L.R. 173, at p. 183; see also *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 336-37).

[70] The classic example of a "necessity" case is a rescue at sea scenario (see *The Medina* (1876), 1 P.D. 272). The circumstances under which such agreements are made indicate the weaker party did not freely enter into the contract, as it was the product of his "extreme need . . . to relieve the straits in which he finds himself" (*Bundy*, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party" (*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see *Norberg*, at pp. 247-48; see also McInnes, at p. 543).

[71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" (see Smith, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation

have otherwise been met (see Sébastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010), 49 *Can. Bus. L.J.* 345, at pp. 353-54).

[72] These examples of inequality of bargaining power are intended to assist in organizing and understanding prior cases of unconscionability. They provide two examples of how weaker parties may be vulnerable to exploitation in the contracting process. Regardless of the type of impairment involved, what matters is the presence of a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" (Bigwood, at p. 185 (emphasis deleted); see also Benson, at pp. 189-90). In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship.

[73] This leads us to the second element of unconscionability: an improvident bargain.

[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see McCamus, at pp. 426-27; Chen-Wishart (1989), at p. 51; Benson, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at pp. 87 and 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" (John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 *Man. L.J.* 187, at p. 202 (emphasis in original)).

[75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties (see Chen-Wishart (1989), at pp. 51-56; McInnes, at pp. 528-29; Reiter, at pp. 417-18).

[76] For a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.

[77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party (see Swan Adamski and Na, at pp. 993-94) or cause an "unfair surprise" (American Law Institute and National Conference of Commissioners on Uniform State Laws, *Proposed Amendments to Uniform Commercial Code Article 2 – Sales: With Prefatory Note and Proposed Comments* (2002), at p. 40). This is an objective standard, albeit one that has regard to the context.

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" (Rotman, at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

[79] Unconscionability, in sum, involves both inequality and improvidence (Crawford, at p. 143; Swan, Adamski and Na, at p. 986). The nature of the flaw in the contracting process is part of the context in which improvidence is assessed. And proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests (see Chen-Wishart (1989), at pp. 47-48; *Portal Forest Industries Ltd. v. Saunders*, 1978 CanLII 2568 (BC SC), [1978] 4 W.W.R. 658 (B.C.S.C.), at pp. 664-65). It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power.

[80] Uber argues, however, that the Court should abandon the classic two-part approach to unconscionability and adopt a stringent test consisting of four requirements:

- a grossly unfair and improvident transaction;

- a victim's lack of independent legal advice or other suitable advice;
- an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
- the other party's knowingly taking advantage of this vulnerability.

(See *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98, 420 D.L.R. (4th) 335, at para. 15; see also *Titus*, at para. 38; *Cain*, at para. 32.)

[81] This higher threshold requires that the transaction was "grossly" unfair, that there was no independent advice, that the imbalance in bargaining power was "overwhelming", and that there was an intention to take advantage of a vulnerable party.

[82] We reject this approach. This four-part test raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused. Unconscionability has always targeted unfair bargains resulting from unfair bargaining. Elevating these additional factors to rigid requirements distracts from that inquiry.

[83] Independent advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party (see Rick Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2018), 60 *Can. Bus. L.J.* 124, at p. 136; Spencer Nathan Thal, "The Inequality of Bargaining Power Doctrine: the Problem of Defining Contractual Unfairness" (1988), 8 *Oxford J. Legal Stud.* 17, at pp. 32-33). It, for example, can assist a weaker party in understanding the terms of a contract, but might not ameliorate a weaker party's desperation or dependence on a stronger party (Thal, at p. 33). Even where advice might be of assistance, *pro forma* or ineffective advice may not improve a party's ability to protect their interests (Chen-Wishart (1989), at pp. 110-11).

[84] Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see *Boustany*, at p. 6). But unconscionability can be triggered without wrongdoing. As Professor Waddams compellingly argues:

> The phrases 'unconscionable conduct', 'unconscionable behaviour' and 'unconscionable dealing' lack clarity, are unhistorical insofar as they imply the need for proof of wrongdoing, and have been unduly restrictive.
>
> (Waddams (2019), at pp. 118-19; see also Benson, at p. 188; Smith, at pp. 360-62.)

[85] We agree. One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

[86] In our view, the requirements of inequality and improvidence, properly applied, strike the proper balance between fairness and commercial certainty. Freedom of contract remains the general rule. It is precisely because the law's ordinary assumptions about the bargaining process do not apply that relief against an improvident bargain is justified.

[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts. As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.
>
> . . .
>
> There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which . . . at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.
>
> (*The Common Law Tradition: Deciding Appeals* (1960), pp. 370-71)

[88] We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).

[89] 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. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand (see Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016), 33 *Windsor Y.B. Access Just.* 177, at p. 179; Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2013), 53 *Can. Bus. L.J.* 475, at pp. 475-476; Thal, at pp. 27-28; William J. Woodward, Jr., "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006), 2 *Hastings Bus. L.J.* 1, at p. 46). The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that 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.

[90] This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where "the normative rationale for contract enforcement . . . [is] stretched beyond the breaking point" (Radin, at p. 179). The link between standard form contracts and unconscionability has been suggested in judicial decisions, textbooks, and academic articles for years (see, e.g., *Douez*, at para. 114; *Davidson v. Three Spruces Realty Ltd.* (1977), 1977 CanLII 1630 (BC SC), 79 D.L.R. (3d) 481 (B.C.S.C.); *Hunter*, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 *Can. Bus. L.J.* 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (1965), at pp. 449-50).

[91] Applying the unconscionability doctrine to standard form contracts also encourages those drafting such contracts to make them more accessible to the other party or to ensure that they are not so lop-sided as to be improvident, or both. The virtues of fair dealing were explained by Jean Braucher as follows:

> Businesses are driven to behave competitively in their framing of market situations or otherwise they lose to those who do. Only if there are meaningful checks on what might be considered immoral behavior will persons in business have the freedom to act on their moral impulses. An implication of this point is that, absent regulation, business culture will become ever more ruthless, so that the distinctions between "reputable businesses" and fringe marketers gradually wither away. . . . [p. 390]

[92] This brings us to the appeal before us and whether Mr. Heller's arbitration clause with Uber is unconscionable.

[93] There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between Mr. Heller, a food deliveryman in Toronto, and Uber, a large multinational corporation. The arbitration agreement, moreover, contains no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation "under the International Chamber of Commerce Mediation Rules" that could be followed by "arbitration under the Rules of Arbitration of the International Chamber of Commerce", there lay a US$14,500 hurdle to relief. Exacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

[94] The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

[95] The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent precondition that he travel to Amsterdam,[7] initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

[96] We add that the unconscionability of the arbitration clause can be considered separately from that of the contract as a whole. As explained in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909 (H.L.), an arbitration agreement "constitutes a self-contained contract collateral or ancillary to the [main] agreement" (p. 980; see also p. 998, per Lord Scarman). Further support comes from the severability clause of the Uber Rasier and Uber Portier agreements, and s. 17(2) of the *AA*.[8]

[97] Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. As our colleague Justice Brown notes, under the arbitration clause, "Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit" (para. 136). The arbitration clause is the only way Mr. Heller can vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.

[98] Based on both the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid.

[99] Given the conclusion that the arbitration agreement is invalid because it is unconscionable, there is no need to decide whether it is also invalid because it has the effect of contracting out of mandatory protections in the *ESA*.

Conclusion

[100] We would dismiss the appeal with costs to Mr. Heller throughout.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[101] While I agree with my colleagues Justices Abella and Rowe that the mandatory arbitration requirement is invalid, I would not rely upon the doctrine of unconscionability to reach this conclusion. Contractual stipulations that foreclose access to legally determined dispute resolution — that is, to dispute resolution according to law —— are unenforceable *not* because they are unconscionable, but because they undermine the rule of law by denying access to justice, and are therefore contrary to public policy.

[102] The arbitration agreement between Uber and Mr. Heller does just that: it effectively bars Mr. Heller from advancing any claim against Uber, no matter how significant or meritorious. In effect, it is not an agreement *to* arbitrate, but rather *not* to arbitrate. In these exceptional circumstances, a central premise of curial respect for arbitration agreements —— that they furnish an accessible method of achieving dispute resolution according to law —— falls away. On this narrow basis, I would find that the arbitration agreement is unenforceable, and would dismiss the appeal and affirm the judgment of the Court of Appeal.

II. Analysis

[103] This appeal was framed by the parties in terms of unconscionability, which presents an unfortunate difficulty since applying unconscionability here amounts to forcing a square peg into a round hole. My colleagues Abella and Rowe JJ. seek to avoid this difficulty by vastly expanding the scope of the doctrine's application and removing any meaningful constraint. As I will explain, their approach is, in my respectful view, both unnecessary and undesirable. Unnecessary, because the law already contains settled legal principles outside the doctrine of unconscionability which operate to prevent contracting parties from insulating their disputes from independent adjudication. And undesirable, because it would drastically expand the doctrine's reach without providing any meaningful guidance as to its application. Charting such a course will serve only to compound the uncertainty that already plagues the doctrine, and to introduce uncertainty to the enforcement of contracts generally.

A. *Access to Justice and the Rule of Law*

[104] I agree with my colleagues Abella and Rowe JJ. that the *Arbitration Act, 1991*, S.O. 1991, c. 17, applies to this appeal. While the parties' relationship determines which statute applies, the nature of the parties' relationship is the very question to be decided in Mr. Heller's action: is Mr. Heller an employee of Uber? Without subjecting that question to a full trial, the preliminary issue of the statute to apply should be determined by reference to the pleadings (see, e.g., *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at paras. 27-30).

[105] The *Arbitration Act* generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s. 7(1)). Of the few exceptions to this general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s. 7(2)). Answering that question is really this simple. As a matter of public policy, courts will not enforce

contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.

[106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is *not* whether Uber's arbitration agreement is *unconscionable*, but whether it is *invalid* as contemplated by the *Arbitration Act* (i.e., unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same: the issues raised by the parties remain the focus (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, 337 O.A.C. 85, at para. 87). Further, this Court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative "arbitration agreement" in this case: "public policy and respect for the rule of law go hand in hand" (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 59).

[107] My colleague Justice Côté stresses freedom of contract, for which I readily share her enthusiasm. Freedom of contract is of central importance to the Canadian commercial and legal system and, to promote the certainty and stability of contractual relations, often trumps other societal values (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 117 (per Binnie J., dissenting (but not on this point))). Indeed, a hallmark of a free society is the freedom of individuals to arrange their affairs without fear of overreaching interference by the state, including the courts.

[108] But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated:

> . . . there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. [Emphasis added.]
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> (*In Re Estate of Charles Millar, Deceased*, 1937 CanLII 10 (SCC), [1938] S.C.R. 1, at p. 4)

[109] This public policy doctrine has been described by this Court as *fundamental* to Canadian contract law, and its "role in the enforcement of contracts has never been doubted" (*Tercon*, at paras. 113 and 116 (per Binnie J., dissenting (but not on this point))). Of course, and as Côté J. cautions, public policy must not be used as a tool to prioritize idiosyncratic judicial views over the interests of contracting parties. But that is not a live concern under our law: courts have cautioned against the recognition of *new* heads of public policy (*Millar Estate*, at pp. 4-7), and the existing public policy grounds for setting aside specific types of contractual provisions are narrow and well-established (see B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 1, at p. 17 and fn. 85). This Court has relied on public policy sparingly, and most recently to limit the operation of forum selection clauses and exclusion clauses, which raise concerns relating to the administration of justice, and to limit the operation of restrictive covenants (*Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at paras. 47 and 51-63; *Tercon*, at paras. 117-20; *Elsley v. J. G. Collins Ins. Agencies Ltd.*, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916, at p. 923; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-22). While the considerations relevant to each type of clause vary, public policy furnishes the common and narrowly framed solution. And by focusing on the specific rationale that suggests a certain type of clause is unenforceable, this Court has sought to ensure a disciplined approach by providing concrete guidance and developing specific principles that apply to similar provisions.

[110] The ground upon which I proceed is that which precludes an ouster of court jurisdiction or, more broadly, which protects the integrity of the justice system. As Lord Atkin stated in *Fender v. St. John-Mildmay*, [1938] A.C. 1 (H.L.), at p. 12, ousting the jurisdiction of the courts is harmful in itself and "injurious to public interests" (see also Kain and Yoshida, at pp. 20-23). A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel

about the proposition that contracting parties, as a matter of public policy, cannot oust the court's supervisory jurisdiction to resolve contractual disputes (see e.g. *Kill v. Hollister* (1746), 1 Wils. K.B. 129, 95 E.R. 532; *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Deuterium of Canada Ltd. v. Burns & Roe Inc.*, 1974 CanLII 163 (SCC), [1975] 2 S.C.R. 124). Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party's right to legal recourse is "a right inalienable even by the concurrent will of the parties" (*Scott*, at p. 1133).

[111] This head of public policy serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 70). Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (*Jonsson v. Lymer*, 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law.

[112] Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty. That such an agreement is contrary to public policy is not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there is no value in a contract that cannot be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they cannot enforce is "substantially incontestable" (*Millar Estate*, at p. 7, quoting *Fender*, at p. 12). It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak. Or, as Frederick Wilmot-Smith puts it, "[l]egal structures that make enforcement of the law practically impossible will leave weaker members of society open to exploitation at the hands of, for example, unscrupulous employers or spouses." (*Equal Justice: Fair Legal Systems in an Unfair World* (2019), at pp. 1-2).

[113] The reference to making enforcement of the law *practically* impossible leads to a further, related point: there is no good reason to distinguish between a clause that *expressly* blocks access to a legally determined resolution and one that has the ultimate *effect* of doing so. That this is so is illustrated by the judgment of Drummond J. in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.A.). In *Novamaze*, the terms of a franchise agreement permitted the franchisor to take control of the franchisee's business if either party threatened to commence, or commenced, legal proceedings against the other. This clause, Drummond J. explained, was "capable of operating as a powerful disincentive to the franchisee to take proceedings of any kind against [the franchisor], no matter how strong a case the franchisee may have that it has suffered wrong" (p. 548). Summarizing the relevant principle, Drummond J. continued:

> . . . the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that "inalienable right" contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation. [pp. 548-49]

[114] I agree. At some point, there is no material difference between a provision that discourages dispute resolution and one that precludes dispute resolution altogether. As the Court of Appeal of Alberta recently recognized, "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" (*Lymer*, at para. 67). During the hearing of this appeal, Uber's counsel would not concede that a clause requiring an upfront payment of 10 billion dollars to commence a civil claim would necessarily be equivalent to a brick wall standing in the way of dispute resolution. With respect, the conclusion that independent adjudication would be blocked by such a clause is obvious. Courts have long recognized that upfront payments may effectively drive litigants from the judgment seat (in the context of requiring security for costs, for example).

[115] None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, "new models of adjudication can be fair and just" (*Hryniak*, at para. 2). But public policy does require access to *justice*, and access to justice is not merely access to a resolution. After all, many resolutions are *un*just. Where a party seeks a rights-based resolution to a dispute, such resolution is *just* only when it is determined *according to law*, as discerned and applied by an independent arbiter.

[116] The law's historical view was that arbitration could not yield dispute resolution according to law. Any arbitration agreement that removed contractual disputes from the purview of the courts was unenforceable as a matter of public policy (see *Deuterium*, at pp. 131-36). Courts, in essence, took the view that an agreement to arbitrate had the effect of precluding any legitimate form of dispute resolution. Contracting parties were seen as being unable to access justice without access to the ordinary courts (see *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 48). Given this hostile judicial posture, legislators intervened by enacting modern arbitration legislation, prompting courts to accord due respect to the use of arbitration as a dispute resolution mechanism, particularly in a commercial setting (*Wellman*, at para. 54; *Zodiak International Productions Inc. v. Polish People's Republic*, 1983 CanLII 24 (SCC), [1983] 1 S.C.R. 529, at pp. 533-42). Our conception of access to justice has been modified accordingly, to account for "the other important objectives pursued by the *Arbitration Act*" (*Wellman*, at para. 83). It is now accepted that courts are not the only bodies capable of providing dispute resolution according to law. Indeed, arbitration is endorsed and encouraged as a means for resolving disputes (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 38).

[117] Uber's position requires this Court to accept that the change in judicial posture following the enactment of modern arbitration legislation leaves no room for the operation of public policy. But curial respect for arbitration, and for parties' choices to refer disputes to arbitration, is premised upon two considerations. First, the purpose of arbitration is to ensure that contracting parties have access to "a 'good and accessible method of seeking resolution for many kinds of disputes' that 'can be more expedient and less costly than going to court'" (*Wellman*, at para. 83, quoting Legislative Assembly of Ontario, March 27, 1991, at p. 245). Second, courts have accepted arbitration as an acceptable alternative to civil litigation because it can provide a resolution according to law. As this Court observed in *Sport Maska Inc. v. Zittrer*, 1988 CanLII 68 (SCC), [1988] 1 S.C.R. 564, at p. 581:

> The legislator left . . . various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice . . . are observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator's real function and that of a judge who has to decide a case. [Emphasis added.]

In other words, any means of dispute resolution that serves as a final resort for contracting parties must be *just*. This is important because, unlike the submission of *existing* disputes to arbitration, and contrary to my colleague Côté J.'s assertion, an agreement to submit all *future unknown* disputes to arbitration is not simply a substitute for the parties' negotiations (para. 250). Rather, it serves as a transfer of dispute resolution authority away from public adjudicators (W. G. Horton, "A Brief History of Arbitration" (2017), 47 *Adv. Q.* 12, at p. 14; *Sport Maska*, at p. 581; *Wellman*, at para. 48; *Desputeaux*, 2003 SCC 17 (CanLII), [2003] 1 S.C.R. 178, at para. 40). The legitimacy of such a transfer rests upon whether it can provide a comparable measure of justice.

[118] As this Court stated in *Sport Maska*, arbitration *does* provide a comparable measure of justice, which is ensured by modern arbitration legislation. Ontario's *Arbitration Act* serves as an example. Like the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, addressed in *Sport Maska*, the *Arbitration Act* also contemplates a legally determined outcome. It states that an arbitral tribunal shall resolve disputes according to the rules of law and equity (s. 31). (And, while contracting parties may be able to opt out of this section's application, they are at least entitled to the inalienable benefit of fair and equal treatment (ss. 3 and 19).) The *Arbitration Act* also contemplates court oversight throughout the arbitral process.

[119] Where a clause expressly provides for "arbitration" while simultaneously having the effect of *precluding* it, however, these considerations which promote curial respect for arbitration dissolve —— and *here* is where the public policy principle preventing an ouster of court jurisdiction continues to operate. The legislature could not have intended that, by enacting the *Arbitration Act*, arbitration clauses whose effect *precludes* access to

justice would be untouchable. Yet Uber's position and, I say with respect, my colleague Côté J.'s position require imputing that very intention —— an intention that would defeat the legislature's purpose in enacting the *Arbitration Act* of promoting access to justice. Meaning, a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right.

[120] Moreover, access to justice is constitutionally protected through s. 96 of the *Constitution Act, 1867*, which limits the legislature's ability to place restrictions on dispute resolution (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 43). As this Court stated in *Trial Lawyers*, at para. 32:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. [Emphasis added.]

As I have explained, arbitration does not strike at the core of superior court jurisdiction, because arbitration provides a comparable measure of justice to the superior courts. Preconditions that prevent contracting parties from even *commencing* arbitration, however, have the same effect as hearing fees that cause undue hardship and deter litigants from advancing legitimate claims in the courts (*Trial Lawyers*, at para. 46). It follows that, in the (inconceivable) event that cutting off access to justice was the legislature's intent in enacting the *Arbitration Act*, that *Act* must not be interpreted so broadly as to sanction agreements that impose such preconditions. In this regard, and again with respect, my colleague Côté J.'s assertion that applying the principles articulated by this Court in *Trial Lawyers* poses a risk of permanently restraining legislative competence is not well taken (para. 318). Reports of the death of legislative competence in this area are, like those of the death of freedom of contract, greatly exaggerated.

[121] In sum, applying public policy to determine whether an arbitration agreement prohibits access to justice is neither stating a "new common law rule" as my colleague Côté J. characterizes it, nor an expansion of the grounds for judicial intervention in arbitration proceedings (paras. 307, 312 and 316). Common law courts have long recognized the right to resolve disputes according to law. The law has simply evolved to embrace arbitration as means of achieving that resolution. Contractual stipulations that prohibit such resolution altogether, whether by express prohibition or simply by effect, continue to be unenforceable as a matter of public policy.

(1) The Rule of Law's Impact on the Competence-Competence Principle

[122] Before commenting on the types of clauses that by their terms or effect foreclose access to legally determined dispute resolution, I pause to comment on the competence-competence principle. There are two aspects to this principle. First, arbitrators are empowered to rule on issues relating to their own jurisdiction. Second, arbitrators generally *should* make such rulings before they are decided by the court. The former aspect is implemented expressly in legislation like the *Arbitration Act*, which states that "[a]n arbitral tribunal may rule on its own jurisdiction" (s. 17(1)). This Court accepted the latter aspect in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, by defining "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator" (para. 84). An exception applies where the challenge is based solely on a question of law or requires only a superficial review of the record (paras. 84-85). But even then, the court must be sure that the jurisdictional challenge is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding (para. 86).

[123] The Court's conclusion in *Dell* was based on the provisions of the Quebec *Code of Civil Procedure*, CQLR, c. C-25. As Deschamps J. recognized, art. 940.1 *C.C.P.*, which generally directed the court to refer court proceedings in favour of arbitration, "incorporate[d] the essence of art. II(3) of the New York Convention and of its counterpart in the Model Law, art. 8", while art. 943 *C.C.P.* "confer[ed] on arbitrators the competence to rule on their own jurisdiction" (para. 80). Thus, the *C.C.P.* "clearly indicate[d] acceptance of the competence-competence principle incorporated into art. 16 of the Model Law" (para. 80). This Court reached the

same conclusion about British Columbia's arbitration regime, based on comparable provisions (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 28-29).

[124] Like the legislative schemes in Quebec and British Columbia, Ontario's *Arbitration Act* adopts the same two features that led to the Court's conclusion in *Dell*: courts are generally directed to stay proceedings in favour of arbitration (s. 7(1) and (2)) and arbitrators are given the competence to rule on their own jurisdiction (s. 17(1)). It follows that, on this Court's jurisprudence, the competence-competence principle also applies to Ontario's legislative scheme (*Ontario Medical Assn. v. Willis Canada Inc.*, 2013 ONCA 745, 118 O.R. (3d) 241, at para. 30). Further, this Court has repeatedly recognized, most recently in *Wellman*, that courts should generally take a "hands off" approach to arbitration (para. 56). The competence-competence principle described in *Dell* accords with that directive.

[125] I agree with my colleagues Abella and Rowe JJ. that *Dell* did not contemplate clauses that effectively prevent access to arbitration. I would therefore recognize a further, narrow exception to the general rule that a challenge to an arbitrator's jurisdiction should first be resolved by the arbitrator. As I have explained, contracting parties cannot preclude access to legally determined dispute resolution. While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms or effects, bars access *to that very arbitrator*. It therefore falls to courts to do so. Nothing in the *Arbitration Act* suggests any other conclusion. Further, and if there were any doubt, the imperative of ensuring access to justice should inform interpretation of the *Arbitration Act* and its adoption of the competence-competence principle. As this Court held in *Trial Lawyers,* access to justice carries such importance that it maintains a constitutional dimension, which restricts even the legislature's ability to prevent private parties from resolving their disputes.

[126] While the question of whether an arbitration agreement bars access to dispute resolution is one of mixed fact and law, and may require more than a superficial review of the record, this limited exception to the general rule of referral stated in *Dell* is necessary to preserve the public legitimacy of the law in general, and arbitration in particular. Unlike my colleagues, I would limit this exception to cases where arbitration is arguably inaccessible. It should not apply merely because the parties' agreement contains a foreign choice of law provision (Abella and Rowe JJ.'s reasons, at para. 39). Further, and as with any other challenge to an arbitrator's jurisdiction, courts must be satisfied that the challenge "is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding" (*Dell*, at para. 86).

[127] In addition to creating an exception to the framework set out in *Dell*, my colleagues direct a new, contested hearing to consider whether there is "a *bona fide* challenge to arbitral jurisdiction that only a court can resolve" (paras. 44-46). In other words, my colleagues say that this hearing is necessary because a court must resolve whether there is an issue of validity that a court must resolve.

[128] I say respectfully that this new procedural mechanism is unnecessary and will serve only to complicate and delay proceedings. Indeed, my colleagues appear to recognize this by their warnings that "this assessment must not devolve into a mini-trial", that "a single affidavit will suffice" and that "[b]oth counsel and judges are responsible for ensuring the hearing remains narrowly focused". First, it seems to me that any development in contract law that requires a new affidavit from anyone on anything is probably a mistake. More fundamentally, however, and again with respect, my colleagues' warnings seem to me entirely unrealistic. This Court might as well tell the parties and the motion judge to keep the hearing to 20 minutes, to conduct it on "Zoom" during the morning break or to dispense with cross-examination on the affidavit(s). My colleagues' exhortations, well-intentioned as they undoubtedly are, are simply futile. Even worse, they will be seen as such; in the face of the realities of litigating the individual motion, it will not matter to anyone what we who dwell on Mt. Olympus think about such matters. The motion that my colleagues direct will proceed in the form in which the parties see fit, and the hearing will be conducted in the manner that the parties and the motion judge think appropriate in the circumstances. It therefore seems reasonable to expect that time savings, if any, will be minimal for those cases in which no genuine issue exists for the court to decide. And where a genuine issue *does* exist, the additional hearing will simply create duplication.

(2) When Does a Contractual Provision Effectively Prohibit Dispute Resolution?

[129] In evaluating a clause that limits access to legally determined dispute resolution, the court's task is to decide whether the limitation is reasonable as between the parties, or instead causes undue hardship. Again, it is helpful to refer to the limitation that the rule of law places on the government's ability to impose hearing fees. As this Court explained in *Trial Lawyers*, at para. 45:

> Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[130] I pause here to affirm that "courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting" (*Wellman*, at para. 54). It will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Arbitration may require upfront costs, sometimes significant costs and far greater than those required to commence a court action. But those costs may be warranted in light of the parties' relationship and the timely resolution that arbitration can provide. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship but that one party simply regrets in hindsight.

[131] Several factors should be considered to decide whether a contractual limitation on legally determined dispute resolution imposes undue hardship and is therefore contrary to public policy. The first consideration is the nature of disputes that are likely to arise under the parties' agreement. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement, this suggests the possibility of undue hardship. This consideration must, however, be situated in the context of the agreement as a whole; a clause that discourages the pursuit of certain low-value claims may be proportionate in light of overall risk allocation between the parties.

[132] The record here shows that Mr. Heller receives $20,800 to $31,200 per year while working 40 to 50 hours per week for Uber. One would reasonably anticipate that a claim by Mr. Heller would not exceed his total annual compensation. Indeed, Mr. Heller's evidence is that a typical claim against Uber would be for non-payment of fees of less than $100. The upfront cost of US$14,500 to advance a claim represents a significant portion of the total compensation Mr. Heller receives each year under his agreement with Uber, and is grossly disproportionate in light of the sort of dispute that agreement is reasonably likely to generate. It is not the case that, as my colleague Côté J. suggests, Mr. Heller and Uber are simply being discouraged from advancing low-value claims (paras. 283 and 311). The costs of proceeding to arbitration are so prohibitive that the agreement effectively bars *any* claim that Mr. Heller might have against Uber. My colleague describes these costs as comparable to an award of litigation costs (paras. 236 and 319), but in my respectful view that is simply not so. These costs are payable by Mr. Heller *in advance*, and *irrespective* of the merit of his claim against Uber —— and therefore bear no resemblance to litigation costs awarded at the end of proceedings. Thus, much like the clause addressed in *Novamaze*, the arbitration agreement here is "capable of operating as a powerful disincentive to . . . take proceedings <u>of any kind</u>". The costs payable by Mr. Heller act as an insurmountable precondition that prevent him from commencing a claim (*Lymer*, at para. 67).

[133] I disagree with my colleague that reaching this conclusion requires further evidence (para. 319). The record in support is ample. Mr. Heller is required to pay US$14,500 to pursue a claim against Uber. That includes a claim for breach of contract, though Mr. Heller's agreement with Uber would rarely, if ever, be expected to produce a claim of that magnitude. These facts are unchallenged. While Mr. Heller may be able to pursue a class action by combining his claim with other individuals in a similar position, that is of no moment here. Class actions are a procedural mechanism and their use "neither modifies nor creates substantive rights" (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17). What matters is *Mr. Heller's* contractual relationship with Uber. Nor, with respect, is the availability of third-party funding a relevant consideration (Côté J.'s reasons, at paras. 236, 286 and 319). A litigant does not need to canvass options for third-party financing —— likely compromising the quantum of their claim in the process —— to benefit from the principle that contracting parties cannot preclude access to dispute resolution according to law.

[134] Courts should also consider the relative bargaining positions of the parties. To be clear, an imbalance in bargaining power is not required to find that a provision bars access to dispute resolution. An outright prohibition on dispute resolution would undermine the rule of law, even in the context of an agreement between sophisticated parties. That said, the hardship occasioned by a limit on legally determined dispute resolution is less likely to be "undue" if it is the product of negotiations between parties of equal bargaining strength. What is reasonable between the parties must be considered in light of the parties' relationship. The role that bargaining strength plays in this context is comparable to its role in the enforcement of other contractual provisions that raise public policy concerns, including restrictive covenants and forum selection clauses (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-57). Here, which it does not dispute, Uber maintains a vastly superior bargaining position in relation to Mr. Heller. The agreement between the parties was formed through a contract of adhesion, which Mr. Heller had no opportunity to negotiate.

[135] Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Arbitration agreements may, for example, be tailored to exclude certain claims or to require the party with a stronger bargaining position to pay a higher portion of the upfront costs. No such nuance is evident, however, in the agreement between Mr. Heller and Uber. It covers any dispute he has with Uber, regardless of its quantum, and requires him to pay all upfront costs required to advance a claim. The ICC Rules that apply to the arbitration agreement also appear to be specifically designed for large commercial claims. For example, the rules contemplate an expedited process, which applies only to claims valued at less than US$2 million (International Court of Arbitration and International Center for ADR, *Arbitration Rules, Mediation Rules* (2016), at pp. 35 and 71 et seq.). Far from being tailored to the circumstances, Uber's chosen arbitration procedure tends to affirm that this limitation on dispute resolution is disproportionate.

[136] In short, the arbitration agreement between Uber and Mr. Heller is disproportionate in the context of the parties' relationship. Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit. This form of limitation on legally determined dispute resolution undermines the rule of law and is therefore contrary to public policy. It follows that I agree with the Court of Appeal that the arbitration agreement between Uber and Mr. Heller is invalid.

[137] In response to my colleague Côté J.'s critique of this approach, I say that the foregoing represents a straightforward application of the applicable law as stated by this Court. By agreeing to arbitrate, contracting parties transfer jurisdiction to resolve disputes from the courts (*Wellman*, at para. 48; Horton, at p. 19; see also *Sport Maska*, at p. 581; *Desputeaux*, at para. 40). The point, to be clear, is not whether curial jurisdiction is ousted: it clearly is. The issue is when such ousting is legally acceptable. And the view of this Court, which I endorse and apply here, is that it is acceptable when it is replaced by a mechanism —— like arbitration —— that provides a comparable measure of justice (*Sport Maska*, at p. 581). The proposition I advance is therefore modest and, viewed in the light of our jurisprudence, uncontroversial: contracting parties must have access to *some* means of resolving their disputes according to law. Otherwise, "justice cannot be done" (*Scott*, at p. 1138). While the rule of law is perfectly compatible with agreements *to arbitrate*, it is *in*compatible with what is in effect an agreement *not to arbitrate* or to preclude parties from resorting to any form of dispute resolution according to law. It is the rule of *law*, not the rule of *Uber*.

[138] This is the narrow but fundamental point that divides my colleague Côté J. and me. I agree that the *Arbitration Act* is a "strong statemen[t] of public policy which favour[s] enforcing arbitration agreements" (para. 309). Indeed, and as I have explained, contracting parties will generally be held to their commitment to arbitrate, even when arbitration requires significant upfront costs. But the agreement my colleague seeks to uphold is a *non*-arbitration agreement. None of the *Arbitration Act*'s objectives require blindly enforcing an agreement labelled as "arbitration" when its effect, in the context of the parties' relationship, is to ultimately *bar* access to legal dispute resolution. Indeed, and as I consider below, my colleague appears to recognize as much by granting a conditional stay requiring Uber to pay for the upfront costs of arbitration.

(3) The Appropriate Remedy

[139] My colleague Côté J. says that, even if the agreement here violates public policy, the appropriate remedy is to "apply blue-pencil severance and strike the selection of the ICC rules" (para. 333). In light of this, and while the parties did not canvass the applicable test, I turn to consider this Court's approach to severance.

[140] Blue-pencil severance is permissible only where it is possible to draw a line through the illegal portion of the parties' agreement, "leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining" (*Shafron*, at para. 29, quoting *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249, at para. 57, per Bastarache J., dissenting). It is therefore important to note here that what my colleague Côté J. views as separate "terms" in the agreement between Uber and Mr. Heller are, in fact, drafted as a single provision:

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a [r]equest for [m]ediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") . . . . The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .
>
> (2019 ONCA 1, 430 D.L.R. (4th) 410, at para. 11)

[141] As I have explained, the illegal portion of the parties' agreement is the *cumulative effect* of this provision. Uber and Mr. Heller agreed to submit all future disputes to mediation, which requires a significant upfront cost, following which any unresolved claim would be submitted to arbitration, requiring additional upfront costs. Reducing the costs of dispute resolution could be achieved by selecting between, or combining, several options: the commitment to mediate could be struck; references to the ICC Rules could be struck; and the commitment to arbitrate could be struck. Blue-pencil severance is achieved by "mechanically removing illegal provisions from a contract" (*Transport North American*, at para. 33 (emphasis added)). Here, there is no single component of the arbitration clause that is, on its own, illegal and that could be struck with a blue line, as my colleague Côté J. suggests.

[142] Moreover, the purpose of severance is to "give effect to the intention of the parties when they entered into the contract", and any application of the doctrine should be restrained (*Shafron*, at para. 32). As my colleague correctly observes, the agreement here may very well embody not just the intention to arbitrate, but also the intention to prohibit either party from advancing claims valued at less than US$14,500 (para. 311). Barring such claims, however, in the context of *this* agreement between *these* parties, is precisely what makes the arbitration clause illegal. It is therefore impossible to strike any illegal portion of the agreement without "fundamentally alter[ing] the consideration associated with the bargain and do[ing] violence to the intention of the parties" (*Transport North American*, at para. 28).

[143] I also say that the remedy my colleague Côté J. would ultimately award —— granting Uber a conditional stay of proceedings —— is inappropriate here for two reasons. First, it is difficult to conclude from the cases cited by my colleague Côté J. that such a remedy is even available in this context. In *Popack v. Lipszyc*, 2009 ONCA 365, the court directed a proposed arbitrator to set a timetable or advise that it would not take jurisdiction, so that a court could otherwise determine whether the arbitration agreement was unable to be performed (paras. 1 and 3 (CanLII)). In *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 1995 CanLII 5752 (SK QB), 135 Sask. R. 254 (Q.B.), the court was not dealing with a stay *in favour* of arbitration proceedings but rather a stay of court proceedings *pending* a related arbitration proceeding. The jurisdiction to stay proceedings did not arise from arbitration legislation and was therefore referred to by the Saskatchewan Court of Appeal as an "extraordinary indulgence" ((1995), 1995 CanLII 4041 (SK CA), 137 Sask. R. 238, at para. 5). And in both *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.), and *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (QL), the proposed court action was stayed on the condition that the defendant waive any time-related defences in the relevant arbitration proceedings (*Iberfreight*, at para. 5; *Continental Resources*, at para. 5). One might question whether it was appropriate to impose such a condition rather than leaving the availability of any applicable defences to the arbitrator's discretion. In any event, however, and even on a broad reading, the conditions imposed in *Iberfreight* and *Continental Resources* simply facilitated the intention of the parties' agreements —— to proceed with arbitration in a timely manner rather than delaying in the courts.

[144] Which brings me to my second point, being that to award a conditional stay is simply to grant notional severance by a different name. There is no bright line of illegality here, and the doctrine of notional severance is therefore inapplicable (*Shafron*, at para 31; Côté J.'s reasons, at paras. 327 and 334). My colleague Côté J. would, however, effectively super-impose such a bright line onto the parties' agreement by reading in a requirement that Uber advance the fees of arbitration. Her view, as I understand it, is that, because Mr. Heller has given sworn evidence that he cannot afford the fees required to pursue his claim, Uber must advance those fees (para. 324). Taking this reasoning to its logical conclusion, Uber will be required to advance the arbitration fees for *any* driver in a comparable financial situation who intends to commence a claim against Uber. While such a claim may be devoid of any merit, Uber is encouraged to take solace in the possibility of recovering its costs (para. 324) —— notwithstanding that any award of costs would be made against a driver who has an already demonstrated inability to pay.

[145] It goes without saying that neither party could have intended such a result. Unlike the conditions imposed in *Iberfreight* and *Continental Resources*, the condition my colleague would impose completely rewrites the parties' agreement in an attempt to render it enforceable. The pathway to reconciling this outcome with my colleague's stress upon party autonomy and freedom of contract is elusive.

[146] The only available remedy in response to the illegality I have identified is to find that the entire arbitration agreement is unenforceable. Any other remedy would require considerable distortion of the intention of the parties.

B. *The Doctrine of Unconscionability*

[147] While the foregoing is sufficient to dispose of the appeal, I offer some observations on the reliance placed by Abella and Rowe JJ. on the doctrine of unconscionability. In my respectful view, the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount.

[148] In *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226, Sopinka J. commented that "the doctrine of unconscionability and the related principle of inequality of bargaining power are evolving and, as yet, not completely settled areas of the law of contract" (p. 309). More than 20 years later, this uncertainty persists, even at the most fundamental level of determining the rationale that underpins the doctrine's existence (C. D. L. Hunt, "Unconscionability Three Ways: Unfairness, Consent and Exploitation" (forthcoming, *S.C.L.R.*); see also M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at pp. 517-19). Rather than unsettling the doctrine further by jamming it with what are in substance public policy concerns, the preferable course in my view would be to develop unconscionability in a manner that places more emphasis on reasoning than results, to ensure that the doctrine is conceptually sound and explicit in its policy underpinnings (R. Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005), 84 *Can. Bar. Rev.* 171, at p. 173).

(1) Confusion in Terminology

[149] At least some of the uncertainty surrounding unconscionability can be attributed to varying usage of the term "unconscionable". Unconscionability, as an independent doctrine, is "a specific concept, like duress and undue influence, that provides a basis upon which a transfer may be reversed" (McInnes, at p. 520). But unconscionability may also refer, in a more general sense, to a unifying theme or organizing equitable principle, or to a constituent element of a distinct legal test (pp. 519-20; Bigwood (2005), at p. 177; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 74). Some commentators suggest that unconscionability as a broader principle explains several independent rules in contract law, including those relating to forfeitures, penalties, exclusion clauses, duress, and restraint of trade (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at c. 14 and p. 306).

[150] While it may be that "unconscionable" is an apt description for multiple and various circumstances, it is important to distinguish unconscionability as an independent basis for setting aside transactions. For example, even though in a generic or lay sense, the arbitration agreement at issue in this appeal might well be considered "unconscionable", it does not follow that it is unconscionable in the specific sense contemplated by the equitable doctrine of that name. As this Court said in *Ryan*, unconscionability "has developed a special meaning in relation to inequality of bargaining power", and use of the term in other contexts therefore has the potential to cause

confusion (para. 74). To avoid such confusion, the term "unconscionability" should be used to refer *only* to the independent doctrine of that name (McInnes, at p. 520).

[151] Specificity is critical here, because the same policy rationale does not underlie each of the distinct concepts that unconscionability may be said to explain. Rules relating to *substantive* concerns with specific contractual provisions (such as penalty and exclusion clauses) arise independently from, and address different concerns than, rules that address *procedural* concerns surrounding contract formation. As Professor McInnes explains:

> Substantive unconscionability would trigger relief where the *result* of a transaction is intolerable. Procedural unconscionability would trigger relief on the basis of the intolerable *manner* in which a transaction is created. [Emphasis in original; p. 548.]

[152] It is therefore important to elaborate on the criteria that form the basis for reaching the conclusion that a contract or contractual provision should be set aside. Attempting to jam multiple grounds for setting aside contracts and contractual terms into one single principle serves only to obfuscate those criteria. To move forward in a coherent and rational way, "it is absolutely imperative, in connection with the doctrine of unconscionability, to resist appeals to unreasoned intuition" (McInnes, at p. 532; see also Bigwood (2005), at pp. 172-73 and 192). Courts must not develop contract doctrines that invite "*ad hoc* judicial moralism or 'palm tree' justice" (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70).

[153] But unreasoned intuition and *ad hoc* judicial moralism are *precisely* what will rule the day, in my respectful view, under the analysis of my colleagues Abella and Rowe JJ. In their view, judges applying unconscionability are to mete out justice as they deem fair and appropriate, thereby returning unconscionability to a time when equity was measured by the length of the Chancellor's foot (para. 78, quoting L. I. Rotman "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016), 2 *C.J.C.C.L.* 497, at p. 535). As Professor Bigwood writes:

> . . . acceptance of such a "free-wheeling" approach is also acceptance of the risk that those subject to Canadian law in this area will lose the very virtues of guidance, transparency and accountability that come with forced specificity in application, justification and analysis. To the extent the test bypasses such natural controlling phenomena of the common law method, it certainly risks decline into unprincipled and undisciplined judicial decision-making, and thus could rightly be viewed as an "enemy" of reason, discipline and the rule of law. [Footnote omitted.]
>
> (Bigwood (2005), at p. 198, citing P. Birks, "Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment" (1999), 23 *Melbourne U.L. Rev.* 1, at pp. 20-21).

(2) Unconscionability as an Independent Doctrine

[154] Focusing squarely on *the doctrine* of unconscionability reveals that it does not apply to this appeal. At the outset, I emphasize that unconscionability applies to all types of contracts, "indicating, by implication, that its application must be highly exceptional" (S. Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010), 49 *Can. Bus. L.J.* 378, at p. 392). Unconscionability is also relevant to unjust enrichment, providing "a means by which an apparent juristic reason (e.g., donative intent, contract) may be negated" (McInnes, at p. 520 (footnote omitted); see also pp. 534-36). Broad ramifications therefore flow from how the doctrine of unconscionability is conceptualized by this Court, and a correspondingly heavy cost arises from applying unconscionability without careful reflection upon the rationale that underpins its existence (Hunt, at pp. 37-39).

[155] A leading statement of the unconscionability doctrine appears in *Morrison v. Coast Finance Ltd.* (1965), 1965 CanLII 493 (BC CA), 55 D.L.R. (2d) 710 (B.C.C.A.), where Davey J.A. remarked, at p. 713:

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material

> ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable or perhaps by showing that no advantage was taken. [Citation omitted.]

[156] Davey J.A.'s statement of the principle reflects the traditional understanding that unconscionability requires both substantive unfairness (an improvident bargain) and procedural unfairness (an inequality of bargaining power stemming from a weakness or vulnerability affecting the claimant) (*Norberg*, at p. 256; McInnes, at p. 524; P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 167; J.A. Manwaring, "Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law" (1993), 25 *Ottawa L. Rev.* 235, at p. 262; Hunt, at p. 54). While both of these elements are typically viewed as necessary, each does not have an equally important role. There is little support in the jurisprudence for the view that unconscionability operates solely, or even primarily, on the basis of substantive unfairness (McInnes, at p. 549; Hunt, at pp. 65-67). To the contrary, the more settled view has been that the mere fact that a court sees a bargain as improvident or unreasonable does *not* make the transaction unconscionable (*Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 72; *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 24 and 64; see also McInnes, at pp. 549-50).

[157] While this Court has not closely examined unconscionability from a doctrinal standpoint, its references thereto support the view that unconscionability is intended to redress *procedural* deficiencies associated with contract formation —— arising, for example, from abuse of an inequality in bargaining power, or exploitation of a weaker party's vulnerability (*Norberg*, at pp. 256 and 261; *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at p. 412; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at paras. 82, 86 and 93, per Bastarache and Arbour JJ., and para. 208, per LeBel J., dissenting; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 6 and 58). In *Dyck v. Manitoba Snowmobile Association*, 1985 CanLII 27 (SCC), [1985] 1 S.C.R. 589, the Court remarked, at p. 593:

> . . . the relationship of Dyck and the Association [does not] fall within the class of cases . . . where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities.

[158] The procedural focus of unconscionability has been similarly emphasized in the most recent appellate decisions giving thorough consideration to the doctrine (*Downer*, at paras. 35-37; *Input Capital*, at paras. 29-37).

[159] Although it is not necessary to decide it here, I note that some commentators have even argued that substantial improvidence in the resulting bargain should not itself be a requirement to establish unconscionability, as it simply serves as a hallmark of a procedurally flawed transaction (McInnes, at pp. 550-52; Bigwood (2005), at p. 176; see also R. Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2018), 60 *Can. Bus. L.J.* 124). This position was adopted in *Downer*, at para. 35:

> Jettisoning the requirement of a resulting improvident bargain as a requirement for the application of the unconscionability doctrine, and affirming it, instead, as an important consideration in determining whether a position of inequality existed and whether it was unfairly taken advantage of will bring the doctrine into line with the early English cases which placed emphasis on vulnerability resulting from a disparity of bargaining positions and the taking advantage of that vulnerability. See for example, Chesterfield v. Janssen (1751), 2 Ves. Sen. 125 (Eng. Ch.) where Lord Hardwicke stressed the need to "prevent taking surreptitious advantage of the weakness or necessity of another."

[160] All this leads, unavoidably, in my respectful view, to the conclusion that unconscionability primarily addresses procedural concerns surrounding contract formation. In that sense, I agree with my colleagues

(Abella and Rowe JJ.'s reasons, at para. 60). It also leads me to the conclusion, however, that a *significant* degree of procedural unfairness is required to invite unconscionability's application. While the procedural component of unconscionability is often stated as simply requiring an "inequality of bargaining power", this phrasing is "inadequate, if not misleading" (McInnes, at p. 524 (emphasis deleted)). Almost every contract involves some difference in bargaining power. Mere inequality — even substantial inequality — is, therefore, insufficient on its own to warrant application of unconscionability to set aside the transaction. Instead, unconscionability has traditionally been understood as requiring a *particular* vulnerability on the part of the plaintiff. As the Newfoundland and Labrador Court of Appeal concluded in *Downer*, at para. 39:

> It is not any inequality of position that will do . . . . It must be such that it has the potential for seriously affecting the ability of the relief-seeker to make a decision as to his or her own best interests and thereby allows the other party an opportunity to take advantage of the claimant's personal or situational circumstances. That is why terms such as "overwhelming" or "substantial" or "special" have been used . . . . I would venture to say that what is meant by such terminology is that the inequality must relate to a special and significant disadvantage that has the potential of overcoming the ability of the claimant to engage in autonomous self-interested bargaining.
>
> (See also McInnes, at pp. 524-28; Bigwood (2005), at pp. 199-204.)

[161] Hence the cases cited by my colleagues, which deal with elderly persons suffering from cognitive impairments (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984), ship captains stranded at sea (*The Mark Lane* (1890), 15 P.D. 135; *The Medina* (1876), 1 P.D. 272), and elderly persons with limited competency in written English and no understanding of the transaction they have agreed to (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447). Each requires a degree of vulnerability particular to the claimant.

[162] By contrast, the only alleged procedural deficit in the agreement between Uber and Mr. Heller is the nature of Uber's contract terms, as they were presented to Mr. Heller through a standard form contract of adhesion. The argument is effectively that *any* party contracting with Uber would be in a position to raise unconscionability because they were unable to negotiate the contract's terms. While my colleagues readily accept this deficit as sufficient (paras. 87-91), this 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. My colleagues see "no reason to depart from the approach to unconscionability endorsed in . . . . [*Douez*]" (para. 65). And, indeed, they do not depart from Abella J.'s separate *concurring* reasons in *Douez*. But they *do depart* from *the majority's* approach in that case. Specifically, in *Douez* the Court *declined* to address unconscionability in the context of a consumer contract of adhesion, and instead considered the matter through the lens of public policy. And the majority's view —— that standard form agreements are not inherently flawed —— is consistent with our liberal conception of freedom of contract, a value that accords great respect to individual autonomy. Though one may be required to accept a standard form agreement without negotiation to use a service, that fact "affects neither party's ability to bargain effectively from the standpoint of legal autonomy, choice and responsibility" (Bigwood (2005), at pp. 199-200). *Douez* is, of course, a precedent of our Court.

[163] The stakes are undoubtedly high here. Concluding that a standard form contract is sufficient to satisfy unconscionability's procedural requirement would open up the terms of every such contract for review on a measure of substantive reasonableness. This would represent a radical and undesirable change in the law, particularly considering the complexity and range of transactions to which unconscionability applies (see Bigwood (2005), at pp. 208-9). The result of the inevitable, undisciplined application by courts of such an undisciplined expansion of the scope of unconscionability will be profound uncertainty about the enforceability of contracts.

[164] My colleagues further expand the scope of unconscionability by eliminating knowledge as a requirement. Unconscionability is generally viewed as requiring the stronger party to have at least constructive knowledge of the weaker party's vulnerability (see e.g. McInnes, at pp. 537 and 544-48; *Downer*, at paras. 44-49; Bigwood (2005), at p. 195; Hunt, at pp. 58-59). As Professor McInnes writes:

> Even more clearly than its equitable cousin, undue influence, unconscionability involves an element of impropriety. The gist of the doctrine is the *exploitation* of vulnerability, the ". . . unconscientious use of power by a stronger party against a weaker [party]." And while there is some debate as to the precise

> nature of the mental element, the best view is that relief is premised upon proof that the defendant *knew* of the claimant's weakness. [Emphasis in original; footnotes omitted; p. 537]

A recent confirmation of this requirement appears in *Downer*, where the Newfoundland and Labrador Court of Appeal concluded that knowledge of either the claimant's vulnerability or "of circumstances that pointed to special and significant disadvantage created or flowing from an inequality of bargaining relationship" must be proven to make out the claim (paras. 46-49).

[165] Without accounting for or even acknowledging this controversy, my colleagues state that knowledge is not essential (paras. 84-85), despite a majority of scholars concluding that *at least* constructive knowledge is required. To reach this conclusion, my colleagues equate knowledge with wrongdoing (paras. 85-86). There is, however, a distinction between the two concepts in matters of unconscionability (see e.g. McInnes, at p. 540; C. Rickett, "Unconscionability and Commercial Law" (2005), 24 *U.Q.L.J.* 73, at pp. 78 and 80). While there is clear support for the proposition that unconscionability can be established without wrongdoing —— that is, conduct rising to the level of intention, actual fraud, dishonesty, or active overreaching —— the same cannot be said of knowledge (see *Chesterfield (Earl of) v. Janssen* (1750), 2 Ves. Sen. 125, 28 E.R. 82, at pp. 100-101; *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. App. 484, at pp. 490-91; *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326 (C.A.), at pp. 339-40; *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.), at pp. 401-6; *Morrison*, at p. 714; *Woods v. Hubley* (1995), 1995 NSCA 173 (CanLII), 146 N.S.R. (2d) 97 (C.A.), at paras. 28-33). Even viewed as a plaintiff-sided doctrine, there can be no claim unless the defendant exploits the plaintiff's vulnerability (McInnes, at pp. 540-43). Accordingly, "there is very little support for the direct application of [strict liability] in the context of unconscionability", which is what my colleagues would impose (McInnes, at p. 544 (footnote omitted)).

[166] There is clear merit in a knowledge requirement, at least when applied to contractual dealings, as opposed to gratuitous transfers. Where the relationship between plaintiff and defendant is contractual, equity's interest in protecting those who are vulnerable must be balanced against the countervailing interests of commercial certainty and transactional security (McInnes, at p. 541; Rickett, at p. 80). Equity therefore demands an explanation as to why the defendant should suffer the consequences of the plaintiff's vulnerability (McInnes, at p. 541, citing P. Birks and C. Mitchell, "Unjust Enrichment" in P. Birks, ed., *English Private Law* (2000)). 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.

[167] The wholesale shift in the law that my colleagues advance by removing knowledge as a requirement, seemingly in response to the equities of this particular case, drastically expands the scope of unconscionability. It is neither supported by the jurisprudence nor counselled by academic commentary, and rightly so. Not only is eliminating the knowledge requirement a recipe for further uncertainty in the doctrine of unconscionability, it is commercially unworkable. Contracting parties are left to wonder whether an unknown state of vulnerability will someday open up their agreement to review on grounds of "fairness". This alone should give pause, but my colleagues do not stop there. Under their approach, a party who contracts exclusively with individuals who have received independent legal advice *still* cannot take comfort in the finality of their agreements. According to my colleagues, only *competent* legal advice will ameliorate an imbalance in bargaining power (para. 83). A potential defendant therefore cannot be assured of finality unless it knows the content of the advice its counterparty has received.

[168] Moreover, this expansion of unconscionability is entirely unnecessary in the context of this appeal. Ultimately, the concern underlying my colleagues' approach is simply that Mr. Heller cannot access any form of dispute resolution (paras. 94-95). As I have explained, this concern is already guarded against by a long-standing rule of public policy. And this Court's decisions clearly demonstrate that where the concern with enforcing a contract relates primarily to the *substance* of a particular provision, unconscionability is not the appropriate doctrine for granting relief. This Court has adopted specific rules to respond to the public policy considerations suggesting that the substance of a particular type of provision is cause for concern. For example, in *Douez*, the Court declined to apply the doctrine of unconscionability to a forum selection clause appearing in a consumer contract of adhesion. Instead, inequality of bargaining power was raised as a relevant consideration in relation to public policy (paras. 47 and 51-63). In its reasons, the Court provided specific guidance and directly addressed the mischief relating to a forum selection clause in the consumer context. The Court has taken a similar approach to restrictive covenants that operate in restraint of trade, viewing those provisions through the lens of public policy (*Elsley*, at p. 923; see also *Shafron*, at paras. 15-23; Benson, at p. 203). In both contexts, imbalance in bargaining power is a relevant consideration, but the degree of vulnerability necessary to establish

unconscionability is not required (*Elsley*, at pp. 923-24; *Douez*, at paras. 51-53). This reflects that the inquiry is grounded in public policy, addressing the substance of the provision at issue.

[169] By addressing substantive provisions of contracts through specific rules designed to address particular types of provisions, courts can provide, and have provided, concrete guidance addressing the relevant mischief. This Court has approached the enforcement of contracts in a principled and rational manner by attempting to "ascertain the existence and the exact limits" of the overriding public policy considerations that prohibit enforcement (*Fender*, at p. 22). The nature of the inquiry varies, depending on the policy issue raised by the provision in question; different considerations will apply in considering exclusion clauses (*Tercon*, at paras. 117-20, per Binnie J., dissenting (but not with regards to the analytical approach to be followed with regards to the applicability of an exclusion clause)), forum selection clauses (*Douez*, at paras. 51-62), restraints of trade (*Elsley*, at pp. 923-24), and clauses that limit access to legally determined dispute resolution (as I have explained in these reasons). While these types of provisions might all be described as improvident in certain circumstances, it is critical to explain *why* that is so. Applying unconscionability in the manner suggested by my colleagues invites the conclusion that well-established rules relating to the enforcement of specific clauses should be swept aside in favour of a unified *ad hoc* and unprincipled approach to enforceability. This is why I say that, while unconscionability is appropriate for remedying procedural concerns that arise during contract formation, applying its generally-framed requirements to address what are ultimately concerns of public policy will serve only to obfuscate the criteria for granting relief. In turn, commercial certainty is undermined.

[170] Indeed, the approach adopted by my colleagues embodies this concern by failing to provide concrete guidance for determining what substantive unfairness —— or an improvident transaction —— looks like. My colleagues assert that improvidence arises whenever a bargain "unduly advantages the stronger party or unduly disadvantages the more vulnerable" (para. 74). Their approach is, they say, "contextual" and incapable of being framed precisely (para. 78). My colleagues therefore invite judges to apply their own subjective, even idiosyncratic understandings of "[f]airness" and "situationa[l] . . . . appropriate[ness]" in deciding whether a contract should be enforced (para. 78, quoting Rotman, at p. 535). It is difficult to imagine a judicial approach more likely to undermine commercial certainty. Professor Rickett's comments are apposite:

> Judges ought not to announce principles at so abstract a level that they are devoid of clear ordinary meaning. Still less should they attempt to apply them as *legal* principles. That there is no generally accepted meaning for unconscionability should immediately warn us off its use. It is not good enough to trumpet the rule of law, and then to apply the rule of men's hearts. The rule of law requires juridically applicable principles. [Emphasis in original; p. 87].

[171] Further, my colleagues say that terms may be unconscionable when a party does not "understand or appreciate" them (para. 77). This suggests that Uber's agreement with Mr. Heller could have been remedied if the US$14,500 fee for commencing a claim was spelled out expressly. As I have explained, however, even a contract that imposes express consequences for commencing a civil claim —— like the contract in *Novamaze* —— will be contrary to public policy if those consequences rise to the level of undue hardship. It may be relevant to consider whether the stronger party obfuscated the limit on dispute resolution, but it cannot be determinative. Directly addressing the public policy concern at issue in this appeal, rather than obscuring it through the lens of unconscionability, allows for a more appropriate response to the problem.

[172] Finally, the doctrine of unconscionability was never meant to apply to individual provisions of a contract. Unlike public policy considerations that target a specific contractual provision, unconscionability's substantive inquiry must consider the entire bargain — that is, the entire exchange of value between the parties (Benson, at pp. 176-82). Indeed, my colleagues seem to agree that a contract appearing to be unfair may be explained by showing that it is accounted for in the assumption of risk between the parties (para. 59; Benson, at p. 182). And yet, nowhere in their analysis do they consider the overall exchange of value and assumption of risk between Mr. Heller and Uber, which may very well justify what appears to be substantial "improvidence" solely from Mr. Heller's perspective. While Mr. Heller was unable to negotiate the terms of his agreement with Uber, he did receive the benefit of working as an Uber driver and receiving income. The contract was in no way foisted upon him. In failing to even consider the value exchange between the parties, my colleagues ultimately create a doctrine of contract enforcement that rests entirely on grounds of distributive justice. I see no justification for this development, and agree with Professor Benson, who writes:

> Unconscionability represents a conception of fairness in transactions or commutative justice, not justice in distributions. It treats parties as equal by recognizing and protecting in each the power to receive something of equal value from the other in return for what he or she gives. [Footnote omitted; p. 190]
>
> (See also Waddams (2017), at p. 304.)

[173] Instead 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 (para. 96 and fn. 8). In my view, however, this is a novel proposition. Some support for their position could possibly be drawn from this Court's decision in *Tercon*, which requires courts to consider whether an "exclusion clause was unconscionable at the time the contract was made" (para. 122, per Binnie J., dissenting (but not on this point)). But nothing in *Tercon*, or *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426 (where the reference to unconscionability in the context of exclusion clauses first appeared) suggests an intention to adopt a novel approach to unconscionability that targets individual terms (J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 442). In my view, 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. In any event, the test set out in *Tercon* ultimately reflects a similar approach to that taken in *Douez*, which I find compelling: if a specific contractual term is properly incorporated into a valid agreement (considering the general doctrines of contract enforcement), then that provision should be held enforceable, absent compelling public policy reasons.

[174] In sum, my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change.

[175] Here, there is no allegation that Mr. Heller suffered from any specific vulnerability that would traditionally ground a claim in unconscionability. It follows that there is no procedural deficit warranting the application of unconscionability to the agreement between Uber and Mr. Heller. The true concern is one of substance: Uber's arbitration agreement bars access to justice, undermining the rule of law. As I have explained, that concern is best addressed by considering whether the limitation on access to justice is reasonable in the circumstances or, instead, imposes undue hardship.

III. Conclusion

[176] The arbitration agreement between Mr. Heller and Uber effectively bars Mr. Heller from accessing a legally determined dispute resolution, thereby imposing undue hardship on Mr. Heller and undermining the rule of law. The arbitration agreement is unenforceable. I would dismiss the appeal, with costs to Mr. Heller in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[177] One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement: *Hofer v. Hofer*, 1970 CanLII 161 (SCC), [1970] S.C.R. 958, at p. 963. Although times change and conventional models of work and business organization change with them, the fundamental conditions for individual liberty in a free and open society do not. Party autonomy and freedom of contract are the philosophical cornerstones of modern arbitration legislation. They inform the policy choices embodied in the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 ("*International Act*"), one of which is that the "parties to a valid arbitration agreement should abide by their agreement": *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 52.

[178] The parties to the agreement at issue in this appeal have bound themselves to settle any disputes arising under it through arbitration. My colleagues Abella and Rowe JJ. and Brown J. advance competing theories which impugn, to varying degrees, the choice of the law that governs the parties' contractual arrangements, the designated seat of the arbitration, and the selection of an international arbitral institution's procedural rules. My colleagues do not impeach the parties' agreement to submit disputes to arbitration, yet they find that the parties' commitment to do so is invalid. I cannot reconcile this result with the concepts of party autonomy, freedom of contract, legislative intent, and commercial practicalities. These important considerations — which ought to be taken into account — are disregarded in the majority's reasons.

[179] As I explain below, the *Arbitration Act*, the *International Act*, this Court's jurisprudence and compelling considerations of public policy require this Court to respect the parties' commitment to submit disputes to arbitration. I would therefore allow the appeal.

II. Background

[180] The appellants, Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. (collectively, "Uber"), form part of a corporate group with strong connections to the Netherlands, including the corporate headquarters of Uber B.V. and Rasier Operations B.V. The corporate group has global operations in what has been styled the "sharing economy".

[181] Uber develops and operates software applications ("Apps" or an "App") for users of GPS-enabled smartphones, which connect ride-seeking passengers with drivers and allow customers to have food delivered from restaurants. The food delivery business is known as "UberEATS", and the App developed for it is known as the "UberEATS App".

[182] Uber licenses another App — the "Driver" App — to David Heller, the respondent. Mr. Heller delivers food from restaurants to customers who have ordered food through UberEATS and is paid through the Driver App. A person in his position is commonly referred to as an "Uber driver". He earns CAN$400 to CAN$600 per week driving for 40 to 50 hours.

[183] To become an Uber driver, Mr. Heller was required to enter into a service agreement with Rasier Operations B.V. through the Driver App. He was periodically required to agree to new versions of the service agreement and of an agreement subsequently signed with Uber Portier B.V., which is not a party to this appeal. To accept the service agreement, Mr. Heller was required to scroll through the entire contract and to click two buttons to indicate his acceptance. The Driver App does not limit the time an Uber driver may take to review the service agreement before accepting.

[184] The parties do not suggest that there were any meaningful substantive differences between the various service agreements for the purposes of this appeal. I refer to the agreements collectively throughout these reasons as the "Service Agreement".

[185] The Service Agreement includes a clause that provides that any dispute, conflict or controversy arising in connection with the agreement is to be first submitted to mediation and, if mediation is unsuccessful, is to be finally resolved by arbitration ("Arbitration Clause"). The Arbitration Clause adds that the International Chamber of Commerce's ("ICC") *Arbitration Rules, Mediation Rules* developed by the International Court of Arbitration ("ICA") and the International Centre for ADR, as amended from time to time ("ICC Rules"), are to apply, and designates Amsterdam, the Netherlands, as the place of arbitration ("Place of Arbitration Clause"). The Service Agreement also includes a clause that provides that it is to be governed by and construed in accordance with the laws of the Netherlands ("Choice of Law Clause").

[186] Uber offers a free internal dispute resolution mechanism which connects Uber drivers to customer support representatives. Ontario-based drivers may also visit a local support centre referred to as a Greenlight Hub to resolve disputes. It is noteworthy that Mr. Heller has raised over 300 complaints through Uber's internal procedure, most of which were resolved within 48 hours.

[187] The selection of the ICC Rules in a mediation or arbitration agreement entails the administration of the proceedings by the ICC's autonomous dispute resolution bodies: the ICA and the International Centre for ADR. The ICC Rules provide for the payment of mandatory fees to these dispute resolution bodies for the administration of mediation and arbitration proceedings, which total US$14,500 for a claim under US$200,000 ("ICC Fees").

[188] Mr. Heller commenced a proposed class proceeding in Ontario for CAN$400,000,000, alleging that Uber drivers such as himself have been misclassified by Uber because they are employees who are entitled to the benefits and protections of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*").

[189] Uber brought a motion to have Mr. Heller's proceeding stayed in favour of arbitration pursuant to the Arbitration Clause and the *International Act* or, alternatively, the *Arbitration Act*.

[190] Applying the *International Act*, the Ontario Superior Court stayed Mr. Heller's action in favour of arbitration: 2018 ONSC 718, 41 D.L.R. (4th) 343. The Court of Appeal allowed the appeal and set the stay aside, holding that, if the drivers are employees, as is alleged, then the Arbitration Clause illegally contracted out of an employment standard. In addition, the Arbitration Clause was found to be unconscionable at common law. Either conclusion meant that the Arbitration Clause is invalid under s. 7(2) of the *Arbitration Act* such that the mandatory stay does not apply.

III. Legislation

[191] The *ESA* includes the following provisions:

> **Definitions**
>
> **1.** (1) In this Act,
>
> . . .
>
> "employment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee; . . .
>
> . . .
>
> **No contracting out**
>
> **5.** (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> **Greater contractual or statutory right**
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.
>
> **No treating as if not employee**
>
> **5.1.** (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.
>
> . . .
>
> **Complaints**

96. (1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

. . .

When complaint not permitted

98. (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.

[192] The *Arbitration Act* includes the following provisions:

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.

2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.

4. To enforce awards.

. . .

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment.

. . .

Arbitral tribunal may rule on own jurisdiction

17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

Independent agreement

(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found

to be invalid.

. . .

Review by court

(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

[193] The *International Act* includes the following provisions:

Application of Model Law

5. (1) Subject to this Act, the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006, set out in Schedule 2, has force of law in Ontario.

. . .

Stay of proceedings

9. Where, pursuant to article II (3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[194] Schedule 2 of the *International Act* implements the United Nations Commission on International Trade Law's *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985 ("UNCITRAL" and "UNCITRAL Model Law", respectively), which includes the following provisions:

Article 1. Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

. . .

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

. . .

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(pp. 1, 5 and 8)

[195] The *Courts of Justice Act*, R.S.O. 1990, c. C.43, includes a provision which addresses stays of proceedings:

> **Stay of proceedings**
>
> **106.** A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[196] The part of the ICC Rules that deals with arbitration ("ICC Arbitration Rules") include the following provisions:

> **Article 18**
>
> **Place of Arbitration**
>
> 1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
>
> 2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
>
> 3. The arbitral tribunal may deliberate at any location it considers appropriate.
>
> . . .
>
> **Article 22**
>
> **Conduct of the Arbitration**
>
> 1. The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
>
> . . .
>
> 4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
>
> . . .
>
> **Article 38**
>
> **Decision as to the Costs of Arbitration**
>
> . . .
>
> 3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
>
> 4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

[197] Appendix VI to the ICC Arbitration Rules contains a set out of procedural rules for the expedited conduct of arbitration ("ICC Expedited Rules"), which include the following provisions:

> **Article 3**
>
> **Proceedings**

. . .

> 4. The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).
>
> 5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication. [pp. 71-72]

IV. Issues

[198] The overall issue in this appeal is whether Uber's motion for a stay of Mr. Heller's proceeding should be granted pursuant to either s. 9 of the *International Act* or s. 7(1) of the *Arbitration Act*. A number of related questions arise:

- Which arbitration legislation governs Uber's motion for a stay?
- Is the Arbitration Clause null and void under the *International Act*, or invalid under the *Arbitration Act*?
- Should a court or an arbitral tribunal rule first on the validity of the Arbitration Clause?
- What conditions, if any, should the Court impose on the stay of proceedings?

V. Analysis

A. *Overview*

[199] I would allow the appeal and grant Uber's motion for a stay of proceedings, on the condition that Uber advances the funds needed to initiate the ICA arbitration proceedings.

[200] I begin my analysis by considering historical trends in Canadian arbitration law, which was initially characterized by a judicial attitude of overt hostility to arbitration. In recent decades, though, Canadian arbitration law has seen a dramatic reversal, as arbitration has been embraced and Canada has been transformed into a world leader in arbitration jurisprudence. I fear, however, that, in taking the approaches they do, my colleagues risk abdicating Canada's leadership role in arbitration law.

[201] Next, I turn to the concrete doctrinal problems posed by this appeal. I consider which arbitration legislation governs Uber's motion for a stay. While I conclude that the *International Act* applies, the ultimate conclusions I reach would be the same under the *Arbitration Act*. I then consider whether the Arbitration Clause is either null and void or invalid, depending on which legislation is concerned. A primary sub-issue is whether a court or the arbitral tribunal should rule first on these questions, and this turns on whether Mr. Heller's arguments can be characterized as raising questions of law or questions of mixed law and fact which require only a superficial review of the documentary evidence in the record in order to establish the relevant factual aspects. I find that his arguments based on the doctrine of unconscionability and on the *ESA* raise questions of mixed law and fact which cannot be decided on the basis of a superficial review of that evidence and should therefore be decided by the arbitrator.

[202] These conclusions would be sufficient to decide the appeal, but, because my colleagues go further and consider Mr. Heller's arguments on their merits, I also comment on the merits of his challenge in respect of the validity of the Arbitration Clause. I find that the testimonial evidence before the Court is insufficient to support a finding that the Arbitration Clause is unconscionable. I also find that the Arbitration Clause is neither inconsistent with the *ESA*, nor contrary to public policy, as Brown J. would find.

[203] I conclude by considering the possible remedies on a motion for a stay. The majority appears to believe that the courts face a stark choice between rigidly enforcing what they perceive to be a one-sided arbitration agreement and finding that the entire arbitration agreement is invalid. I suggest that at least two remedies are available to a court hearing a motion for a stay in order to alleviate any perceived unfairness: (1) a conditional stay of proceedings and (2) severance of an unenforceable term of an arbitration agreement. These remedies would enable courts to safeguard procedural fairness in a manner consistent with the principle of party autonomy and with the legislature's intent.

[204] I turn now to the broader historical and jurisprudential context of this appeal.

B. *Historical Trends in Canadian Arbitration Law: From Overt Hostility to World Leadership*

[205] Until the 1980s, Canadian courts displayed hostility to arbitration, treating it as a second-tier class of dispute settlement: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 89-96, per LeBel and Deschamps JJ. (dissenting, but not on this point). The Canadian judiciary's hostility was inherited from the English common law, which held that arbitration agreements had the effect of ousting the jurisdiction of the courts and were therefore void on the basis that they were contrary to public policy: *Seidel*, at paras. 89-90; *Wellman*, at para. 48. This hostility was exemplified by *National Gypsum Co. Inc. v. Northern Sales Ltd.*, 1963 CanLII 96 (SCC), [1964] S.C.R. 144, in which this Court held that an agreement to submit disputes to arbitration in New York was unenforceable on the basis of public policy.

[206] Beginning in the 1980s, however, this Court recognized that the prevailing attitude was misconceived and began to chart a new course for arbitration law jurisprudence in Canada. In *Zodiak International Productions Inc. v. Polish People's Republic*, 1983 CanLII 24 (SCC), [1983] 1 S.C.R. 529, this Court distanced itself from the approach it had taken in *National Gypsum* and advanced a more favorable position on arbitration. In *Sport Maska Inc. v. Zittrer*, 1988 CanLII 68 (SCC), [1988] 1 S.C.R. 564, it recognized that the judiciary's hostility to arbitration had unfortunately inhibited the legal community's interest in arbitration, thereby inhibiting the growth of this form of dispute resolution. Around the same time, legislatures began to intervene to further promote the use of arbitration: *Wellman*, at para. 49.

[207] Over time, courts, including this Court, began to take notice that the legislatures had adopted a pro-arbitration stance. In *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at paras. 38 and 40-41, this Court acknowledged that arbitration is a legitimate form of dispute resolution and that this had been fully recognized and endorsed by the legislature and in its own jurisprudence. In *Seidel*, at para. 2, this Court stated that, "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause". It added that it had both recognized and welcomed the virtues of commercial arbitration: *Seidel*, at para. 23. Finally, in *Wellman*, this Court endorsed "the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts": *Wellman*, at para. 56, quoting *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14.

[208] As a result of legislative and judicial encouragement, Canada is now a world leader in arbitration law. The jurisprudence of Canadian courts features prominently with that of other leading UNCITRAL Model Law jurisdictions, such as Germany, Australia, Hong Kong and Singapore, in the United Nations Commission on International Trade Law's *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012). Canada sits on the cusp of becoming a world-class seat for arbitration, with modern arbitration legislation and a thriving community of dedicated practitioners, scholars, and arbitrators: J. Walker, "Canada's Place in the World of International Arbitration" (2019), 1 *Can. J. Comm. Arb.* 1.

[209] My colleagues threaten to roll back the tide of history and Canadian jurisprudence to the days when judges were overtly hostile to arbitration. They decline to follow the rule of systematic referral to arbitration that was clearly established in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 84-85. Instead, they add to the grounds for judicial intervention in the arbitration process by proposing new exceptions to the rule of systematic referral. Finally, they suggest that, regardless of the legislative intent embodied in the *Arbitration Act* and the *International Act*, judicial respect for arbitration is predicated upon the accessibility of arbitration in a given case: *Wellman*, at paras. 48-56 and 82; Abella and Rowe JJ.'s reasons, at

para. 97; Brown J.'s reasons, at para. 117. As a result, my colleagues' approaches call into question this Court's commitment to encouraging the use of arbitration and to the modern "hands-off" approach to arbitration it so recently endorsed in *Wellman*. Canada's role as a world leader in arbitration law may now be in doubt.

C. *Which Arbitration Legislation Applies to Uber's Motion for a Stay?*

[210] Mr. Heller argues that the *Arbitration Act* applies because employment disputes are excluded from the scope of the UNCITRAL Model Law, which is incorporated into Ontario law by the *International Act*.

[211] The *International Act* applies to arbitrations which are "international" and "commercial": UNCITRAL Model Law, art. 1(1). In this appeal, the arbitration is "international" because the parties have their residences or places of business in different countries: UNCITRAL Model Law, art. 1(3)(*a*) and (4)(*b*). Therefore, the applicability of the *International Act* turns on whether the parties' relationship is properly characterized as being "commercial" in nature. In my view, a court should approach this issue by analyzing the nature of the parties' relationship on the basis of a superficial review of the record, as opposed to characterizing the nature of the dispute solely on the basis of the pleadings.

[212] An interpretive footnote in the UNCITRAL Model Law explains that the term "'commercial' is to be given a wide interpretation so as to cover all matters arising from all *relationships* of a commercial nature": fn. 2 (emphasis added). The footnote also contains a non-exhaustive list of covered transactions, which includes licensing agreements. This implies that the focus of the analysis is on the nature of the relationship created by the transaction: see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-36 to 1-40.

[213] The weight of the Canadian jurisprudence on the scope of the UNCITRAL Model Law has focused on the nature of the relationship and not of the dispute. For example, in *Borowski v. Fiedler (Heinrich) Perforiertechnik GmbH* (1994), 1994 CanLII 9026 (AB QB), 158 A.R. 213 (Q.B.), Murray J. found that the UNCITRAL Model Law did not apply to the case before him, because the evidence established that the relationship between the parties was that of master and servant (i.e., an employment relationship): para. 30. In other cases, the UNCITRAL Model Law was found to be inapplicable because the plaintiff's status as an employee was not in dispute, thereby obviating any need to characterize the relationship: *Ross v. Christian & Timbers Inc*. (2002), 2002 CanLII 49619 (ON SC), 23 B.L.R. (3d) 297 (S.C.J. Ont.); *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588. In *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359, at para. 46, by contrast, Tysoe J. found that the UNCITRAL Model Law did apply despite the fact that the *dispute* was not itself commercial in nature, because the *relationship* between the parties was commercial. Similarly, in *Kaverit Steel and Crane Ltd. v. Kone Corp.*, 1992 ABCA 7, 120 A.R. 346, at para. 26, Kerans J.A. held that a dispute over liability in tort falls within the scope of the UNCITRAL Model Law despite its non-contractual nature, "so long as the relationship that creates liability is one that can fairly be described as 'commercial'".

[214] Labour and employment disputes are said to be excluded from the scope of the term "commercial": United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985. However, this does not shift the focus of the analysis from the nature of the relationship to the nature of the dispute between the parties. Rather, its effect is to exclude arbitrations arising in the context of employment and labour relationships from the scope of the UNCITRAL Model Law. The focus of the analysis is still on the nature of the relationship.

[215] My colleagues, Abella and Rowe JJ., take the opposite position, arguing that the analysis turns on the nature of the dispute, not of the relationship: para. 25. However, the author of the learned treatise upon which Abella and Rowe JJ. rely in support of their view actually takes a position diametrically opposed to their approach to the applicability of the UNCITRAL Model Law: Abella and Rowe JJ.'s reasons, at para. 27. Gary B. Born does present the proposition that consumer and employment disputes are excluded from the UNCITRAL Model Law, but as an alternative to his own view. He then rebuts it by pointing to the fact that the list of covered transactions is non-exhaustive and "expressly extends to the 'carriage of . . . passengers' and 'consulting' agreements, which very arguably include at least certain consumer or employment relations": *International Commercial Arbitration*, vol. I, *International Arbitration Agreements* (2nd ed. 2014), at p. 309. Born's assessment is that "the Model Law includes within its coverage both consumer and employment matters, subject to any specific nonarbitrability rules adopted in

particular states": p. 309. His work is therefore of no assistance to my colleagues on this point. On the contrary, he expresses the opinion that the term "commercial" applies "without regard to the nature or form of the parties' claims and looks only to the character of their underlying transaction or conduct": p. 308.

[216] A superficial review of the documentary evidence reveals that the underlying transaction between Uber and Mr. Heller is commercial in nature. The Service Agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, which, as I mentioned above, is a type of transaction that is identified as coming within the scope of the UNCITRAL Model Law.

[217] But Mr. Heller submits that he is an employee of Uber. While the parties' characterization of their relationship is not determinative in a dispute as to whether an employment relationship has been misclassified, a court hearing a motion for a stay should not decide complex questions of mixed law and fact which require more than a superficial review of the documentary evidence in the record: *Dell*, at paras. 84-85. This Court cannot decide that the Service Agreement creates an employment relationship without usurping the role of the arbitral tribunal. I therefore agree with the motion judge, Perell J., that "until the arbitrator rules otherwise, the court should take the parties at their word that the Service Agreements are not employment contracts": para. 49.

[218] On the basis of a superficial review, I am satisfied that the parties' relationship is both commercial and international within the meaning of the UNCITRAL Model Law. As a result, I conclude that the *International Act* applies to Uber's motion for a stay. Because my colleagues are of the view that the *Arbitration Act* applies, however, I will continue to address both statutes, where relevant. I reiterate that the analysis that follows would not change were I to conclude that the *Arbitration Act* applied instead of the *International Act*.

D. *Is the Arbitration Clause Null and Void Under the International Act, or Invalid Under the Arbitration Act?*

[219] Mr. Heller does not contest that this dispute falls within the scope of the Arbitration Clause, which means that the criteria for a stay under both the *International Act* and the *Arbitration Act* are met. A court hearing a motion for a stay and for referral to arbitration may, nonetheless, dismiss the motion if the arbitration agreement is found to be null and void, or invalid: UNCITRAL Model Law, art. 8(1); *Arbitration Act*, s. 7(2). Mr. Heller submits that the Arbitration Clause is invalid, or null and void, because it amounts to an unlawful contracting out of the *ESA* and because it offends the doctrine of unconscionability. I will address his arguments below after first considering some preliminary questions concerning the correct analytical approach to such a challenge.

(1) Doctrine of the Separability of Arbitration Agreements

[220] Mr. Heller challenges the validity of the Arbitration Clause itself, and not of the Service Agreement as a whole. He rests his argument on the proposition that arbitration clauses embedded in contracts should be treated as independent agreements: R.F., at para. 101. Mr. Heller's submission therefore gives this Court an occasion to recognize and affirm the doctrine of the separability of arbitration agreements. I would do so readily.

[221] The doctrine of separability is "one of the conceptual and practical cornerstones" of arbitration law which plays an important role in ensuring the efficacy and efficiency of the arbitration process: Born, vol. I, at pp. 350-51 and 401. According to this doctrine, an arbitration clause should be analyzed as a separate agreement that is ancillary or collateral to the underlying contract: *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909 (H.L.), at p. 980; see also *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 (H.L.); *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395 (1967), at pp. 402 and 404; *Fiona Trust and Holding Corp. v. Privalov*, [2007] UKHL 40, [2007] 4 All E.R. 951. Put another way, an arbitration clause should be considered "autonomous and juridically independent from the main contract in which it is contained": A. J. van den Berg, ed., *Yearbook Commercial Arbitration 1999* (1999), vol. XXIVa, at p. 176, as quoted in Born, vol. I, at p. 350.

[222] The separability doctrine is a logical extension of the rule created by this Court in *Dell* which states that a challenge to an arbitral tribunal's jurisdiction should be considered first by the tribunal itself because arbitral tribunals have the competence to determine their own jurisdiction: paras. 84-85. I will refer to this holding as the "rule of systematic referral". The same statutory provisions which ensure an arbitral tribunal's competence to

determine its own jurisdiction also ensure its competence to determine the invalidity of the underlying contract by providing that the arbitration agreement should be treated as an independent agreement for the purposes of such a determination: *Arbitration Act*, s. 17(1) and (2); UNCITRAL Model Law, art. 16(1). Given that the legislature saw fit to give the arbitral tribunal the competence to decide these questions, the legislative choice embodied in s. 17(2) should receive the same respect as the one embodied in s. 17(1). The relationship between this "competence-competence" principle and separability is highlighted by the fact that they are both provided for in art. 16(1) of the UNCITRAL Model Law.

[223] National courts around the world nearly uniformly recognize the separability doctrine, even where no legislation provides for it: Born, vol. I, at p. 361 and 390; R. Feehily, "Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine" (2018), 34 *Arb. Intl.* 355, at pp. 356-57. In addition, some superior and appellate courts in Canada have already recognized the doctrine: see, e.g., *Krutov v. Vancouver Hockey Club Ltd.*, 1991 CanLII 2077 (B.C.S.C.); *NetSys Technology Group AB v. Open Text Corp.*, 1999 CanLII 14937 (ON SC), 1 B.L.R. (3d) 307 (S.C.J. Ont.), at para. 21; *Cecrop Co. v. Kinetic Sciences Inc.*, 2001 BCSC 532, 16 B.L.R. (3d) 15, at para. 25; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1.

[224] The *Arbitration Act* and the UNCITRAL Model Law codify one aspect of the doctrine, that is, the preservation of an arbitral tribunal's jurisdiction to rule on the validity of the underlying contract on the basis that the arbitration agreement is to be treated as a separate and independent contract for such purposes. However, the separability doctrine has wider significance. More broadly, the doctrine holds that an arbitration agreement is invalidated only by a defect relating specifically to the arbitration agreement itself and not by one relating merely to the underlying contract in which that agreement is found: *Fiona Trust*, at paras. 32-35, per Lord Hope; Feehily, at p. 373; Born, vol. I, at pp. 351, 457 and 466-69. In effect, the separability doctrine "immunizes the arbitration clause, protecting it from flaws or defects" in the underlying contract: Feehily, at pp. 371 and 373. Nonetheless, there may be instances where the same circumstances which impugn the validity of the underlying contract also call the validity of the arbitration agreement into question: *Fiona Trust*, at para. 17, per Lord Hoffmann.

[225] Recognizing the separability doctrine has a number of implications for this appeal. For the purposes of Mr. Heller's challenge to the validity of the Arbitration Clause, the commitment to submit disputes to arbitration should be considered to be an independent agreement which is separate from the Service Agreement. Therefore, while the Choice of Law Clause and the Arbitration Clause appear together in the Service Agreement, the Choice of Law Clause applies to the Service Agreement as a whole and must be analyzed separately from the Arbitration Clause. Further implications are addressed below.

(2) Law Governing the Substantive Validity of the Arbitration Clause

[226] The Choice of Law Clause selects Dutch law to govern the Service Agreement. Owing to the separability doctrine, however, the validity of an arbitration agreement may be governed by a different substantive law than the one that governs the validity of the underlying contract in which the arbitration clause is found: Born, vol. I, at pp. 475-76 and 835; McEwan and Herbst, at pp. 8-1 to 8-6.

[227] Nonetheless, not much turns on this distinction in this appeal, for two reasons. The first is that the Arbitration Clause is likely governed by Dutch law, because the law of the underlying contract and the seat of arbitration are generally considered to be persuasive factors in determining the law applicable to the arbitration agreement: N. Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed. 2015), at p. 158; *BNA v. BNB*, [2019] SGCA 84, at paras. 44-48 (CommonLII). The law of the Arbitration Clause is therefore likely Dutch law because of the Choice of Law Clause and the Place of Arbitration Clause — although I express no firm conclusions in this regard at this juncture. The second is that the parties have failed to prove Dutch law. In the absence of evidence proving the foreign law, the court may apply the law of the forum: *Tolofson v. Jensen*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, at p. 1053. For the purposes of this appeal, therefore, this Court may apply the law of Ontario to determine whether the Arbitration Clause is substantively valid.

[228] I wish to stress, however, that a court hearing a challenge to the validity of an arbitration agreement, even under domestic arbitration legislation, should not presume that the law of the forum always governs the substantive validity of the arbitration agreement. Neither should a court assume that the law applicable to the arbitration agreement is the same as the law that applies to the underlying contract.

(3) Rule of Systematic Referral to Arbitration

[229] Mr. Heller's arguments against Uber's motion raise the same question as the one this Court considered in *Dell*: which body should decide first — a court or an arbitral tribunal? Given that the *International Act* implements the UNCITRAL Model Law, the rule of systematic referral from *Dell* clearly applies to motions brought under that Act. The rule of systematic referral from *Dell* also applies to the *Arbitration Act*, which is largely based on the *Uniform Arbitration Act*, 1990 (online), drafted by the Uniform Law Conference of Canada ("ULCC"). This is because, despite slight modifications for the purposes of domestic arbitrations, the "organisation and the principles of the Uniform Arbitration Act are recognizably those of the Model Law": *Uniform Arbitration Act*, p. 2-3. In particular, the *Arbitration Act* provides that an arbitral tribunal has the competence to rule on its own jurisdiction, including the ability to rule on challenges to the validity of the arbitration agreement: *Arbitration Act*, s. 17(1). Thus, *Dell* applies regardless of which arbitration legislation governs Uber's motion for a stay.

[230] In *Dell*, this Court interpreted Quebec's legislation implementing the UNCITRAL Model Law in the context of the *Civil Code of Québec*. It established a "general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator": *Dell*, at para. 84. A court *may* depart from the rule of systematic referral to arbitration only if the challenge is based solely on a question of law or on a question of mixed law and fact that requires only a "superficial" consideration of the documentary evidence: *Dell*, at paras. 84-85. The court must also be satisfied that the jurisdictional challenge "is not a delaying tactic and will not unduly impair the conduct of the arbitration proceeding": para. 86.

[231] Contrary to Abella and Rowe JJ.'s view, expressed at para. 36, this Court has clearly decided on the meaning of "superficial review". A review is not superficial if the court is required to review testimonial evidence: *Dell*, at para. 88. Put another way, "the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause": *Dell*, at para. 84. Throughout her reasons in *Dell*, Deschamps J. carefully distinguished between the types of evidence a court can consider in ruling on a motion for a stay. She stated that when a challenge to the validity of the arbitration agreement requires a court to consider "factual evidence", the court should normally refer the case to arbitration: *Dell*, at para. 85. The exception she mentioned for questions of mixed law and fact applies only if the questions of fact require only "superficial consideration of the documentary evidence in the record": *Dell*, at para. 85. Deschamps J. then explained that one of the issues raised in the appeal required more than a superficial review of the record because it required a review of the "documentary and testimonial evidence" in the record: *Dell*, at para. 88. Thus, testimonial evidence is not seen as being reviewable on a superficial basis, and should be left for the arbitral tribunal. In the language of the *prima facie* test which this Court sought to incorporate into the analysis in *Dell*, the "nullity" of an arbitration agreement is "manifest" if, having regard to the contract in which it is found, the question of the validity of the arbitration agreement is a primarily legal one that can be answered without recourse to further evidence: see *Dell*, at paras. 75-77 and 83.

[232] In the cases in which it has applied the rule of systematic referral, this Court has remained faithful to this limit on the kind of evidence which may be considered on a motion for a stay. In *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, Dr. Muroff challenged the validity of an arbitration agreement in his cellphone contract with Rogers Wireless on the basis that it was abusive. The Court held that resolving the challenge would require more than a superficial review of the documentary evidence. Determining whether the arbitration agreement was abusive would have required the Court to look beyond the documentary evidence, given that "an arbitration clause is not necessarily abusive simply because it appears in a consumer contract": para. 15; see also para. 25, per LeBel J. (concurring). This Court therefore declined to entertain Dr. Muroff's challenge because it was dependent on testimonial evidence. Subsequently, in *Seidel*, the Court entertained a challenge to the validity of an arbitration agreement in a case in which a superficial review of the documentary evidence in the record was itself sufficient to establish the applicability of the legislation the Court relied upon to find that the arbitration clause was invalid: paras. 13 and 30. Therefore, this Court has applied the superficial review standard consistently since first articulating it in *Dell* — until this appeal.

[233] The new standard for superficial review introduced by Abella and Rowe JJ. allows for the production and review of considerable testimonial evidence. Superficial review will now incorporate a searching review of the record for the purpose of determining whether findings of fact can be made on the basis of apparently undisputed testimonial evidence, and this review might even involve cross-examination. This is a marked departure from the clear principles laid down in *Dell*, which were followed in *Rogers* and *Seidel*, and I therefore cannot accept it.

[234] This point is important because this appeal should turn on the rule of systematic referral. More than a superficial review of the documentary evidence is required, because Mr. Heller's arguments, like those of my colleagues Abella and Rowe JJ. and Brown J., are dependent upon testimonial evidence regarding Mr. Heller's financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the Arbitration Clause applies.

[235] Further, my colleagues avoid the operation of the rule of systematic referral by creating new exceptions to *Dell* which permit them to consider the testimonial evidence in the record. However, even if that evidence could properly be considered by a court ruling on a motion for a stay, it is lacking in many important respects. For example, there is no evidence that Mr. Heller was in a state of necessity or was incapacitated when he entered into the agreement. He had an unlimited amount of time to review the agreement before accepting it. His evidence suggests that he is capable of understanding the significance of the Arbitration Clause: A.R., vol. II, at p. 134. As counsel for Uber demonstrated in cross-examination, Mr. Heller is sufficiently knowledgeable that he was able to quickly grasp the implications of a change in Uber's fee payment structure and voice his concerns through the media: A.R., vol. III, at pp. 145-46. He also showed considerable sophistication in lodging over 300 complaints through Uber's internal dispute resolution procedure: A.R., vol. III, at p. 129. The record is simply not sufficient for this Court to conclude with certainty that Mr. Heller was vulnerable throughout the contracting process.

[236] In addition, my colleagues assert that the Arbitration Clause is inaccessible to Mr. Heller despite the fact that there is no evidence in the record regarding the comparative availability of third party funding for arbitration or litigation. This Court also has no indication as to what fraction of the CAN$400,000,000 being sought in Mr. Heller's proceeding represents his individual claim against Uber. Nor is there any evidence regarding the comparative cost of pursuing a class action — although I note that the costs awarded in the Court of Appeal (CAN$20,000) were greater than the amount of the ICC Fees (approximately CAN$19,000), and the parties are not even at the certification stage of the class proceeding: C.A. reasons, at para. 75. I am of the view that all of this evidence is necessary, because I find it highly unlikely that the cost of pursuing this claim in the courts, whether individually or by way of a class action, would be very much less than the ICC Fees. Indeed, such a proceeding might even be more costly. It is therefore not the absolute dollar value of the ICC Fees which is at issue. I think that what is implicit in my colleagues' arguments about accessibility is an unstated assumption about the comparative accessibility of pursuing a class action, given the existence of a specialized third party litigation funding industry and lawyer fee structures for the pursuit of such claims. However, such assumptions should be grounded in evidence. As the record currently stands, this Court cannot say on the basis of the testimonial evidence that the Arbitration Clause makes dispute resolution any less accessible than litigation.

[237] In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of *ad hoc* judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements. This is in fact what the *Arbitration Act* and the UNCITRAL Model Law were designed to avoid.

(4) Proposed Exceptions to the Rule of Systematic Referral

[238] I will now address the exceptions to the rule of systematic referral proposed by the Court of Appeal as well as by Abella and Rowe JJ. and Brown J. I will confine my comments on Brown J.'s approach to his contention that s. 96 of the *Constitution Act, 1867* requires such an exception.

(a) *Systematic Referral and Challenges to the Validity of the Arbitration Agreement*

[239] The Court of Appeal appears to have held that the rule of systematic referral is confined to challenges relating to the scope of arbitration agreements, and therefore does not apply to challenges to the validity of such agreements: C.A. reasons, at paras. 39-40. I disagree.

[240] The rule of systematic referral is based on the arbitral tribunal's competence to rule on its own jurisdiction. Article 16(1) of the UNCITRAL Model Law and s. 17(1) of the *Arbitration Act* both state that the arbitral tribunal has competence to rule on objections with respect to "the existence or validity of the arbitration agreement". In *Seidel* and in *Rogers Wireless*, this Court applied the rule of systematic referral to challenges to the validity of the arbitration agreements that were at issue. There is accordingly no basis in the words of either statute for excluding the rule of systematic referral from a challenge to the validity of an arbitration clause, and there is in fact authority from this Court to the contrary.

(b) *Systematic Referral and Accessibility*

[241] Abella and Rowe JJ. propose to create an exception to the rule of systematic referral that would apply where an arbitration agreement is deemed to be "too costly or otherwise inaccessible": paras. 38-46. With great respect, I am of the view that this Court should not create this exception to the rule of systematic referral. I also do not agree that, if such an exception were to be created, it should be applied on the basis of the record before the Court.

[242] First, and foremost, the rule of systematic referral is the product of an exercise of interpretation of the UNCITRAL Model Law. This means that any exception to the rule must also be a product of statutory interpretation. However, Abella and Rowe JJ. do not purport to justify their proposed exception with reference to the words, the scheme, the context, the object, and the purposes of either statute, as this Court's jurisprudence requires: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. The exception they propose rests instead on policy considerations related to access to justice: paras. 38-39. While I appreciate the importance of those considerations, I am respectfully of the view that they cannot be used to make the *Arbitration Act* say something it does not say: see *Wellman*, at para. 79. Further, because Abella and Rowe JJ. propose this exception as a modification of the *Dell* framework itself, the exception must also be justified on the basis of an interpretation of the UNCITRAL Model Law which was interpreted in *Dell*.

[243] Second, the dissenting justices in *Dell* proposed a flexible approach to referral according to which the courts would have retained some discretion to fully entertain a challenge to an arbitration agreement's validity: para. 178, per Bastarache and LeBel JJ. (dissenting). The majority chose not to adopt this discretionary approach, preferring instead a rule of *systematic* referral to arbitration "in any case involving an arbitration clause": para. 84. Abella and Rowe JJ.'s exception would transform the rule of systematic referral by turning it into a rule of *situational* referral that is dependent on the circumstances of a given case. This situational "carve-out" of part of the rule of systematic referral would add to the grounds for judicial intervention in the arbitration process and thus create a perverse incentive to engage in "parasitic" litigation as a delaying tactic: see J. Paulsson, *The Idea of Arbitration* (2013), at pp. 58-60. It would be open to future courts to endlessly identify issues which constitute "unforeseen circumstances" that *Dell* did not contemplate, thus sowing uncertainty and giving rise to incessant litigation with respect to the degree of scrutiny to apply when ruling on a motion for a stay. Inviting litigiousness is more likely to thwart access to justice than to advance it because litigiousness increases the time and cost of dispute resolution.

[244] Third, Abella and Rowe JJ. argue that courts are well positioned to mitigate the risk of spurious arguments being advanced against the validity of an arbitration agreement by awarding costs and requiring security for costs: para. 42. However, this Court contemplated the risk of spurious arguments being used as a delaying tactic in *Dell* and decided that the scope of review on a motion for a stay should be confined to a superficial review of the documentary evidence in order to counteract such tactics: *Dell*, at para. 84. If costs awards were an effective deterrent against delaying tactics, there would be no need to confine the scope of the review to a superficial review of the documentary evidence in the record at all. In addition, seeking security for costs would require a motion within the motion, thus adding further complexity and a potential for further delays.

[245] Fourth, Abella and Rowe JJ. observe "incidentally" that their approach would prevent the drafting of arbitration agreements which "exploit" what they see as a "significant loophole" in *Dell*: paras. 49-50. The exploitative loophole they are worried about results from the ordinary operation of the rule of systematic referral to arbitration under an agreement which is governed by a foreign choice of law clause. This argument amounts to a critique of *Dell* itself. What is more, the critique is not grounded in legislative intent. There is no basis

in the *Arbitration Act* or in the UNCITRAL Model Law for distinguishing between arbitration agreements which include a foreign choice of law clause from those which do not.

[246] Fifth, Abella and Rowe JJ. state that their exception applies where the fees to commence arbitration proceedings are "significant" relative to the plaintiff's claim: para. 39. However, they provide no guidance on what amount might be considered "significant", and this Court has no indication in the record regarding the size of Mr. Heller's claim. They also express a concern that Mr. Heller may not reasonably be able to reach the physical location of the arbitration. But, as I explain in detail below, the choice of a foreign seat for arbitration should not be equated with the choice of the physical location of the arbitration proceedings. In fact, Uber has agreed to hold the proceedings in this case in Ontario. While it might be appropriate to disregard this concession on Uber's part for the purpose of determining whether the contract is valid, there is no reason to do so in relation to Abella and Rowe JJ.'s fact-specific exception to the rule of systematic referral. There is therefore no basis for concluding that the ICC Fees are significant relative to Mr. Heller's claim, given that the amount of the claim is unknown, or for concluding that he will be unable to reach the physical location of the arbitration, given that Uber has agreed to hold it in his home jurisdiction.

[247] For these reasons, I do not accept that an exception should be either created or applied in this case. If the Constitution requires such an exception, I would, of course, have to reconsider the issue. It is to that question which I now turn.

(c) *Systematic Referral and the Governor General's Constitutional Power to Appoint Superior Court Judges*

[248] My colleague Brown J. refers to a "constitutional dimension" which, in his view, demands an exception to the rule of systematic referral where arbitration is inaccessible in the context of the parties' relationship: paras. 120 and 125. I will confine my comments here to the question whether the Constitution requires such an exception, as I will consider Brown J.'s additional arguments regarding public policy below. While I agree that access to justice and the rule of law are important considerations, I respectfully disagree that the rule of systematic referral would, absent an exception, infringe, or even engage, s. 96 of the *Constitution Act, 1867*.

[249] Section 96 of the *Constitution Act, 1867* assigns to the Governor General the power to appoint superior court judges. This Court has interpreted this provision as a restriction on the competence of provincial legislatures and Parliament to enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 30. In my view, legislation which facilitates the enforcement of agreements to submit disputes to arbitration neither abolishes the superior courts nor removes any part of their core or inherent jurisdiction.

[250] As a preliminary matter, it is important to understand that arbitration is not litigation by another name: W. G. Horton, "A Brief History of Arbitration" (2017), 47 *Adv. Q.* 12, at p. 12. Rather, it is a substitute for the parties' own ability to negotiate or to reach agreement through mediation, and is not based on a transference or denial of court power: Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 24. Courts retain an oversight role throughout the arbitration process and afterwards: *Arbitration Act*, ss. 6, 8, 10, 15, 17(8) and 45 to 48. Arbitration legislation, and supporting doctrines such as the rule of systematic referral, should not therefore be conceptualized as a limit on the supervisory jurisdiction of the courts. Instead, they should be seen as a positive reinforcement of the principle of party autonomy in that they require parties to an arbitration agreement to abide by their agreement.

[251] From this perspective, it is party autonomy, not statutory edict, which compels the parties to an arbitration agreement to refrain from litigation in the courts and to pursue the mode of dispute settlement to which they have previously agreed: see *Wellman*, at paras. 51-52. The legislation merely gives the parties to an arbitration agreement machinery they can use to enforce their agreement. Section 96 of the *Constitution Act, 1867* and the unwritten principle of the rule of law are not engaged because s. 96 "has never been construed (and cannot be) as forbidding two or more citizens from appointing another as their 'private judge' to resolve their dispute": *Quintette Coal Ltd. v. Nippon Steel Corp.* (1988), 1988 CanLII 2923 (BC SC), 29 B.C.L.R. (2d) 233 (S.C.). Further, "[a]s legislation similar in effect has been on the books for nearly 300 years without it being attacked as constitutionally outrageous, I think it too late to take the point": *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 1990 CanLII

1060 (BC CA), 67 D.L.R. (4th) 131 (B.C.C.A.), at p. 136. Thus, no constitutional issue arises. In my view, the possibility that the agreed-upon terms of a given arbitration agreement may be ill suited to a hypothetical claim for a small amount that is unrelated to the appeal now before the Court does not elevate the issue from one of private law to one of constitutional law.

[252] Another relevant — and important — consideration is the type of remedy courts are to grant in order to enforce arbitration awards. A court stays a proceeding that has been commenced in contravention of an arbitration agreement — it does not dismiss the action: *Arbitration Act*, s. 7. This has important practical ramifications, because a stay can be lifted. Further, a court hearing a motion for a stay may order a conditional stay and specify how the parties are to proceed to arbitration: see, e.g., *Popack v. Lipszyc*, 2009 ONCA 365 (CanLII); *Iberfreight S.A. v. Ocean Star Container Line A.G.* (1989), 104 N.R. 164 (F.C.A.); *Continental Resources Inc. v. East Asiatic Co. (Canada)*, [1994] F.C.J. No. 440 (F.C.); see also *Fuller Austin Insulation Inc. v. Wellington Insurance Co.* (1995), 1995 CanLII 5752 (SK QB), 135 Sask. R. 254 (Q.B.), var'd (1995), 1995 CanLII 4041 (SK CA), 137 Sask. R. 238 (C.A.). It is therefore wrong to conceptualize a successful motion for a stay as the end of the line for the plaintiff's pursuit of their claim.

[253] It would also be wrong to characterize private arbitral tribunals as statutory tribunals, which are amenable to judicial "surveillance" by virtue of s. 96 of the *Constitution Act, 1867*: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13, quoting *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at para. 14. A statutory tribunal is "a body set up by statute and which has duties conferred on it by statute so that the parties are bound to resort to it": *R. v. National Joint Council for the Craft of Dental Technicians (Dispute Committee)*, [1953] 1 Q.B. 704, at p. 706, quoted in *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, 1982 CanLII 34 (SCC), [1982] 2 S.C.R. 888, at pp. 893-94. By contrast, arbitration "is essentially a creature of contract, a contract in which the parties themselves charter a private arbitral tribunal for the resolution of their disputes": *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, quoted in *Wellman*, at para. 52. Thus, the distinction between a statutory tribunal and a private arbitral tribunal is the greater autonomy which parties have and are free to exercise in the private arbitration context. That is why this Court's jurisprudence distinguishes between a statutory tribunal and "a clearly consensual tribunal which owes its existence solely to the will of the parties": *Roberval Express*, at p. 900; see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 104.

[254] I would add that, even if s. 96 were considered to be engaged, the constitutional right to access to the courts is not absolute: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 17. The legislature has the power to impose conditions on how and when people have access to the courts. Any impediment to such access under the *Arbitration Act* or the *International Act* exists simply because the parties to an arbitration agreement must abide by their agreement. Payment of the hearing fees at issue in *Trial Lawyers Association* was a mandatory condition on litigants' access to the superior courts which had the effect of taking the choice of pursuing litigation in the superior courts away from a segment of society: para. 35. Similarly, the Alberta Court of Appeal's comment that "[i]nsurmountable preconditions . . . effectively amount to a total barrier to court access" concerned court orders which bar vexatious litigants from commencing proceedings in the courts unless the litigants fulfill certain preconditions: *Jonsson v. Lymer*, 2020 ABCA 167, at para. 67 (CanLII). By contrast, the *Arbitration Act* and the *International Act* deny access (to the limited extent that they do) only to "those who by agreement have surrendered their constitutional right of access": *Stancroft*, at para. 21. Since the legislature has the competence to impose conditions on access, these humble conditions must be permissible.

[255] For these reasons, I conclude that the rule of systematic referral applies unaltered to Uber's motion for a stay. The general rule is that the parties must be referred to arbitration unless Mr. Heller's challenge to the validity of the Arbitration Clause can be characterized as a pure question of law or a question of mixed law and fact which requires only a superficial review of the documentary evidence. If the arguments against the validity of the Arbitration Clause require more than a superficial review of the documentary evidence, that will be sufficient to decide the appeal. However, as the parties have made submissions on the merits of Mr. Heller's challenge to the validity of the Arbitration Clause, I will also comment on the merits of their arguments.

(5) Does Determining Whether the Arbitration Clause Is Valid Require More Than a Superficial Review of the Documentary Evidence?

[256] Three main arguments have been raised against the validity of the Arbitration Clause. Mr. Heller argues the Arbitration Clause is invalid because it is unconscionable and because it is contrary to the *ESA*. Brown J. raises a separate argument that the Arbitration Clause is invalid because it is contrary to public policy. I address each of these arguments below in turn.

(a) *Doctrine of Unconscionability*

[257] Despite Abella and Rowe JJ.'s learned analysis of the theoretical underpinnings of the unconscionability doctrine, I am unfortunately unable to agree with their statement of that doctrine. In particular, I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts. Abella and Rowe JJ. state that vulnerability in the contracting process may arise from "dense or difficult to understand terms" in the agreement: at para. 71. They also note that one situation in which a standard form contract might impair a party's ability to protect their interests would be if it contained provisions which were "difficult to read or understand": para. 89. I find this standard rather vague and illusory. I fear it might be open to abuse by a party to a standard form contract who chooses to enjoy the benefits of the agreement as long as it suits them, but who then chooses to rely on this opaque standard when called upon to honour an obligation which is not in their interest. As Brown J. observes, a lower threshold for finding that there is inequality of bargaining power risks exposing the terms of every standard form contract to review in order to ensure that they are substantively reasonable: para. 163. This would be an unwelcome development, as it would undermine private ordering and commercial certainty, which are important considerations in the law of contracts: see *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 66.

[258] I therefore agree with Brown J.'s able exposition of the unconscionability doctrine in the general law of contracts. However, an arbitration agreement engages unique considerations which require an analytical approach that differs from the one he takes in para. 172. In particular, Mr. Heller directs his unconscionability arguments specifically at the Arbitration Clause, which should be considered a separate and autonomous contract for this purpose.

[259] I will now analyze Mr. Heller's arguments and those of Abella and Rowe JJ. in light of the components of the unconscionability doctrine identified by Brown J., which I understand to be (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and (3) the stronger party's knowledge of the weaker party's vulnerability: Brown J.'s reasons, at paras. 156, 159 and 164-66. However, I add that I would reach the same conclusions if I were to apply the test set out by Abella and Rowe JJ.

(i) Significant Inequality of Bargaining Power

[260] The key question in relation to this component of the doctrine is whether the weaker party "had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests", thereby undermining the premise of freedom of contract: *Downer v. Pitcher*, 2017 NLCA 13, 409 D.L.R. (4th) 542, at paras. 37. The "personal characteristics or attributes of the weaker party are a fundamental consideration" in this regard: *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 438 D.L.R. (4th) 387, at para. 39.

[261] The vulnerability alleged by Mr. Heller relates to his high school education and his comparatively limited access to financial resources: R.F., at paras. 121-22. Establishing these facts would require the Court to consider testimonial evidence, which means that the rule of systematic referral is engaged and that the parties must be referred to arbitration. This conclusion suffices to dispense with Mr. Heller's unconscionability argument; however, I wish to address the question whether the testimonial evidence is adequate to support a finding of unconscionability on the merits.

[262] Even if the superficial review criterion did not apply, the testimonial evidence before this Court is contradictory on the question as to whether Mr. Heller had the capacity to understand and appreciate the significance of the Arbitration Clause. Mr. Heller's evidence established that he is capable of understanding the significance of the Arbitration Clause, but that he simply declined to read it before agreeing to the terms: A.R., vol. II, at p. 134. He was free to review the Service Agreement for as long he wished before communicating his

acceptance: A.R., vol. II, at p. 16. And as counsel for Uber demonstrated in cross-examination, Mr. Heller showed considerable sophistication by lodging over 300 complaints through Uber's internal dispute resolution procedure and by communicating with the media shortly after a change had been made to Uber's fee payment structure: A.R., vol. III, at pp. 129 and 145-46. There is nothing in the record to suggest that he was rushed into accepting the terms of the Service Agreement, and no evidence regarding why he decided to become an Uber driver. There is accordingly no basis for finding that his capacity for autonomous self-interested decision-making was compromised or that the law's normal assumptions about free bargaining no longer hold true. Because this inquiry requires findings of fact based on conflicting evidence, this issue cannot be resolved on the basis of the record before the Court.

[263] Abella and Rowe JJ. find that there was inequality of bargaining power in this case because the Service Agreement in which the Arbitration Clause is found is a standard form contract, and because it was not accompanied by information about the cost of mediation and arbitration proceedings administered by the ICC's dispute resolution bodies: para. 93. Of course, these circumstances would not be sufficient to find that there was inequality of bargaining power based on the approach articulated by Brown J., with which I agree: para. 162. Nonetheless, I appreciate the reasons of Abella and Rowe JJ. for what they do not say. They do not contend that an arbitration agreement in a standard form contract is itself unconscionable. Such a conclusion would conflict with the weight of authority from this Court:

> . . . nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* — as well as its predecessors *Dell*, *Rogers*, and *Desputeaux* — confirm that the starting presumption is the opposite.
>
> (*Wellman*, at para. 84)

[264] At first blush, Abella and Rowe JJ.'s point that it would not be clear to a person reading the Arbitration Clause that the selection of the ICC Rules means that initiating the arbitration process would entail the payment of US$14,500 (approximately CAN$19,000) in fees has some force. On reflection, however, my view is that individuals should be expected to be aware that any form of dispute settlement, including litigation in the courts, comes with a price. A person cannot read an arbitration clause and reasonably assume that the process will be free of charge. It has not been shown that the ICC Fees are out of step with the cost of pursuing litigation — or of pursuing arbitration under a different set of rules — for a claim involving an amount equivalent to the unknown amount of Mr. Heller's claim. I therefore find it difficult to accept Abella and Rowe JJ.'s speculation that Mr. Heller would have had no reason to suspect that fees of this magnitude were required. With respect, they are effectively arguing that individuals have no reason to suspect that dispute settlement has a cost. To approach the matter as they do infantilizes individuals by viewing all of them as being bereft of autonomy and incapable of rational decision making. There is ample evidence in the record to suggest that Mr. Heller is not such an individual.

[265] Further, although Abella and Rowe JJ. do not expressly state that a standard form contract containing an arbitration clause is unconscionable, one wonders how a contract drafter could possibly anticipate the cumulative fees that would have to be paid in every possible arbitration scenario given the wide variety of disputes which could arise under an arbitration agreement. Arbitration is a private form of dispute resolution in which, generally speaking, the parties are required, at a minimum, to pay for the arbitral tribunal's time and expenses and for the venue, as well as to pay certain other costs. Abella and Rowe JJ. implicitly take the position that Uber should not have selected the ICC Rules because, in their view, the ICC Fees are substantively unfair. It is difficult to see how the drafter of a contract could anticipate the total of the fees to be paid in a non-institutional arbitration that would be conducted on an *ad hoc* basis under either the *Arbitration Act* or the *International Act*, which means that it is hard to see how an arbitration clause in a standard form contract could possibly be drafted in a way that would satisfy the requirements of Abella and Rowe JJ.'s approach to the unconscionability doctrine.

[266] Regrettably, I fear that the effect of their approach amounts to a sweeping restriction on arbitration clauses in standard form contracts, even if they did not intend such a consequence. This Court has stated that deciding whether to restrict arbitration clauses in standard form contracts is a matter for the legislature: *Seidel*, at para. 2; *Wellman*, at paras. 46 and 79-80. With respect, the approach taken by Abella and Rowe JJ. to the doctrine of unconscionability is therefore inconsistent with the proper law-making role of the courts. In our democracy, it is the legislature, and not the courts, which is primarily responsible for law reform: *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at pp. 666-70. Major changes in the law are best left to the legislature, because reform

should be considered with a wider view of how the new rule will operate in the broad generality of cases: pp. 666-68. A court of law may not be in a position to appreciate the economic, social and other policy issues at stake: p. 668.

[267] These concerns are heightened by the economic context of this appeal, which relates to the contractual arrangements of businesses operating in what some have styled the "sharing economy": I. F. (Montreal Economic Institute), at para. 6. Enterprises with business models similar to that of Uber and individuals in Mr. Heller's position are part of a vital and growing sector of Canada's economy which could be stifled if the majority's reduced threshold for inequality of bargaining power is adopted. This sector depends on standard form contracts that are agreed to electronically by businesses and the people who use their online platforms: I. F. (Montreal Economic Institute), at para. 12. Individuals in Mr. Heller's position may have reduced opportunities to generate income in this sector of the economy if businesses like Uber cannot be assured of certainty in their contractual arrangements, as certainty is essential for global business operations. This Court is simply not in a position to know what the fallout from Abella and Rowe JJ.'s approach might be.

[268] It is not the role of the courts to establish policies where the legislature has declined or omitted to do so. Ontario's Ministry of Labour, Training and Skills Development recently undertook a comprehensive review of the *ESA* in order to address the changing nature of work, including the sharing economy: *The Changing Workplaces Review: An Agenda for Workplace Rights — Final Report* (2017). That review culminated in amendments to the *ESA* that were enacted in the *Fair Workplaces, Better Jobs Act, 2017*, S.O. 2017, c. 22. If the legislature was concerned about arbitration agreements in this sector's standard form digital contracts, it could easily have amended the *ESA* to restrict such clauses, as it has in the case of consumer protection legislation: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7 and 8. Whether the legislature's omission was an oversight or a deliberate policy choice, any decision to restrict or not to restrict standard form contracts containing arbitration clauses in a matter for the legislature, not the courts.

[269] In the end, whether Mr. Heller suffered from a peculiar vulnerability that undermined his capacity to engage in rational autonomous decision making is a question of mixed law and fact which requires more than a superficial review of the documentary evidence. Therefore, the rule of systematic referral applies and the parties must be referred to arbitration. I will nonetheless consider the other components of unconscionability below.

(ii) Improvident Bargain

[270] Mr. Heller's attack on the Arbitration Clause rests on three propositions: (1) the Place of Arbitration Clause forces him to travel to Amsterdam at his own expense, (2) the Choice of Law Clause excludes the application of the *ESA*, and (3) the selection of the ICC Rules entails the payment in advance of disproportionately high fees in order to initiate a dispute. I will address each of these propositions in turn, not because they could not cumulatively add up to a substantially unfair bargain, but because, in my view, the first two are unpersuasive, which leaves the third to stand on its own.

1. *Place of Arbitration Clause*

[271] Mr. Heller equates the Place of Arbitration Clause in the Arbitration Clause with a forum selection clause that requires him to travel to Amsterdam in order to pursue his claim. With respect, it is wrong to equate the designation of a foreign seat in an arbitration agreement with a forum selection clause.

[272] One major distinction relates to the fact that the discretion not to enforce a forum selection clause comes from the common law: see *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. By contrast, a court's power to decline to enforce an arbitration agreement is circumscribed by the exhaustive list in s. 7(2) of the *Arbitration Act*. The designation of a foreign place of arbitration is not one of the enumerated grounds for declining a stay.

[273] Another distinction stems from the fact that "[f]orum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction": *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 1. If enforced, such a clause requires a litigant to commence a proceeding in the foreign forum, which may indeed involve travelling to the foreign jurisdiction. The place (or "seat") of arbitration,

by contrast, is a legal concept which denotes the parties' selection of a particular jurisdiction "whose arbitration law governs proceedings, and under whose law the arbitral award is made": Born, vol. I, at pp. 206; Born, vol. II, *International Arbitral Procedures and Proceedings*, at p. 1596. The designation of a foreign jurisdiction as the place of arbitration is therefore akin to a choice of law clause for the procedural aspects of the arbitration process.

[274] However, the place of arbitration "is not synonymous with the location where arbitral hearings take place": *Alberta Motor Association Insurance Co. v. Aspen Insurance UK Limited*, 2018 ABQB 207, 17 C.P.C. (8th) 81, at para. 147. There is no obligation to actually conduct the arbitration at the place of arbitration. Article 20(2) of the UNCITRAL Model Law provides that an arbitral tribunal may meet, and hear witnesses or submissions from the parties, at any place it considers appropriate, regardless of the place of arbitration selected by the parties. The *Arbitration Act* includes a substantively a similar provision: s. 22(2). Article 18 of the ICC Arbitration Rules provides that the arbitral tribunal may conduct hearings and meetings at any location it considers appropriate: p. 26. In addition, art. 3(5) of the ICC Expedited Rules provides that the arbitral tribunal may decide the dispute solely on the basis of documentary evidence and written submissions, and that it may conduct hearings "by videoconference, telephone or similar means of communication": p. 72. In practice, it often happens that, although the parties have agreed to arbitration in one jurisdiction, the arbitration proceedings are in fact conducted at other locations for the sake of convenience: McEwan and Herbst, at p. 7-1 to 7-8; Born, vol. II, at p. 1596.

[275] It is true that the UNCITRAL Model Law, the *Arbitration Act* and the ICC Arbitration Rules leave the decision regarding the location of the proceedings to the arbitral tribunal, but there is no reason to presume that an arbitral tribunal would act arbitrarily and callously by compelling a party to travel overseas unnecessarily and at great hardship. Indeed, there is good reason to assume otherwise. The *Arbitration Act* requires the arbitral tribunal to treat the parties equally and fairly: s. 19(1). Further, art. 22(1) and (4) of the ICC Arbitration Rules provide that the arbitral tribunal must make every effort to conduct the arbitration in an expeditious and cost-effective manner and must ensure that each party has a reasonable opportunity to present its case: pp. 27-28. I therefore see no basis for assuming that the arbitral tribunal would require Mr. Heller to travel to Amsterdam in order to participate in arbitration proceedings. Hearings, if any need to be conducted, can reasonably be expected either to be held in Ontario or to be conducted remotely. Further, this Court should take judicial notice of the fact that modern communications technology makes it unnecessary for an Ontario resident to travel overseas in order to pay the ICC Fees or to make initial representations to the arbitral tribunal.

[276] The Arbitration Clause thus cannot be impugned on the basis that the Place of Arbitration Clause would require Mr. Heller to travel to a foreign jurisdiction in order to initiate a claim or to participate in the hearings, thereby incurring expenses, and any arguments to that effect cannot stand. I therefore see no basis for concluding that the Place of Arbitration Clause favours Uber significantly at Mr. Heller's expense.

2. *Choice of Law Clause*

[277] In light of the separability doctrine, it is critical, for analytical purposes, to distinguish between the validity of the Service Agreement, or of one of its terms, and the validity of the Arbitration Clause: Born, vol. I, at pp. 401-2 and 834; see also *Fiona Trust*. The result is that the alleged invalidity of the Choice of Law Clause on the basis that it is unconscionable does not affect the validity of the Arbitration Clause. Arguments directed at the alleged unfairness, whether substantive or procedural, of having the Service Agreement governed by a foreign law are therefore analytically distinct from those concerning alleged unfairness arising from the Arbitration Clause itself. As a result, arguments directed at the Choice of Law Clause are not a bar to Uber's motion for a stay.

[278] Approaching the validity of the Arbitration Clause in this fashion is consistent with this Court's jurisprudence. In *Seidel*, the arbitration agreement provided that "[a]ny claim, dispute or controversy . . . shall be determined by . . . arbitration" and that, "*[b]y so agreeing*, [Ms. Seidel] waive[d] any right [she] may have to commence or participate in any class action against TELUS Mobility": para. 13 (emphasis added; emphasis in original deleted). This Court declined to view the class action waiver as separate from the arbitration provision because the contract was "structured internally to make the class action waiver dependent on the arbitration provision": para. 46. By contrast, in the instant case, the Choice of Law Clause is not dependent on arbitration being the parties' chosen means to settle disputes. Despite the fact that the text of the Choice of Law Clause appears in the same paragraph of the Service Agreement as the text of the Arbitration Clause, the two clauses have very different legal effects and should be considered to be separate.

[279] It would be different if Mr. Heller was arguing that unfairness results from having the Arbitration Clause itself governed by Dutch law, but he has neither argued nor proven that to be the case. As with his arguments regarding the *ESA*, which I will address below, the alleged invalidity of the Choice of Law Clause has no bearing on the validity of the Arbitration Clause.

[280] Even if the separability doctrine did not apply, there is nothing unusual or offensive about a choice of law clause in an international contract. Uber is a company with global operations and is headquartered in the Netherlands. Its selection of Dutch law to govern the contract is merely an attempt at legal risk management designed to ensure a degree of certainty in its operations. For a company with global operations, this serves a valid commercial purpose which courts should not interfere with lightly. A court that does so risks undermining the certainty that is needed in conducting international commerce. Further, although the Choice of Law Clause does confer a benefit on Uber (namely, legal certainty in the company's global operations), it is unclear that it does so at any cost to Mr. Heller, given that neither party has proven the foreign law and, as I will explain below when I address Mr. Heller's arguments with respect to the *ESA*, it remains to be seen whether the arbitral tribunal would apply the *ESA* in any event.

3. *Selection of Institutional Procedural Rules*

[281] As I have refuted Mr. Heller's arguments about the effect of the Place of Arbitration Clause and the Choice of Law Clause, all that remains of his unconscionability argument is the submission that the selection of the ICC Rules imposes the payment of disproportionately high fees, which total US$14,500, or approximately CAN$19,000. This disproportionality argument has two branches: (1) the ICC Fees are a disincentive to pursue hypothetical claims for small amounts; and (2) the ICC Fees are disproportionate to Mr. Heller's ability to finance the pursuit of a claim for a larger amount, because his income as an Uber driver is approximately CAN$20,800-31,200 a year. I will address each of these branches in turn, as I consider them to be distinct arguments for analytical purposes.

[282] In my view, any commitment to submit disputes to arbitration should be regarded as generally imposing mutual obligations on both parties. It does not impose an obligation on one party in favour of the other. Rather, "[i]t embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution": *Heyman*, at pp. 373-74, per Lord Macmillan. An arbitration agreement thus involves a mutuality of exchange.

[283] If an arbitration agreement involves a mutuality of exchange, I fail to see how mandatory fees which apply to disputes initiated by either party would not involve a similar mutuality of exchange. The ICC Fees make pursuing a claim for a small amount just as uneconomic for Uber as for Mr. Heller. By contrast, a one-sided arbitration clause which requires one party to submit disputes to arbitration while the other party retains the right to litigate might not involve a mutuality of exchange: see, e.g., *Houston v. Exigen (Canada) Inc.*, 2006 NBQB 29, 296 N.B.R. (2d) 112, at para. 12. Therefore, to the extent that any unfairness results from the imposition of high fees on hypothetical claims for small amounts, I do not consider this situation to be sufficiently unfair, given the mutuality of the exchange.

[284] In any event, the actual amount of Mr. Heller's claim is unknown. While it is possible — from the point of view that "anything can happen" — to discern from the Arbitration Clause itself that a dispute over a small amount could, in theory, arise, establishing that such a dispute is likely or foreseeable under the contract would require the production and review of testimonial evidence, thereby engaging the rule of systematic referral. To proceed otherwise would be to hold that a contract is invalid on the basis of speculation.

[285] An imbalance might be observed between the size of the fees and Mr. Heller's ability to finance a claim for a larger amount, because Uber clearly has greater financial resources than he does. However, this aspect of Mr. Heller's argument requires the production and review of testimonial evidence, which means that the rule of systematic referral applies.

[286] Even if this Court were to consider Mr. Heller's testimonial evidence, the improvidence of a transaction has to be measured as of the time the contract is formed: Abella and Rowe JJ.'s reasons, at para. 74. The Court has no evidence regarding Mr. Heller's financial position at the time he entered into the Service Agreement. The only information the Court has regarding his financial means is the income he derived as an Uber driver after

entering into the Service Agreement. Additionally, the Court does not have any evidence before it regarding the availability of third party funding for arbitration or the comparable cost of, for example, pursuing a class proceeding. And, I repeat, the size of Mr. Heller's individual claim is unknown. There is simply no basis for concluding that the ICC Fees render his rights under the Service Agreement unenforceable.

(iii) Knowledge

[287] A finding that Uber had, at a minimum, constructive knowledge of Mr. Heller's peculiar vulnerability is required in order for a court to conclude that the Arbitration Clause is unconscionable: *Downer*, at para. 47; *Input Capital*, at paras. 48 and 61-64. In the case at bar, the Court of Appeal found that Uber had such knowledge, but I am of the view that it erred in principle regarding the kind of vulnerability which would be sufficient to establish inequality in bargaining power and that this error tainted its finding with respect to knowledge. The Court of Appeal found that Uber knew its drivers were "vulnerable to the market strength of Uber": para. 68. Uber's knowledge that it is a large company which uses standard form contracts does not suffice in this regard because contracts of adhesion, including agreements to arbitrate, are generally enforceable: *Seidel*, at para. 2.

[288] The vulnerability alleged by Mr. Heller relates to his comparatively limited access to financial resources and the fact that he has only a high school education. Given that the Driver App is widely accessible to members of the public, it would have been impossible for Uber to be aware of Mr. Heller's specific income and education level when he first decided to become an Uber driver. Uber could not have known that he intended to use the Driver App as his primary source of income, given that Uber drivers are not required to use the App at any given time and may therefore use it casually as a means to supplement their income. There is a lack of evidence as to why Mr. Heller chose to sign up for the Driver App, and why he chose to adopt it as his primary source of income and not to seek other work. There is also no evidence of his income at the time he entered into the contract. In any event, such questions would require the production and review of testimonial evidence, which would lead the Court to stray impermissibly beyond the documentary record.

[289] Whether the unconscionability doctrine renders the Arbitration Clause unenforceable is thus a question of mixed law and fact that requires more than a superficial review of the documentary evidence. The parties should therefore be referred to arbitration.

(iv) Application of Unconscionability to Individual Terms of an Arbitration Agreement

[290] In a footnote to their reasons, Abella and Rowe JJ. assert a contested point of substantive law: that the unconscionability doctrine may be applied to individual terms of an agreement: fn. 8. I agree with Brown J. that the unconscionability doctrine should not be applied to individual terms of a contract, but I take issue with how Abella and Rowe JJ. apply their approach to the unconscionability of individual terms to the contractual arrangements now before the Court.

[291] If Abella and Rowe JJ.'s approach were to be applied in light of the separability doctrine, which, at para. 96, they purport to accept, they would be led to the conclusion that the Place of Arbitration Clause and the selection of the ICC Rules are individually unconscionable terms of the Arbitration Clause. In their opinion, this does not render the Arbitration Clause itself unenforceable, because they assert that the unconscionability doctrine can be applied to individual terms without rendering the entire agreement unenforceable: fn. 8.

[292] Even if the separability doctrine did not apply, it would be arbitrary to conclude that the individual term committing the parties to submit disputes to arbitration is invalid on the basis that the clause providing for it is close to clauses providing for other supposedly unenforceable terms involving the selection of certain institutional procedural rules for arbitration proceedings, of a foreign seat for such proceedings and of a foreign law to govern their agreement. Abella and Rowe JJ. relieve Mr. Heller of his commitment to submit disputes to arbitration on the basis that they find the terms for the arbitration offensive even though the commitment to arbitrate is itself left unimpeached. This result is impractical from a commercial standpoint, as well as being unjustified by Abella and Rowe JJ.'s own approach to unconscionability.

[293] Therefore, it follows from Abella and Rowe JJ.'s approach to the doctrine of unconscionability that the Arbitration Clause is valid and enforceable. I will now consider whether Mr. Heller's other arguments relating to whether the Arbitration Clause is invalid under the *ESA* require more than a superficial review of the documentary evidence in the record.

(b) *The ESA*

[294] My colleagues decline to address the *ESA* issue because they would decide the appeal on the basis of unconscionability or, in the case of Brown J., on the basis of public policy. As I do not agree with their disposition of those issues, and for the sake of completeness, I must also analyze Mr. Heller's arguments with respect to the question whether the Arbitration Clause is invalid under the *ESA*.

[295] Mr. Heller raises two arguments in support of his position that the Arbitration Clause is invalid under the *ESA*. First, he argues that the Arbitration Clause amounts to an unlawful contracting out of an employment standard because he says it prevents him from accessing the *ESA*'s statutory enforcement mechanisms. Second, he submits that the choice of Dutch law to govern the Service Agreement also amounts to an unlawful contracting out of an employment standard.

[296] Although these two arguments are distinct, they suffer from the same fatal flaw. For the purposes of both of them, Mr. Heller submits that it is appropriate to presume that he is an employee, which means that the *ESA* applies. In *Seidel*, this Court was able to apply the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), to find that the arbitration agreement at issue was partially invalid, because a superficial review of the documentary evidence was sufficient to establish the applicability of the legislation. By contrast, the Service Agreement expressly states that it is an agreement to access and license software and that it does not create an employment relationship: A.R., vol. II, pp. 34 and 109-10. The question whether Mr. Heller is an employee goes to the heart of the dispute between the parties. The Court of Appeal recognized that this issue was central to the dispute, as it repeatedly relied on an assumption that Mr. Heller is an employee in its analysis: paras. 24, 42, 45-46, 49-50 and 74. However, a court hearing a motion for a stay cannot make such an assumption without usurping the role of the arbitral tribunal.

[297] This means that the provision of the *ESA* on which Mr. Heller relies in support of a determination of invalidity of the Arbitration Clause is unavailable to him for the purposes of this motion:

> **No contracting out**
>
> **5** (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

A court cannot determine that an arbitration agreement is invalid pursuant to s. 5 without first finding that the parties involved are an employer or agent of an employer and an employee or agent of an employee.[9] Whether Mr. Heller is an employee within the meaning of the *ESA* is a complex question of mixed law and fact which cannot be decided on the basis of the record before the court, nor should it be: the rule of systematic referral applies, and the parties should be referred to arbitration.

[298] Nonetheless, because the parties have made submissions on the merits of the challenge under the *ESA*, I find that it will be helpful to comment on some of the legal aspects of this challenge.

(i) Contracting out of the Enforcement Mechanisms by Means of an Arbitration Clause

[299] Mr. Heller argues that the Arbitration Clause amounts to a contracting out of an employment standard in that it precludes him from filing a complaint with the Ministry of Labour pursuant to s. 96 of the *ESA* in which he would allege that he has been misclassified. The flaw in his argument is that the ability to file a complaint under s. 96 of that Act is not an employment standard. An "employment standard" is a "requirement or prohibition

[under the *ESA*] that applies to an employer for the benefit of an employee": *ESA*, s. 1(1). Even if I assume, without deciding, that s. 96 of the *ESA* operates "for the benefit of an employee", it clearly does not require an employer to do — or prohibit an employer from doing — anything. It therefore does not provide for an employment standard.

[300] In addition, nothing in the record indicates that Mr. Heller has attempted to make a complaint under s. 96 of the *ESA*. Instead, he filed a multi-million dollar class proceeding. It may be possible to interpret the Arbitration Clause such that it does not apply to s. 96 of that Act. As the parties expressly represented in the Service Agreement that they are not in an employment relationship, it may be open to a court or an arbitral tribunal to conclude that s. 96 of the *ESA* was not reasonably within their contemplation. I note in this regard that where a term of a contract is capable of two constructions, one which renders the term lawful and one which renders it unlawful, the construction which supports the validity and legality of the term is to be preferred: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 772-73.

[301] Mr. Heller also argues that the *ESA* precludes arbitration as a means of pursuing claims under that Act. The opposite is true, however, as there is no express prohibition on arbitration in the *ESA* and the *ESA* "cannot be assumed to exclude arbitral jurisdiction unless it expressly so states": *Desputeaux*, at para. 42. When the legislature wants to exclude arbitration, it is able to express itself in very clear language, and it has in fact done so in other statutes: see, e.g., *Consumer Protection Act, 2002*, s. 7(2); *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2). Further, the objective of the *ESA*'s enforcement provisions is "to make redress available, where it is appropriate at all, expeditiously and cheaply": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 27. Arbitration is entirely consistent with this objective. Given arbitration's inherent flexibility, this Court's numerous statements encouraging and professing the benefits of arbitration, and the legislature's clear pro-arbitration stance as indicated in the *Arbitration Act* and the *International Act*, I would be very slow to conclude that arbitration is excluded as an acceptable means of dispute resolution under the *ESA*: *Seidel*, at para. 23; *Wellman*, at paras. 48-56.

(ii) Contracting out of the *ESA* by Means of a Choice of Law Clause

[302] Mr. Heller submits that the Arbitration Clause amounts to a contracting out of the entire *ESA* as a result of the Choice of Law Clause. However, in light of the separability doctrine, the Choice of Law Clause must be understood as a part of the Service Agreement, while the Arbitration Clause must be considered to be a separate contract which is independent of the Service Agreement. Therefore, even if I were to assume, without so deciding, that the Choice of Law Clause is invalid, a finding to that effect would not, on its own, render the Arbitration Clause invalid because an arbitration agreement generally survives the invalidity of the underlying contract, or of a term therein.

[303] Further, the *ESA* only renders invalid the individual terms of an employment agreement which amount to a contracting out of an employment standard, not the entire employment agreement: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1001. Therefore, this is not one of those cases in which the invalidity of the underlying contract also entails the invalidity of the arbitration agreement: *Fiona Trust*, para. 17, per Lord Hoffmann. The alleged invalidity of the Choice of Law Clause does not undermine the validity of the Arbitration Clause. Therefore, Mr. Heller's argument is not a bar to Uber's motion for a stay.

[304] In addition, since the Service Agreement expressly states that it is an agreement to license software and that it does not create an employment relationship, it may be open to the arbitral tribunal to find that the contracting parties did not intend to exclude the operation of mandatory employment legislation in the jurisdiction in which the contract was to be performed. Given that the contract did not purport to create an employment relationship, it is unlikely that the drafters contemplated the possibility that employment legislation would apply to the contract.

[305] In any event, the parties' choice of law does not oust mandatory rules, particularly mandatory statutory rules that are applicable in a jurisdiction with a strong nexus to the dispute (in this case, Ontario): S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at pp. 298-300; G. A. Bermann, "Mandatory rules of law in international arbitration", in F. Ferrari and S. Kröll, eds., *Conflict of Laws in International Arbitration* (2011), 325, at pp. 333-34; see also *Williams v. Amazon.com, Inc.*, 2020 BCSC 300, at paras. 61-71 (CanLII). While the parties produced no evidence on whether an arbitral tribunal seated in the Netherlands and applying Dutch law would apply the *ESA*, it does not follow merely from the choice of Dutch law that the *ESA* would not be applied in

relation to the dispute. Simply assuming that the *ESA* will not apply smacks of the old common law mistrust of arbitration which the *Arbitration Act* was intended to put to rest: *Wellman*, at para. 49.

[306] In conclusion on the *ESA* issue, neither of Mr. Heller's arguments warrants holding that the Arbitration Clause is invalid, as the rule of systematic referral negates both of them and, in any event, the substance of his arguments does not justify the relief he seeks.

(c) *Doctrine of Public Policy*

[307] My colleague Brown J. proposes to create a new common law rule that contractual provisions which have the effect of prohibiting access to dispute resolution are contrary to public policy: paras. 119-21 and 129-31. He concludes that the selection of the ICC Rules in this case is contrary to public policy, because the ICC Fees are disproportionate in light of the parties' relationship, and that this renders the Arbitration Clause itself invalid.

[308] Like Abella and Rowe JJ.'s unconscionability analysis, Brown J.'s approach is dependent on testimonial evidence for the purpose of establishing that the ICC Fees are disproportionate relative to the amount that would likely be at issue in a dispute under the Service Agreement and to the income Mr. Heller earns as an Uber driver: Brown J.'s reasons, at para. 132. His approach therefore requires more than a superficial review of the documentary evidence, and the parties should be referred to arbitration. Nonetheless, even if the rule of systematic referral did not apply, I also respectfully disagree with the legal and factual merits of the public policy analysis Brown J. expounds in his carefully drafted reasons.

[309] The common law of contracts is fundamentally committed to ensuring "the freedom of contracting parties to pursue their individual self-interest": *Bhasin*, at para. 70. Thus, the doctrine of public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds": *In re Estate of Millar (Charles), Deceased*, 1937 CanLII 10 (SCC), [1938] S.C.R. 1, at p. 7, quoting *Fender v. Mildmay*, [1937] 3 All E.R. 402, at p. 407. This is a high hurdle to overcome. With respect, I am not persuaded that the public policy concerns my colleague identifies justify overriding the "very strong public interest in the enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123, per Binnie J. (dissenting, but not on this point). In this regard, I view the *Arbitration Act* and the *International Act* as strong statements of public policy which favour enforcing arbitration agreements: see *Haas*, at paras. 10, 40 and 58; *Wellman*, at para. 54.

[310] Deciding whether to submit disputes to arbitration or to pursue litigation in the courts involves trade-offs. In arbitration, the parties trade the procedural certainty of the courts and the opportunity to appeal an unfavorable decision for the procedural flexibility, expediency, and efficiency of arbitration. There is no guarantee that arbitration will always yield the correct decision, but the courts are equally unable to offer that guarantee: L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, my Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143. Deciding whether this trade-off is in the parties' best interests rests with them, not with the courts.

[311] Just as there are many valid commercial reasons for parties to use exclusion clauses, including to allocate risks, there are also many valid commercial reasons for parties to use an arbitration agreement in which they select a particular international arbitral institution's procedural rules: *Tercon*, at para. 102, per Binnie J. (dissenting). One such reason might be to have the parties share the risk that recourse to arbitration may not be economical in the case of a claim for a small amount, although Mr. Heller would of course be free to use Uber's internal dispute resolution procedure, as he already has many times. However, should a claim for a large amount arise, the parties would have access to a world-class institution to aid in resolving the dispute. This is a valid contractual arrangement with which courts should not interfere. Given the mutuality of exchange the Arbitration Clause involves, it bears no resemblance to the clause at issue in *Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd.* (1995), 128 A.L.R. 540 (F.C.), which was clearly one-sided.

[312] In any event, the pursuit of access to justice and the enforcement of arbitration agreements are often complementary objectives. Indeed, one of the objectives of the *Arbitration Act* is to further access to justice by encouraging the use of arbitration: *Wellman*, at para. 135. Arbitration enhances access to justice because it can

be more expedient and less costly than litigation: para. 135. The policy that parties to a valid arbitration agreement should abide by their agreement furthers access to justice by preventing delaying tactics which hamper access to dispute resolution: para. 135. By contrast, widening the grounds for judicial intervention, as Brown J. would do, is as likely to undermine access to justice as to promote such access, because it would incentivize litigation as a delaying tactic, thereby increasing the time for, and cost of, dispute resolution.

[313] While it is often complementary to other legislative objectives, the pursuit of access to justice should not "be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*": *Wellman*, at para. 83. The Act also pursues another important objective: it gives effect to party autonomy by permitting parties to craft their own dispute resolution mechanism through consensual agreement: *Wellman*, at para. 52. Moreover, concluding that an arbitration agreement is invalid on public policy grounds without impeaching the parties' consent to the agreement undermines another objective of the *Arbitration Act*, that of holding parties to their commitment to submit disputes to arbitration where they have agreed to do so: *Wellman*, at para. 49, quoting *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.) (WL Can.).

[314] Similarly, the rule of law is not a "tool by which to avoid legislative initiatives of which one is not in favour": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 67. On the contrary, the rule of law requires courts to "give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text": *Imperial Tobacco*, at para. 67. As a motion for a stay in favour of arbitration does not impinge on the Governor General's power to appoint judges under s. 96 of the *Constitution Act, 1867*, I see no reason why this Court should not seek to give effect to the legislature's objectives as embodied in the *Arbitration Act* and the *International Act*.

[315] Further, when considering whether, or how, to refashion old common law doctrines regarding arbitration, this Court should, in my view, follow its decision in *Wellman* to embrace a more modern approach to arbitration law. According to this approach, arbitration is "an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts": *Inforica*, at para. 14, quoted in *Wellman*, at para. 56. Therefore, doctrines based on the notion that only superior courts are capable of granting remedies for legal disputes should no longer be applied. This Court should not seek to roll back the tide of history by breathing new life into authorities which are irreconcilable with the modern approach to arbitration.

[316] I appreciate Brown J.'s able attempt to provide a new conceptual justification for the common law doctrine: paras. 111-14. However, when this new justification is considered alongside his reformulation of the substantive doctrine, these innovations cannot be said to amount to an incremental development in the law: paras. 119-21 and 129-31. Rather, in my view, this is an entirely new common law rule governing the validity of arbitration agreements.

[317] Additionally, the comparative suitability of litigation, arbitration and other methods of dispute resolution for various classes of persons in various circumstances is a complex, polycentric policy decision that involves a host of different interests, objectives and solutions. Such questions do not fall to be answered by the courts, as they are instead matters for the elected policy-makers who sit in the legislature: *Wellman*, at para. 79.

[318] My concerns about the limits of the courts' institutional capacity to fully consider questions in this regard are heightened by Brown J.'s reliance on s. 96 of the *Constitution Act, 1867*, which risks permanently restraining the legislature's competence in the future to enact policies which promote access to civil justice outside the courtroom context. Although I appreciate Brown J.'s attempt to corral his proposed rule, public policy is an "unruly horse", and I fear that once this Court sits astride that horse, judges may be led back to the days when they displayed overt hostility to arbitration, treating it as a second-tier method of dispute resolution: *Tercon*, at para. 116.

[319] Finally, while Brown J. maintains that the ICC Fees bar Mr. Heller from bringing a claim of any size against Uber, there is no evidence before this Court regarding the actual size of Mr. Heller's claim against Uber or the possible availability of third party funding for the pursuit of his claim: Brown J.'s reasons, at para. 132. Neither is there any evidence of his income at the time of the formation of the contract. There is, therefore, an insufficient evidentiary basis for Brown J.'s conclusion given the testimonial evidence in the record. The analysis requires an understanding of the parties' ability to finance the pursuit of arbitration proceedings, and of the comparative availability of litigation funding. As the record currently stands, it is difficult to accept that approximately CAN$19,000 in fees for the pursuit of arbitration can be said to amount to a total bar on dispute

resolution in this case when the costs awarded to Mr. Heller in the Court of Appeal amounted to CAN$20,000: C.A. reasons, at para. 75. Given the inadequacy of the record, this appeal differs markedly from *Lymer*, in which the Alberta Court of Appeal found that a court order barring an undischarged bankrupt from commencing or continuing court proceedings until he paid all costs awards against him in full constituted an insurmountable precondition to court access: para. 67. Therefore, I cannot conclude, as Brown J. does, that the ICC Fees act as an insurmountable precondition that prevent Mr. Heller from commencing a claim: Brown J.'s reasons, at para. 132.

[320] I conclude that the selection of the ICC Rules in this case is not contrary to public policy. Because each of the arguments against the validity of the Arbitration Clause requires more than a superficial review of the documentary evidence in the record, the parties should be referred to arbitration. The remedial options available to a court on a motion for a stay remain to be considered, however.

E. *Possible Remedies on a Motion for a Stay*

[321] My colleagues put forward different theories to conclude that the Arbitration Clause is invalid. Even though none of their theories impugn the parties' basic commitment to submit disputes to arbitration, my colleagues find that that commitment is invalid. They appear to conceptualize the available relief as involving a stark choice between rigidly enforcing the arbitration agreement and finding that the entire arbitration agreement is invalid. In my view, the pro-arbitration stance that has been taken by legislatures across Canada and which is embodied in this Court's jurisprudence supports a generous approach to remedial options which will facilitate the arbitration process. Two such options are (1) ordering a conditional stay of proceedings and (2) applying the doctrine of severance. I address each of these options below.

(1) Conditional Stay of Proceedings

[322] If the exceptions in s. 7(2) of the *Arbitration Act* or art. 8(1) of the UNCITRAL Model Law do not apply, the legislation directs a stay of the proceedings: *Arbitration Act*, s. 7(1); *International Act*, s. 9; UNCITRAL Model Law, art. 8(1). A stay is mandatory in such circumstances, but the *Arbitration Act* and the *International Act* are silent as to what conditions, if any, may be imposed on the stay. However, s. 106 of the *Courts of Justice Act*, which Uber cited in its notice of motion, provides that a court may stay a proceeding on such terms as it considers just: A.R., vol. II, at p. 88. Although it will usually be unnecessary for a court to order a conditional stay, it may be appropriate to do so to ensure procedural fairness in the arbitration process. I caution that a court should be careful not to impose conditions which impinge on the decision-making jurisdiction of the arbitral tribunal: Born, vol. II, at p. 2196. Nonetheless, in the period before the appointment of the arbitral tribunal, a condition which facilitates the arbitration process can protect the tribunal's jurisdiction by ensuring that the parties are able to proceed with the arbitration.

[323] Courts hearing motions for stays and for referral to arbitration have ordered conditional stays in the past: see, e.g., *Popack*; *Iberfreight*; *Continental Resources*; see also *Fuller Austin*. As was the case in *Iberfreight* and *Continental Resources*, such conditions support one of the purposes of arbitration agreements and of modern arbitration legislation, that of proceeding with dispute resolution in a timely manner rather than delaying progress in the courts. In this regard, I find that the following comments of Gerwing J.A. from *Fuller Austin* (C.A.), at para. 5, on the interpretation of Saskatchewan's legislation implementing the UNCITRAL Model Law are persuasive:

> In most stays the party requesting the extraordinary indulgence of the court must act with expedition to facilitate justice. Particularly where remedies of an unusual nature, such as commercial arbitration, are permitted to circumvent litigant's normal access to the court, or delay it, it is for the purpose of facilitating and not delaying justice. As in most stays, common sense indicates that the successful applicant for a stay cannot use it as it were as a permanent way of ending the matter by deliberate inattention to pursuing the course of action which justified the granting of the stay. While we did not indicate expressly in our reasons this requirement, that reasonable steps be taken, we agree with the interpretation placed by the chamber judge below that this is implicit. (Indeed, it might be noted that substantial argument can be made that in interpreting the *Act*, if principles of statutory interpretation would have to be called in aid, that the legislation was similarly intended to expedite the resolution of disputes and not to delay them.)

[324] Mr. Heller has given sworn evidence that he cannot afford the ICC Fees, which must be paid in order to initiate ICA proceedings. In light of Mr. Heller's particular circumstances, I would impose a condition that Uber advance the filing fees to enable him to initiate such proceedings. I would leave the decision as to who should ultimately bear those costs to the arbitral tribunal. In this regard, Rule 38 of the ICC Arbitration Rules empowers the arbitral tribunal to make decisions on costs at any time during the proceedings and to decide which party should bear the costs in the final award.

[325] This condition would be consistent both with the principle of party autonomy and with the legislature's intent, because it would facilitate the arbitration process. As it would merely be an interim measure, it would not change the substantive rights and obligations of the parties pursuant to the Arbitration Clause. It would therefore be consistent with s. 17(1) of the *Arbitration Act* and art. 16(1) of the UNCITRAL Model Law, because it would leave the decision on the question of the validity of the Arbitration Clause to the arbitral tribunal.

(2) Doctrine of Severance

[326] While granting a conditional stay is sufficient for my purposes to decide the appeal, there is one further important aspect of Uber's submissions which Abella and Rowe JJ. do not address in their reasons. In oral argument, counsel for Uber suggested that, if part of the Arbitration Clause was found to be unenforceable, this Court should sever the unenforceable portions of the agreement and enforce the remainder: transcript, pp. 17 and 55-56. I agree. Compelling policy considerations support a generous application of the doctrine of severance in cases in which the parties have clearly indicated an intent to settle any disputes through arbitration but in which some aspects of their arbitration agreement have been found to be unenforceable. Where doing so is practical, courts should strive to give effect to the parties' intentions by severing unenforceable terms and referring the parties to arbitration.

[327] The doctrine of severance takes two forms: (1) notional severance and (2) blue-pencil severance. Notional severance involves reading down a contractual provision so as to make it legal and enforceable. Blue-pencil severance consists of removing the illegal part of a contractual provision: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 2 and 29-30. Whereas notional severance calls for the application of a bright line test of illegality, blue-pencil severance can be effected where the court can strike out the portion of the contract it wants to remove by drawing a line through it without affecting the meaning of the part that remains: *Shafron*, at paras. 29 and 31; *Transport North American Express*, at para. 34.

[328] In deciding whether to apply the doctrine of severance, a court should also consider whether it would be both commercially practical and consistent with the parties' intentions for it to enforce the remainder of the arbitration agreement: McCamus, at pp. 510-11. The fundamental aspect of an arbitration agreement is a clear commitment by both parties to settle any disputes by arbitration: see UNCITRAL Model Law, art. 7 (option 1); *Arbitration Act*, s. 1 "arbitration agreement". Therefore, where the parties' intention to submit disputes to arbitration is clearly established, applying the doctrine of severance will usually be consistent with their intentions.

[329] Further, courts will consider the context of the contract at issue and any relevant policy considerations when assessing whether and how to sever provisions: *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, at para. 37. The *Arbitration Act* and the *International Act* are both legislative statements of public policy which encourage the use of arbitration and favour holding parties to their commitment to submit disputes to arbitration: *Wellman*, at para. 49. The doctrine of severance advances these policies by ensuring that the parties' intentions are not defeated by shortcomings in their selection of the terms for the arbitration process.

[330] In *Shafron*, Rothstein J. cautioned courts to take a restrained approach to severance, because severance interferes with the right of parties to freely contract and to choose the words that determine their obligations and rights: para. 32. However, different considerations arise in assessing arbitration agreements because arbitration itself is a party-driven form of dispute resolution. Were an aspect of an arbitration agreement to be severed, the parties would still be free to agree on a replacement for it: for example, if certain procedural rules were severed, they could agree on other existing procedural rules or on a procedure of their own. Severance does not take that choice away. In fact, it furthers party autonomy by ensuring that the parties can have access to their chosen means of dispute resolution. Severance will rarely, if ever, change the fundamental nature of the parties' agreement, which was to settle disputes by arbitration.

[331] The practice in other countries is to sever unenforceable provisions while still giving effect to the arbitration clause wherever possible. Thus, "[t]he overwhelming majority of national court decisions . . . uphold the validity of international arbitration agreements even after invalidating one (or more) term(s) of those agreement[s]": Born, vol. I, at p. 916; see, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

[332] This Court's jurisprudence supports upholding the validity of an arbitration clause where practical. In *Seidel*, this Court found that the arbitration clause at issue was inconsistent with the *BPCPA*. The consumer had commenced a proposed class proceeding in respect of claims under the *BPCPA* as well as other causes of action. The Court found the arbitration clause to be invalid only to the extent that it applied to the *BPCPA* claims, as the clause in question was barred by that Act, and ordered a stay in relation to the other claims, thereby referring them to arbitration: *Seidel*, at para. 50. The Court's remedial approach in *Seidel* may be viewed as an application of notional severance to the arbitration agreement because the Court in effect granted relief which was equivalent to writing in a term excluding the *BPCPA* claims from the scope of the arbitration agreement instead of holding that the entire agreement was invalid. Further, in *Wellman*, this Court stated that courts must show due respect for arbitration agreements and, more broadly, for arbitration, thus endorsing the view that the law should favour giving effect to arbitration agreements and that arbitration should be encouraged: para. 54.

[333] In the instant case, the parties' commitment to submit disputes to arbitration is clear. The selection of the ICC Rules is neither contrary to public policy nor unconscionable, but, if it were so, the appropriate remedy would be for the Court to apply blue-pencil severance and strike the selection of the ICC Rules, leaving it to Uber and Mr. Heller to agree on an arbitration procedure, or to the arbitral tribunal to decide how to proceed. The same would be the case for the Place of Arbitration Clause. This approach is more consistent with the parties' intentions and with the legislature's intent than simply holding that the entire arbitration agreement is invalid.

[334] Given that my colleagues do not seem to take issue with the actual selection of arbitration as a mode of dispute settlement or with the requirement to attempt mediation first, it would be inappropriate to sever those aspects of the Arbitration Clause. The substance of Mr. Heller's arguments, and of those of my colleagues, relates to the ICC Fees which result from the selection of the ICC Rules and to the designation of a foreign seat for the arbitration. I repeat that I find that the ICC Rules and the Place of Arbitration Clause are valid, but, if I had found that they were unenforceable, I would have applied blue-pencil severance to rewrite the Arbitration Clause as follows:

> Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings ~~under the International Chamber of Commerce Mediation Rules ("*ICC Mediation Rules*")~~. If such dispute has not been settled within sixty (60) days after a Request for Mediation has been submitted ~~under such Mediation Rules~~, such dispute can be referred to and shall be exclusively and finally resolved by arbitration ~~under the Rules of Arbitration of the International Chamber of Commerce ("*ICC Arbitration Rules*"). The ICC Rules' Emergency Arbitrator provisions are excluded~~. The dispute shall be resolved by one (1) arbitrator ~~to be appointed in accordance with the ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands~~.

[335] If the parties were then unable to agree on how to proceed, the *Arbitration Act* and the UNCITRAL Model Law contain detailed provisions to assist in the enforcement of an arbitration agreement where the parties are unable to agree on the details: see, e.g., *Arbitration Act*, ss. 9, 10, 20 and 22; UNCITRAL Model Law, arts. 10, 11(3), 19(2) and 20(1).

[336] The facts of this case illustrate a situation in which severance is needed in order to prevent commercially absurd results. My colleagues take issue with the ICC Fees in the context of a hypothetical dispute for a small amount. While I appreciate that such a dispute could arise from the Service Agreement, defeating the parties' commitment to submit disputes to arbitration on the basis of this hypothetical case is absurd given that the dispute actually before the Court concerns a proposed class proceeding for CAN$400,000,000 and that the amount of Mr. Heller's individual claim is as yet unknown. Approaching the enforceability of arbitration agreements in this fashion compromises the certainty upon which commercial entities rely in structuring their global operations. The commitment to submit disputes to arbitration should be upheld. Any other result would be commercially impractical.

[337] Finally, I note that, since Abella and Rowe JJ. would apply the unconscionability doctrine to individual terms, they are, in reality, applying blue-pencil severance by another name. However, they do not explain why they have chosen to strike the entire Arbitration Clause (and perhaps — although this is unclear — the Choice of Law Clause as well) instead of the specific individual terms they find to be unconscionable.

VI. Conclusion

[338] For these reasons, I would allow the appeal and order a conditional stay of proceedings.

Appeal dismissed with costs throughout, CÔTÉ J. *dissenting.*

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Solicitors for the respondent: Wright Henry, Toronto; Samfiru Tumarkin, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Young Canadian Arbitration Practitioners: Perley-Robertson, Hill & McDougall, Ottawa.

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Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.

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Solicitors for the intervener the Community Legal Assistance Society: Allen/McMillan Litigation Counsel, Vancouver.

Solicitors for the intervener ADR Chambers Inc.: Bennett Jones, Toronto.

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[1] We refer to the four appellants collectively as "Uber".

[2] The phrases "arbitration clause" and "arbitration agreement" both refer to that part of the overall contract dealing with the arbitration.

[3] On June 7, 2016, Mr. Heller entered into a contract with Rasier Operations B.V. ("Uber Rasier") to use the Ride App. On December 15, 2016, he entered into a contract with Uber Portier B.V. ("Uber Portier") to use UberEATS.

[4] This case was argued on the basis that all four Uber defendants can invoke the arbitration agreement, even though only Uber Rasier is a party to it. Our reasons should not be taken as implying that an arbitration agreement can bind or be invoked by non-parties (see J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 74-75; *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121 (Comm.), [2004] 1 Lloyd's Rep. 603). That is an issue to be decided another day.

[5] We note in passing that if the motion judge had issued a stay under the *AA*, no appeal to the Court of Appeal would have been available (*AA*, s. 7(6)). A direct appeal to this Court with leave would still have been permissible (*Crown Grain Company, Limited v. Day*, [1908] A.C. 504 (P.C.), at p. 507; *Re Sutherland and Halbrick* (1982), 1982 CanLII 3023 (MB CA), 134 D.L.R. (3d) 177 (Man. C.A.), at p. 181). In this case, because the motion judge's order was made (in error) under the *ICAA*, the Court of Appeal did have jurisdiction.

[6] The majority did not discuss the elements of unconscionability.

[7] We note that Uber's concession that the arbitration could physically occur in Ontario is of no moment in the context of a standard form contract that stipulates the "place of arbitration shall be Amsterdam, The Netherlands".

[8] This Court, moreover, has confirmed that a finding of unconscionability can be directed at a contract as a whole or against any severable provisions of it (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69, at para. 122, citing *Hunter*, at p. 462, per Dickson C.J.; McCamus, at pp. 440-42; Chris D. L. Hunt and Milad Javdan, "Apparitions of Doctrines Past: Fundamental Breach and Exculpatory Clauses in the Post-*Tercon* Jurisprudence" (2018), 60 *Can. Bus. L.J.* 309, at p. 328, fn. 112).

[9] Mr. Heller did not rest his argument on the common law doctrine of statutory illegality, and I decline to consider it in the absence of submissions from the parties: see *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249.

CITATION: Heller v. Uber Technologies Inc., 2021 ONSC 5518
COURT FILE NO.: CV-17-567946-00CP
DATE: 20210812

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DAVID HELLER Plaintiff	)	*Michael D. Wright, Lior Samfiru, Danielle E. Stampley* and *Samara Belitzky* for the Plaintiff
- and -	)	
UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., RASIER OPERATIONS B.V. and UBER PORTIER B.V. Defendants	)	*Linda M. Plumpton, Lisa Talbot, Sarah Whitmore* and *Alexander Bogach* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: July 13-15, 2021

PERELL, J.

REASONS FOR DECISION

A. <u>Introduction and Overview</u>

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] David Heller, the Plaintiff, and Felicia

[1] S.O. 1992, c. 6.

Garcia, a putative Class Member who is to be joined as co-Plaintiff, move for certification of their action as a class action. The Plaintiffs' action is against Uber Technologies Inc., Uber Canada Inc., Uber B.V., Rasier Operations B.V., and Uber Portier B.V. (collectively referred to as "Uber"). The Plaintiffs seek to be Representative Plaintiffs on behalf of a class of persons who have entered into Service Agreements with Uber to use software applications ("Uber Apps") developed and operated by Uber to provide rider transportation and food delivery services. The Plaintiffs submit that Uber has breached its employment contracts with the putative Class Members and contravened Ontario's *Employment Standards Act, 2000*.[2] They also plead that Uber is liable for unjust enrichment and negligence.

[2] The Plaintiffs describe their proposed class action, which has had a visit to the Supreme Court of Canada about the court's jurisdiction to decide the dispute,[3] as a conventional misclassification of employment class action. There is, however, nothing routine about it, and it is misdescribed as a misclassification of employment status class action. The proposed class action is better described as a compound classification of employment status class action. The Plaintiffs' proposed class action raises unique problems of how class actions should adopt to what has been called the "sharing economy" which is animated by information, computer, and Internet technology.

[3] In a conventional misclassification of employment status class action, there will be no controversy about whether there is an employer, and the typical issue will be whether the Class Members are working as employees or working for the employer as independent contractors. In either case, the class members will be "working for" the defendant in some capacity. However, in this compound classification of employment status class action, Uber denies that it is the putative Class Members' employer. This quandary about not only the legal status of the putative Class Members but also of the defendant Uber adds complexities about the commonality of the common issues of fact and law that are the bread-and-butter prerequisite of a certifiable class action.

[4] Amongst the proposed class action's unique features is the unusual circumstance that the proposed class action pits some putative Class Members against others. Both sides called putative Class Members to support their cases. Nine putative Class Members testified. The evidence on the certification motion reveals that the putative Class Members - the persons that the Plaintiffs wish to represent - are divided into two opposing camps and that there also is a third camp of putative Class Members whose members do not yet know which camp to join or who may be indifferent to joining either camp.

[5] In the immediate case, the first camp of putative Class Members are persons who would want to be classified as employees "working for Uber." This camp of putative Class Members would be much assisted in their aspirations for access to justice, if the Plaintiffs were appointed their Representative Plaintiffs, because the fundamental allegation in the proposed class action is the allegation that Uber is the employer of the putative Class Members. If Uber is indeed the first camp's employer, these putative Class Members would be entitled to the benefits of Ontario's *Employment Standards Act, 2000* and of federal employment protection legislation such as the *Canada Pension Plan*,[4] and the *Employment Insurance Act*.[5]

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[2] S.O. 2000, c. 41.
[3] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, aff'g 2019 ONCA 1, which rev'd 2018 ONSC 718.
[4] R.S.C. 1985, c. C-8.
[5] S.C. 1996, c. 23.

[6] In the immediate case, however, the second camp of putative Class Members are persons who do not want to be "working for Uber". These persons see themselves as "working for themselves." These putative Class Members do not want to work for Uber as employees or even as independent contractors, although the latter status would be preferable to the former. It is already apparent that this second camp of persons who are using Uber's technology should opt-out of the proposed class action because they would not wish to disturb the current contractual relationship they have with Uber. They certainly do not wish to be bound by a decision at a common issues trial that they are "working for Uber". For this second camp of persons, a class proceeding is not access to justice for breach of contract but rather it is interference with their freedom to contract.

[7] In the immediate case, the discussion will reveal that there are complexities associated with the commonality of the proposed common issues, which is desired by the first camp of putative Class Members, or the idiosyncrasy of the proposed common issues, which is the position of the second camp of putative Class Members and of the Defendant Uber.

[8] In this extraordinary case, the common issues focus on the questions of whether the relationship between Uber and the putative Class Members is that of: (a) service provider and customer; (b) employer and employee; or (c) employer and independent contractor. There is a serious controversy about the commonality or conversely with the idiosyncrasy of the relationship between the parties and this controversy is amplified because the contracts upon which the relationships are based have constantly been changing.

[9] In this extraordinary case, the evidentiary record reveals that with numerous Service Agreement amendments, Uber has been striving mightily, but not necessarily successfully: (a) to not be classified as an employer; and also (b) to not have a court decide the Plaintiffs' proposed class action and rather have the grievances of the putative Class Members referred to arbitrators.

[10] This struggle about the court's jurisdiction led to the parties' visit to the Supreme Court of Canada, and it continues into this certification motion, and, thus, in addition to seeking certification, the Plaintiffs request that the court rule invalid an Arbitration and Class Action Waiver Clause that Uber introduced into its Service Agreements on August 26, 2020. Uber, however, submits that it took heed of the lessons learned from the Supreme Court's judgment and the Arbitration and Class Action Waiver Clause is a valid and enforceable arbitration contract and that the putative Class Members who did not opt out of the clause should not be included as Class Members.

[11] In the immediate case, Uber's position is that it does not dispute that Mr. Heller and Ms. Garcia are qualified to be Representative Plaintiffs, but it disputes all of the other certification criterion, and Uber requests that the certification motion be dismissed.

[12] In the immediate extraordinary case, as I shall explain below, my conclusions about the contested certification criteria and about the matter of the Arbitration and Class Action Waiver Clause are as follows.

a. The Plaintiffs satisfy the cause of action criterion for their causes of action of: (a) breach of contract; and (b) breach of the *Employment Standards Act, 2000.* They do not satisfy the cause of action criteria or the preferable procedure criteria for their claims of: (a) unjust enrichment; and (b) negligence.

b. The Plaintiffs satisfy the identifiable class criterion, but the class definition needs a modest revision to identify the putative Class Members simply as Uber App users rather

than begging the question of whether they are "working for" Uber.

c. There are certifiable common issues for the breach of contract and the breach of the *Employment Standards Act, 2000* causes of action. The question of aggregate damages, however, is not certifiable as a common issue. The question of punitive damages is also not certifiable as a common issue.

d. The Plaintiffs satisfy the preferable procedure criterion.

e. It is conceded that Mr. Heller and Ms. Garcia satisfy the representative plaintiff criterion.

f. The Plaintiffs' action should be certified as a class action.

g. At this juncture of the proceeding, nothing needs to be done with respect to the Arbitration and Class Action Waiver Clause except insofar as its significance, if any, needs to be addressed in the notice of certification.

h. Extreme care must be taken with respect to the notice of certification to bring to the attention of the putative Class Members: (a) the legal significance of the Arbitration and Class Action Waiver Clause; and (b) the legal consequences of their having exercised or conversely their not having exercised the right to opt-out of the Arbitration and Class Action Waiver Clause.

B. <u>Battleground: Overview of the Parties' Positions and Arguments</u>

[13] In this proposed class action, the major theatre of war is the parties' battle over the commonality or the idiosyncrasy of the behaviour of the parties in their performance of the standard form contracts and the associated documents that are a constant feature of the Uber software (the "Uber Apps").

[14] The line of the Plaintiffs' argument may be summarized as follows:

a. Uber provides consumers with two product lines of internet software applications that are accompanied by a standard form contract, the Service Agreements. The consumers, who are called "Riders", can use one product line of Uber App to obtain rides much like a taxi service, and the consumers, who are called "Eaters," can use the other product line of Uber App to obtain deliveries from restaurants. Uber provides the persons who provide the rides, who are called "Drivers" and the persons who make the deliveries, who are called "Delivery People," corresponding software applications, and these Uber Apps are accompanied by standard form Service Agreements between Uber and the Drivers and the Delivery People.

b. The Drivers and the Delivery People are the putative Class Members.

c. The Plaintiffs, one of whom is a Delivery Person and the other a Delivery Person and a Driver, submit that the putative Class Members are employees working for Uber. The Plaintiffs make this argument based on: (a) the commonality of the functionality of the Uber App; (b) the commonality of the terms of the standard form Service Agreements, which are not negotiable; and (c) the commonality of associated rules of contract performance imposed on Drivers and Delivery People and some external rules and regulations imposed by municipalities on users of the Uber Apps.

d. The Plaintiffs submit that Uber has misclassified its employees as independent

contractors. The Plaintiffs submit that their proposed class action is similar to the other employment status misclassification cases that have been certified[6] and that it too should be certified.

[15] The line of Uber's argument to resist certification may be summarized as follows.

a. The Drivers and the Delivery People are not employees working for Uber but are independent contractors, which is a status expressly attributed to them in the Service Agreements, and it follows that there cannot be a common issue about employment status misclassification.

b. Moreover, and in any event, the matter of employee or independent contractor status cannot in whole or in part be determined at a common issues trial because notwithstanding common Uber Apps, common standard form Service Agreements, and common rules and regulations, employment status is inevitably an idiosyncratic phenomenon that cannot be determined in common.

c. There is no basis in fact for any common issues based on the alleged commonalities.

d. In addition, Uber submits that, in any event: (a) there are no certifiable causes of action for unjust enrichment and negligence; (b) the proposed class definition is defective; (c) putative Class Members who did not opt-out of the Arbitration and Class Action Waiver Clause should not be included as Class Members; (d) the common issues want for commonality; (e) in particular, aggregate damages is not a common issue; and (f) a class proceeding is not the preferable procedure and the putative Class Members should wait for legislative reform of employment law in the context of the law's regulation of the sharing economy.

[16] As the detailed description of the factual background and of the legal background set out below will reveal, the focus of the Plaintiffs in advancing their case for certification was on demonstrating that in accordance with the established law about employment status, there was commonality in the various indicia of an employment relationship in the immediate case. Uber's focus was to show that the various indicia revealed idiosyncrasy not commonality.

C. <u>Methodology</u>

[17] In this case, to resolve the competing positions and arguments of the Plaintiffs and Uber and to decide whether the Plaintiffs' action satisfies the test for certification, it is necessary to cover a large amount of factual and legal territory. And it is necessary before setting out the details of the facts, to place those facts in the context of employment law about employee status and in the context of the existing jurisprudence about employment status misclassification class actions. I have, therefore, organized the Reasons for Decision as set out in the table of contents above.

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[6] *Montaque v. Handa Travel Student Trip Ltd.,* 2020 ONSC 6459; *Rallis v. Approval Team Inc*., 2020 ONSC 4197; *Berg v. Canadian Hockey League*, 2017 ONSC 2608, var'd 2019 ONSC 2106; *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122 and 2018 ONSC 271; *Omarali v. Just Energy*, 2016 ONSC 4094; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144.

D. The Employment Law Context

[18] In Ontario, there are three types of workplace relationships;[7] namely: (a) employer-employee (master-servant); (b) contractor-independent contractor, and (c) contractor-dependent contractor, which is an intermediate classification where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied.[8]

[19] What the parties may choose to call their relationship is relevant, but it is not determinative, and the court will determine the nature of the relationship based on the conduct of the parties.[9]

[20] In *McKee v. Reid's Heritage Homes Ltd.*,[10] the Court of Appeal described the methodology or analytical approach to the determination of the type of worker relationship. The first step is to determine whether or not the worker is an employee or a contractor in accordance with the established methodology and criteria for differentiating an employee from an independent contractor. The analysis of the classification of the relationship ends if the worker is determined to be an employee. However, if the worker is determined to be a contractor, the second step of the analysis is to determine whether he or she is a dependent or an independent contractor.

[21] The leading cases for the first step of differentiating employees from contractors, be they independent or dependent contractors (which is the focus of the second step of the analysis) are: *Montreal v. Montreal Locomotive Works Ltd.*,[11] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[12] *Belton v. Liberty Insurance Co. of Canada*,[13] and *Braiden v. La-Z-Boy Canada Ltd*.[14]

[22] The employee versus contractor cases establish that there is no litmus test or formula for determining the classification of the worker, and, rather, there is a non-comprehensive list of relevant criteria or factors which should be analyzed on a case-by-case basis to determine the true legal nature of the relationship. In determining whether the worker is an employee or contractor, the court must consider: (a) the intentions of the parties; (b) how the parties themselves regarded the relationships; (c) the behaviour of the parties toward each other; and (d) the manner of conducting their business with one another.[15]

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[7] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, 2016 ONCA 79, affg. 2015 ONSC 1055; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, 2014 ONSC 4989; *Wyman v. Kadlec*, 2014 ONSC 4710; *Huber v. Way*, 2014 ONSC 4426; *Filiatrault v. Tri-County Welding Supplies Ltd*., 2013 ONSC 3091; *Duynstee v. Sobeys Inc*., 2013 ONSC 2050; *Conde v. National Sign Manufacturers Ltd*., 2013 ONSC 229 (Div. Ct.); *Sarnelli (c.o.b. East End Lock and Key) v. Effort Trust Co.*, 2011 ONSC 1080; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Slepenkova v. Ivanov*, [2007] O.J. No. 4708 (S.C.J), affd. 2009 ONCA 526; *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464; *Moseley-Williams v. Hansler Industries Ltd*., [2008] O.J. No. 4457 (S.C.J.); *Ross v. 413554 Ontario Ltd. (c.o.b. Chouinard Bros. Roofing)*, [2008] O.J. No. 3381 (S.C.J.).

[8] *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.).

[9] *Cormier v 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587 at para 50; *Omarali v. Just Energy*, 2016 ONSC 4094 at para. 20; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, 2014 ONSC 4989 at paras. 72, 77.

[10] 2009 ONCA 916.

[11] [1947] 1 D.L.R. 161 (P.C.).

[12] [2001] 2 S.C.R. 983.

[13] (2004), 72 O.R. (3d) 81 (C.A.).

[14] 2008 ONCA 464.

[15] *Charbonneau v. A.O. Shingler & Co.*, [2000] O.J. No. 4282 at para. 12 (S.C.J.); *Wyman v. Kadlec*, 2014 ONSC 4710 at para. 28.

[23] In *Montreal v. Montreal Locomotive Works Ltd.*, Lord Wright indicated a fourfold test would be appropriate to differentiate an employee from an independent contractor; namely: (a) control of the work; (b) ownership of tools; (c) chance of profit; and (d) risk of loss. He stated that posing the question "Whose business is it?" would also serve, in some cases, to answer the question of the nature of the parties' relationship.

[24] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., at para. 47, the Supreme Court of Canada said that the central question for determining whether a worker is a contractor is whether he or she is providing services in business on his or her own account. The Court stated:

> 47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, [1968] 3 All E.R. 732, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[25] In *Braiden v. La-Z-Boy Canada Ltd*. at para. 34, Justice Gillese suggested that the question of whose business was being operated was at the heart of the matter; *i.e.*, was the worker carrying on business for himself or herself or was he or she paid to make a contribution to somebody else's business enterprise? In determining that question, the following non-comprehensive factors were relevant but not necessarily determinative: (a) the extent to which the activities of the worker were controlled by the other contracting party; (b) whether the worker provided his or her own tools or equipment; (c) whether the worker hired his or her own helpers; (d) the extent to which the worker assumed financial risk; (e) the extent to which the worker had invested capital in the enterprise; (f) the extent to which the worker had management responsibilities; and (g) whether the worker had an opportunity for profit in the performance of his or her tasks.

[26] In *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*[16] at paras. 74-75, Justice D.G. Price provided a helpful description of the control factor, as follows:

> 74. The control test is the most traditional and frequently used method of determining whether an individual is an employee. If the employer has substantial control over the worker's operations, an employment relationship will be found, even if the worker has substantial freedom to operate, such as a professional employee normally has.
>
> 75. Control over the employee need not be complete in order to establish an employment relationship. Indicia of control include: the ability to decide when, where, and by what method the employee will perform his/her work; the ability to determine which customers can be served or sold goods, and which cannot; the requirement that the employee submit activity reports; the employee's ability or inability to attend meetings; assistance and guidance that the employer gives to the employee in connection to the work being performed; the employer's ability to set dress and conduct codes for the employee, and the discipline the employer exercises over the employee for breaches of company policy. The employer's ability to select and dismiss the employee, and the general power to control the employee, are also important factors in determining the existence of an employment relationship.

[27] As noted above, if the first step of the analysis determines that the worker is a contractor,

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[16] 2014 ONSC 4989.

then it is necessary to go further and determine whether the worker is a dependent or independent contractor. In *McKee v. Reid's Heritage Homes Ltd.*, *supra*, Justice MacPherson identified a variety of factors to differentiate dependent and independent contractors including: (a) the extent to which the worker was economically dependent on the particular working relationship; (b) the permanency of the working relationship; and (c) the exclusivity or high level of exclusivity of the worker's relationship with the enterprise. It follows from the factors identified by Justice MacPherson that the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship.[17]

[28] Thus, the extent to which, over the history of the relationship, the worker worked exclusively or near-exclusively or was required to devote his or her time and attention to the other contracting party's business is an important factor in determining whether the worker is a dependent or independent contractor: the greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker will be classified as a dependent contractor.[18]

[29] In *McKee v. Reid's Heritage Homes Ltd.*, *supra*, Justice MacPherson said that recognizing the intermediate category between employee and independent contractor accorded with the statutorily provided category of dependent contractor found in the *Labour Relations Act*, S.O. 1995. At para. 29 of his judgment in *McKee v. Reid's Heritage Homes Ltd.*, he stated:

> 29. Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
>
> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

[30] It should be noted that if the analysis of the worker relationship reaches the second stage, there will inevitably be indicia that the worker was a contractor; for example, that he or she was paid in exchange for invoices and not issued salary cheques, but the analysis, nevertheless, continues to examine the true substance of the relationship. Thus, the case law reveals that the fact that the worker operated as a sole proprietor or through a business is relevant but not determinative of the worker's status.[19]

E. <u>Employment Law Class Action Context</u>

[31] As mentioned above, it is my view that the Plaintiffs misdescribe the case at bar as a

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[17] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, 2016 ONCA 79, affg. 2015 ONSC 1055.

[18] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd*., 2016 ONCA 79, affg. 2015 ONSC 1055.

[19] *McKee v. Reid's Heritage Homes Ltd*., 2009 ONCA 916 at para. 54; *Braiden v. La-Z-Boy Canada Ltd*., 2008 ONCA 464 at para. 30; *Kordish v. Innotech Multimedia Corp*. [1998], 46 C.C.E.L. (2d) 318, (Ont. Gen. Div.), aff'd [2000] O.J. No. 2557 (C.A.).

conventional misclassification of employment class action. My view is that the proposed class action is better described as a compound classification of employment status class action. The difference in labelling can be demonstrated by contrasting the following two illustrations of proposed class actions.

[32] In the first illustration, ABC Ltd. purchases buses from School Buses Ltd. ABC Ltd. operates a business in which it hires drivers to drive students to school. "X" is a school bus driver. X brings a proposed class action against ABC Ltd., and the issue is whether the drivers, who are the putative class members are hired as employees working for ABC Ltd. or hired as dependent or independent contractors working for ABC Ltd. This is a conventional misclassification of employment status class action.

[33] In the second illustration, School Buses Ltd. sells buses to drivers pursuant to a service contract in which School Bus Ltd. shares in the revenues the drivers earn from transporting students to school. X brings a proposed class action against School Buses Ltd., and there is the compound issue of whether in a sharing economy, there is any employment relationship between School Buses Ltd. and the drivers, who are the putative class members, and, if so, whether the drivers are hired as employees working for School Buses Ltd. or hired as dependent or independent contractors working for School Buses Ltd. This is a compound classification of employment status class action.

[34] The case at bar is like the second illustration because Uber pleads the following in paragraphs 5 and 6 of its Statement of Defence:

> 5. As the services agreements between Uber and the proposed class members explicitly state and accurately reflect, the parties did not intend to, and did not, create an employment relationship. The criteria necessary to establish an employment relationship do not exist here, nor do those criteria have application in the context of this commercial relationship. The plaintiff and the proposed class members made the choice to provide services to riders or merchants using the Uber Apps, and to benefit from the flexibility that using the Apps affords. Uber's role is to develop, improve, license, and market the technology that the plaintiff and the proposed class members use to provide services to a number of third parties, and to facilitate payments for those services.
>
> 6. Uber denies that the provisions of the *Employment Standards Act*, the *Canada Pension Plan*, and the *Employment Insurance Act*, or any of them, apply. Uber also denies each of the other asserted claims, all of which depend upon the individualized finding that each of the proposed class members is an employee of Uber. There is accordingly no basis for the plaintiff's claim. It should be dismissed.

[35] That the case at bar is not a conventional misclassification of employment class action does not mean that it is not certifiable. The prospect of certification in the immediate case still turns on the matter of commonality versus idiosyncrasy.

[36] The conventional misclassification of employment cases succeed in achieving certification when there is some basis in fact for a systemic, which is to say a class-wide commonality in the behaviour and characteristics of the relationship between the putative Class Members and the defendant such that a court may be able to classify that relationship as that of an employee working for an employer.[20] The conventional misclassification of employment cases fail in achieving

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[20] *Montaque v. Handa Travel Student Trip Ltd*., 2020 ONSC 6459 (consent certification); *Rallis v. Approval Team Inc.*, 2020 ONSC 4197 (consent certification); *Berg v. Canadian Hockey League*, 2017 ONSC 2608 var'd 2019 ONSC 2106 (Div. Ct.); *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122 and 2018 ONSC 271; *Omarali v. Just Energy*, 2016 ONSC 4094; *Baroch v. Canada Cartage Diversified GP Inc*., 2015 ONSC 40; *Rosen*

certification when the classification of the employee's relationship can only be determined on a case-by-case basis based on the individual circumstances of the putative class members.[21]

[37] The same legal tension between commonality and idiosyncrasy is present in a compound classification of employment status class action.

[38] Although the case at bar is unique, for present purposes, it is necessary to understand the conventional misclassification of employment class action caselaw because it focuses attention on what the Plaintiffs must do to show some basis in fact for the four certification criteria that require a factual underpinning and it focuses attention on what the Defendants can do to resist certification in a case where there is the compound issue of whether in a sharing economy, there is any employment relationship at all.

[39] All of which is another way of saying that in this proposed class action, the major theatre of war is the parties' battle over the commonality or the idiosyncrasy of the behaviour of the parties in their performance of the standard form contracts and the associated documents that are a constant feature of the Uber software (the "Uber Apps").

F. Procedural Background

[40] On January 19, 2017, Mr. Heller commenced his proposed class action.

[41] On January 22, 2018, Uber brought a motion to have the action stayed in favour of arbitration in the Netherlands. On January 30, 2018, I stayed the action.[22]

[42] On January 2, 2019, the Ontario Court of Appeal reversed my decision and held that the arbitration clause was unconscionable and illegal because it contracted out of the *Employment Standards Act, 2000*.[23]

[43] On May 23, 2019, the Supreme Court of Canada granted leave to appeal.[24]

[44] On June 19, 2019, Mr. Heller amended the Statement of Claim to add Uber Portier B.V. as a party defendant.

[45] On June 26, 2020, the Supreme Court of Canada dismissed the appeal and held that the arbitration agreement was unconscionable.[25]

[46] On September 28, 2020, Mr. Heller delivered an Amended Fresh as Amended Statement of Claim.

[47] On November 27, 2020, Uber delivered its Statement of Defence.

[48] On December 18, 2020, Mr. Heller served his Motion Record for Certification (1,141 pages).

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v. BMO Nesbitt Burns Inc., 2013 ONSC 2144; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[21] *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377 aff'd 2014 ONCA 677; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, rev'g 2010 ONSC 4520.

[22] *Heller v. Uber Technologies Inc*., 2018 ONSC 718.

[23] *Heller v. Uber Technologies Inc*., 2019 ONCA 1, which rev'd 2018 ONSC 718.

[24] *Uber Technologies Inc. v. Heller* [2019] S.C.C.A. No. 58.

[25] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, aff'g 2019 ONCA 1, which rev'd 2018 ONSC 718.

[49] In March 2021, Uber delivered its Responding Motion Record (3,045 pages).

[50] In May 2021, Uber delivered its Supplementary Responding Motion Record (9 pages).

[51] On June 9, 2021, Mr. Heller delivered his Supplementary Motion Record (3,586 pages) and his Factum (164 pages).

[52] On June 10, 2021, Mr. Heller delivered his Second Supplementary Motion Record (2,749 pages).

[53] On June 30, 2021, Uber delivered its Responding Factum (114 pages).

[54] On July 7, 2021, Mr. Heller delivered his Reply Factum (50 pages).

[55] In their Statement of Claim, the Plaintiffs advance four causes of action; namely: (a) breach of the *Employment Standards Act*; (b) breach of contract; (c) negligence; and (c) unjust enrichment.

[56] The proposed Class Definition is:

> Any person who, since January 1, 2012, worked or continues to work in Ontario transporting passengers and/or providing delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[57] For reasons discussed below, I shall amend the class definition to be:

> Any person who, since January 1, 2012, in Ontario used an Uber app to transport passengers and/or to provide delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[58] The proposed Common Issues are as follows:

Statutory Claims and Breach of Contract:

> 1. Are the Class Members "employees" of the Defendants (or of any Defendant) pursuant to the *Employment Standards Act, 2000* ("ESA")?
>
> 2. Are the Defendants (or some of the Defendants) a common employer of the Class Members for the purposes of the ESA?
>
> 3. If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants (or of any Defendant) pursuant to the *Canada Pension Plan* ("CPP")?
>
> 4. If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants (or of any Defendant) pursuant to *the Employment Insurance Act* ("EI")?

5. If the answer to (1) is "yes", are the Class Members outside the scope of the "taxi cab driver" exemption to Parts VIII and X of the ESA because they are not "taxi cab drivers"?

6. If the answer to (1) is "yes", do the minimum requirements of the ESA with regard to minimum wage, vacation pay, and notice of termination or pay in lieu thereof form express or implied terms of the Defendants' (or of any Defendant's) contracts with the Class Members?

7. If the answer to (5) is "yes", do the minimum requirements of the ESA with regard to overtime pay, public holiday pay, and premium pay form express or implied terms of the Defendants' (or of any Defendant's) contracts with the Class Members?

8. If the answer to question (1) is "yes", do the Defendants (or does any Defendant) owe contractual duties and/or a duty of good faith to:

(a) ensure that the Class Members are properly classified as employees;

(b) ensure that Class Members' hours of work are monitored and accurately recorded;

(c) ensure that the Class Members are paid the minimum wage;

(d) ensure that the Class Members are paid vacation pay;

(e) ensure that the Class Members whose services the Defendants terminated without just cause received notice of termination or pay in lieu thereof ("Termination Pay"); and

(f) ensure that the Class Members are reimbursed for out-of-pocket expenses paid for gas, insurance, maintenance, parking fines, and/or cell phone data in connection with the use of personal vehicles and/or mobile phones used to perform work for the Defendants ("Out-of-Pocket Expenses")?

9. If the answer to question (5) is "yes", do the Defendants (or does any Defendant) owe contractual duties and/or a duty of good faith to:

(a) ensure that the Class Members are paid overtime pay for hours worked in excess of 44 hours per week; and

(b) ensure that the Class Members are paid public holiday pay and premium pay?

10. Did the Defendants (or any Defendant) breach any of their contractual duties and/or duty of good faith? If so, how?

11. If the answer to (1) is "yes", did the Defendants (or any Defendant) fail to pay the Class Members minimum wage, vacation pay, and Termination Pay as required by the ESA?

12. If the answer to (5) is "yes", did the Defendants (or any Defendant) fail to pay the Class Members overtime pay, holiday pay, and premium pay as required by the ESA?

13. If the answers to (3) and/or (4) are "yes", did the Defendants (or any Defendant) fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Negligence

14. Alternatively, did the Defendants (or any Defendant) owe a duty of care to the Class Members to:

(a) ensure that the Class Members are properly classified as employees;

(b) advise the Class Members of their entitlement to the minimum wage, overtime pay, vacation pay, public holiday pay, premium pay, and Termination Pay;

(c) ensure that the Class Members' hours of work are monitored and accurately recorded; and

(d) ensure that the Class Members are paid minimum wage, overtime pay, vacation pay, public holiday pay, premium pay, and Termination Pay?

15. If the answer to any of the subparts of question (14) is "yes", did the Defendants (or any Defendant) breach their duty of care to the Class Members? If so, how?

Unjust Enrichment

16. Were the Defendants (or was any Defendant) unjustly enriched by:

(a) failing to pay the Class Members minimum wage, overtime pay, vacation pay, public holiday pay, premium pay and/or Termination Pay in accordance with the ESA;

(b) failing to reimburse the Class Members for their Out-of-Pocket Expenses; and/or

(c) failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Aggregate Damages

17. If the Defendants (or any Defendant) breached the ESA, their contracts with the Class Members, their duty of good faith or duty of care owed to the Class Members, or was unjustly enriched, should damages be assessed on an aggregate basis? If so, in what amount?

Punitive, Exemplary, and Aggravated Damages

18. Are the Class Members entitled to an award of punitive, exemplary, or aggravated damages based on the Defendants' (or any Defendant's) conduct?

[59] For reasons discussed below, I shall certify as common issues questions 1-13.

G. <u>Evidentiary Record</u>

[60] Mr. Heller supported his certification motion with the following evidence:

- Affidavit of **Linda Brown** dated December 17, 2020. Ms. Brown is a putative Class Member. She was cross-examined.

- Affidavit of **Felicia Garcia** dated December 16, 2020. She was cross-examined.

- Affidavit of **David Heller** dated December 17, 2020. He was cross-examined.
- Affidavit of **Youssef Kodsy** dated December 18, 2020. Mr. Kodsy is a lawyer at Wright Henry LLP, Plaintiff's counsel. He was cross-examined.
- Affidavit of **Dwight Steward** dated December 18, 2020. Dr. Steward is an economist and statistician with a B.A. (Economics, 1990) from the University of Austin Texas and a Ph.D. (Economics, 1995) from the University of Iowa. He is currently the principal of EmployStats, an economic consulting firm that he founded in 1997 based in Austin, Texas. He has been an expert witness in over 500 cases in the United States. He has held teaching positions in The Department of Economics and The Red McCombs School of Business at the University of Texas at Austin, and in The College of Business Administration at Sam Houston State University. He was cross-examined.

[61] Uber responded to the certification motion with the following evidence:

- Affidavit of **Lisa Broderick** dated March 1, 2021. Ms. Broderick is a user of the Uber App. She was cross-examined.
- Affidavit of **David Clark** dated March 2, 2021. Mr. Clark is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Tiffany Chevers** dated March 4, 2021. Ms. Chevers is a user of the Uber App. She was cross-examined.
- Affidavit of **Jess Edwards** dated March 1, 2021. Mr. Edwards is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Derek Eyamie** dated March 2, 2021. Mr. Eyamie is a user of the Uber App.
- Affidavit of **Peter Needham** dated March 1, 2021. Mr. Needham is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Daniel Valenti** dated March 5, 2021. Mr. Valenti is the Head of Marketplace & Planning at Uber Canada, Inc. He was cross-examined.

H. Facts

1. The Plaintiffs and the Putative Class Members

[62] The putative Class Members, who include Mr. Heller and Ms. Garcia, are persons who have entered into Service Agreements with Uber to use the Uber Apps. More precisely the putative Class Members are persons who entered into Service Agreements with Uber B.V., Rasier Operations B.V., or Portier B.V.

[63] **Ms. Brown** is a putative Class Member. She has been a Driver and occasionally a Delivery Person using Uber Apps since August 2015. It has been a main source of income. Previously, she worked at Sun Life Financial. She used the App approximately 87% of days in a given year between 2015 and 2019. In addition to providing services using the App, Ms. Brown also offers her services through Rideco, a transportation service company. With Rideco, Ms. Brown is required to work scheduled shifts. She provides her ridesharing services using the Uber App

around her set Rideco schedule.

[64] **Ms. Broderick** is a putative Class Member. For over twenty years, Ms. Broderick has worked full-time in the fleet management industry, which she continues to do. In 2016, to save money for vacation holidays, she began providing ridesharing services using the Uber App and enjoyed the collegiality of the experience. She testified that she would stop driving if a Service Agreement was changed in a way that she did not like. Before the pandemic, Ms. Broderick typically provided ridesharing services for approximately 15 hours per week. In 2018, her job duties involved travelling every other week, so she reduced her App usage significantly for about ten months, including a six-month period where she did not log on at all. Typically, she turns on the App while commuting home from work. She also provides ridesharing services on weekend mornings. Since the pandemic, Ms. Broderick has spent less time ridesharing. Since October 2020, Ms. Broderick has worked remotely from home, and has returned to occasionally providing services using the App.

[65] **Ms. Chevers** is a putative Class Member. She is a single mother who works full-time as a manager in the hospitality industry. She holds three bachelor degrees: a Bachelor of Arts in Spanish Language and Literature, a Bachelor of Social Science, and a Bachelor of Business Administration. She began using the Uber App in 2018, during a pregnancy in order to earn money to pay off her car debt and student loans. She has provided both ridesharing and delivery services but focuses primarily on ridesharing because she enjoys getting to know people. When she delivers, she uses a delivery bag she bought from Canadian Tire. Since the pandemic, Ms. Chevers has maintained a job but her hours have been reduced and she has had more time to use the App. With passengers less eager to talk and socialize with her during the pandemic, Ms. Chevers has shifted to delivering using the Uber Eats platform and delivers during the dinner rush to maximize her earnings.

[66] **Mr. Clark** is a putative Class Member. He has had a varied career in the restaurant industry, including managerial positions, and now operates a not-for-profit fishing program for children. In late 2019, he signed up to provide delivery services using the Uber App to raise money for his fishing program and for an exercise activity. In making food deliveries, he uses his bicycle. He purchased an Uber delivery bag. He only used the App around his existing work schedule with his other jobs. He used a variety of strategies to maximize his earnings. His earnings were between $25-$35/hour. If a delivery took him outside the downtown zone, where he lives, Mr. Clark's strategy was to turn off the App, bike towards a better zone, and then turn the App back on again to ensure he is sticking to areas with high demand and that he is familiar with. He was diligent in serving his "Eaters" to earn high ratings on the Uber Eats App.

[67] **Mr. Edwards** is a putative Class Member. He has BFA in Creative Writing and is an aspiring publisher. In 2016, after graduating from the University of Victoria, he moved his wife and two kids from Victoria to Toronto to pursue his publishing career. However, he was unable to locate a job in publishing and instead worked in food services at a Toronto university for a few years while his wife pursued studies in nursing at the same university. During this time, Mr. Edwards also provided delivery services using the App, typically on his way to visit a friend in North York, as a way to earn some extra spending money to buy fast food and purchase a new video game to play with his friends. He has never used the App for more than 4-8 hours a week, except when he went on a disability leave from the university. He will sometimes refrain from logging into the App for weeks or months at a time and has used it less than a handful of times since August 2020. He described his use of the App as a hobby. He testified that he would stop using the Uber App if there was anything in the license agreements that he did not like. He is very

selective in his use of the App; for example, he "wouldn't touch" any promotions that were being offered downtown, notwithstanding the increased earning potential because of the hassles associated with downtown traffic and parking.

[68] **Mr. Eyamie** is a putative Class Member. His regular job was with the Ottawa-Carleton District School Board as a head of student guidance. In March 2020, idled by the pandemic, he decided to use the Uber Eats App to fill his time and to earn additional income. He used his own vehicle. He monitored surges in demand and made deliveries around dinner rushes or around lunchtime on weekends. He never worked more than 8 hours in a day. In June or July 2020, he stopped using the Uber App.

[69] **Ms. Garcia** is a putative Class Member and is proposed as a Representative Plaintiff. She has been using the Uber ride app since October 1, 2015 and the Uber Eats App since 2017. She uses her own vehicle. From October 2015 to March 2021, Ms. Garcia provided ride services in 53 out of 66 months. She averaged 19 days of work in each month, though in 2017-2019, she frequently worked almost every day and often more than eight hours a day. She first became aware of the Uber App after searching on Google for ways to make extra money. She submitted documentation both through the App and in person at the Greenlight Hub, which is an in-person registration centre, but she received no training. During the time that Ms. Garcia has used the App, she has had other jobs and she provided ridesharing or delivery services around the schedules of her other jobs. She is sometimes accompanied by her daughter who assists her.

[70] **Mr. Heller** is a putative Class Member and is proposed as a Representative Plaintiff. He used the Uber Eats App in the greater Toronto area from February 24, 2016 until April 12, 2018. It was his livelihood. On average, he worked 15 days per month. He used the App for 427 of 782 days (54.5%). At times, he worked 40-50 hours a week and earned between $400 and $600 a week, which is under the minimum wage of an employee. He used his own vehicle and a thermal delivery bag that he purchased from Uber. In 2017, for a time, he was a "dual-apper," a person who provides delivery services using the Uber App and also a rival software known as DoorDash. The evidence from Uber's records was that Mr. Heller worked 71.7 % of his hours on Fridays, Saturdays, and Sundays and 28.4% of Mondays and Tuesdays. Mr. Heller made over 300 complaints to Uber during his time using the App addressing matters like waiting too long at a restaurant for food to be ready, not being able to find an Eater, payments and receiving promotions.

[71] **Mr. Needham** is a putative Class Member. He began using the Uber Apps in 2015 and it became his main source of income, although he has a business offering services as a Life Coach. He regards his use of the App as entrepreneurial, and he uses a wide array of strategies to maximize his earnings. During the pandemic, Mr. Needham has shifted his strategies throughout the various stages of lockdown. He now focuses on providing ridesharing services to frontline workers at Long-Term Care Homes in Whitby. Mr. Needham provides feedback and input directly to Uber on ways he thinks the App or experiences with restaurant partners can be improved to increase earnings. Some of those suggestions have been adopted by Uber. In 2019, Mr. Needham received a $14,300 "appreciation payment" from Uber for contributing to its success.

2. <u>Class Size</u>

[72] Between January 1, 2012 and March 1, 2021, 366,359 putative Class Members have provided at least one ride or delivery using the Uber App.

[73] During the Class Period, 30.8% of the putative Class Members provided rides, 37.9% provided Uber Eats services, and 31.3% of the putative Class Members provided both ride and delivery services.

3. Uber

[74] Uber Technologies Inc. is incorporated under the laws of Delaware, USA and is the parent corporation of Uber B.V., Rasier Operations B.V. ("Rasier") and Uber Portier B.V ("Portier") (collectively referred to as "Uber").

[75] Uber B.V., Rasier and Portier are incorporated under the laws of the Netherlands with offices in Amsterdam.

[76] Uber Canada Inc. is incorporated under the laws of Canada, and it provides marketing and administrative support to Uber B.V. in Canada.

[77] Uber is a technology company that develops computer software applications ("Uber Apps"), and then markets, licenses, and operates the Uber Apps as a digital marketplace for goods and services.

[78] Through Uber Technologies Inc., its business enterprise operates in 69 countries, and it generates billions of dollars of revenue annually. The enterprise had gross booking revenues of $65 billion in 2019.

4. Uber Apps, the Service Agreements, Incentives, and the Code of Conduct

[79] Among Uber's software applications are applications that have revolutionized the transportation and delivery industry. All of the applications have associated Service Agreements. The Service Agreements are for Uber Apps known as: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[80] The Service Agreements are all standard form contracts that differ in aspects but not in kind. For example: UberX is a ride service for drivers with standard four-door vehicles; UberXL is a ride service for drivers with larger vehicles; Uber Premier is a ride service for drivers with higher-end vehicles and highly rated drivers; Uber Green is a ride service for drivers with low emission vehicles; Uber WAV is a ride service for drivers with wheelchair-accessible vehicles; Uber Taxi is a public municipal ride service for municipally licensed taxi drivers; and Uber Pool is similar to UberX but it is for passengers who agree to travel together in a car pool.

[81] The precise nature or standard of service may vary and be changed from time to time, but Uber uses the same technological model for its rider software applications and for its food delivery software applications.

[82] For the rider applications, the person seeking transportation, the "Rider" downloads from an Internet site one version of the Uber Ridesharing App. The person who will provide the transportation, the "Driver" downloads a complementing and corresponding version of the software.

[83] For the "Uber Eats" application, there are three complementing and corresponding versions of the software. The person ordering food or other items, the "Eaters," downloads one version, and

the restaurant or person supplying the goods, the "Merchants" downloads an associated version, and the person providing the carriage, the "Delivery People" (some Delivery People walk or use bicycles rather than drive vehicles) respectively download complementing versions of Uber Eats.

[84] To provide services through the Uber App, putative Class Members (Drivers or Delivery People) enter into a Services Agreement. Uber updates the Services Agreements from time to time. There have been numerous amendments. Each time Uber revises a Services Agreement, Drivers and Delivery People providing services must accept the new agreement to continue providing services through the Uber App.

[85] The Service Agreements label the Drivers or Delivery People as "independent contractors." This legal categorization is disputed by the Plaintiffs.

[86] Uber Drivers and Uber Delivery People must complete an application and be approved by Uber to enter a Services Agreement with Uber for which there are different standards of service.

a. The Class Member must provide proof that his or her vehicle meets Uber's standards. Uber requires Drivers to have certain licenses, qualifications, and/or vehicles to provide certain levels of service. For examples, as noted above, the UberX Rides Service Agreement requires standard four-door vehicles, but the Uber Select Service Agreement requires higher-end vehicles.

b. A Driver for the rides service must provide a copy of a valid driver's licence, proof of eligibility to work in Canada, vehicle registration information, and vehicle insurance information.

c. To provide Uber Eats services by bike or foot, Uber requires Drivers to provide proof of work eligibility, and photo identification confirming that they are over 18 years of age.

d. To provide Uber Eats services by car, Delivery People must provide a photo of a valid driver's licence identifying they are at least 21 years old, proof of vehicle insurance, vehicle registration information, and proof that their vehicle is 20 years old or newer. Any prospective Delivery People seeking to deliver alcohol must also obtain a SmartServe Certification.

[87] All prospective Drivers and Delivery People, with the exception of commercial delivery Drivers, must complete background screening. This background screening involves a multi-step process that checks for issues including, but not limited to, driving violations, impaired driving history, and a criminal record.

[88] Once an Uber user is registered, Uber proactively reruns driving and criminal history checks every year to ensure that Drivers and Delivery People continue to meet its standards. If a routine motor vehicle record check or background check uncovers a violation of Uber's Community Guidelines, the Uber user will lose access to the Uber App.

[89] Putting aside the disputed issue of whether Uber is an employer, the Uber App for ridesharing replicates the operation of a taxi company. The fares (passengers, Riders) download the Uber App and use it to call for a ride. The Uber App initially acts as a dispatcher and assigns the Rider to a Driver, (a putative Class Member), who has also downloaded the Uber App. The putative Class Member has a short period of time to accept the assignment, failing which the Uber App assigns the fare to another Driver. If the Class Member accepts the assignment, the Uber App identifies the Rider's pickup location and provides a map to the location. The fare begins when the

Rider is picked up and enters the Class Member's vehicle. The Uber App provides the Class Member with a route map to the destination. The trip is monitored, and the Uber App sends the Driver notifications if the speed limit is exceeded. At the destination, the Uber App charges the Rider a fare and issues a receipt. If a Rider cancels the ride request, he or she will be charged a cancellation fee which is deemed to be a fare. The Rider may use the Uber App to rate the Driver on a scale of one to five stars. The Driver may use the App to rate the Rider on a scale of one to five stars.

[90] After collecting payment from the Rider, Uber deducts its fees, which range in general between about 25 and 30% of the fare and then remits the balance of the fare to the Driver. Uber pays Drivers on a weekly basis.

[91] From the perspective of the putative Class Members who are Delivery People, the Uber Eats App operates similarly to the Uber applications for the delivery of passengers to their destination. The Uber Eats App sends the putative Class Member requests for food delivery services from restaurants. The request indicates where the Driver is to pick up the food order and provides a route. As of June 2020, the request indicates the order's ultimate destination and a delivery fee based on a formula set by Uber. If the Delivery Person accepts the request, Uber notifies the restaurant, and then the Uber App displays a map to the restaurant for the Delivery Person. After the Delivery Person picks up the food at the restaurant, the Uber App provides a route map to the "Eater's" Location. When the food delivery is completed, the Uber App collects payment and issues the Eater a receipt. If the Eater or restaurant cancels an accepted Uber Eats request, Uber, in its discretion, may charge a cancellation fee, which is deemed to be the delivery fee. Uber deducts its fees, which can range between 5% and 35% of the fare and remits the balance to the Delivery People who provided the delivery service.

[92] Uber communicates with Drivers and Delivery People by email and through the Uber App.

[93] Uber has data about the assignment, commencement and completion of trips and route details. The Uber App tracks the location of the Driver and the Delivery People while he or she is using the Uber App.

[94] From February 2012 to September 10, 2014, Drivers contracted with Uber by signing simple one-page Services Agreements. These early Services Agreements provided that: (a) Uber would enforce Driver quality through ratings, client feedback, cancellations, and acceptance rates; (b) Uber would monitor Driver activity and require at least one trip every two weeks; and (c) the Driver's "partnership" with Uber was dependent on meeting quality and activity requirements.

[95] Before July 2013, putative Class Members who provided services under a commercial livery license (i.e., Uber Black and Uber Taxi Drivers) contracted with Uber Technologies Inc.

[96] From July 26, 2013 to December 2018, Drivers who provided services under a commercial livery license contracted with Uber B.V. From July 26, 2013 to January 4, 2016 these Drivers were subject to a B.V. "Partner Terms" agreement (the "2013 B.V. Agreement"). From January 4, 2016, these Drivers were subject to the Uber B.V. Services Agreement (the "2016 B.V. Agreement") There were sixteen addenda to the Uber B.V. Services Agreement. On and after December 2018, all Drivers providing rides contracted with Rasier.

[97] After September 10, 2014 (when Uber introduced UberX in Ontario) to date, Drivers who have provided services without a commercial livery license have contracted with Rasier pursuant to a "Transportation Provider Services Agreement."

[98] The 2014 Rasier Services Agreement was used until January 4, 2016, when the 2016 Rasier Services Agreement was introduced. During its tenure, there were three addenda updating the agreement.

[99] The Rasier Services Agreements: (a) require Drivers to use only their assigned Driver ID; (b) wait 10 minutes at a pick-up location before cancelling a trip; (c) give Uber the right to terminate or suspend the agreement and prohibit Drivers from using the Uber App in the event of a breach; (d) require Drivers to meet a minimum rating requirement and give Uber the right to "deactivate" a Driver's account if they fail to do so; and (e) set restrictions as to when Rides can be cancelled and when the cancelling Rider will have to pay the Driver a cancellation fee.

[100] There have been forty-seven addenda to the 2016 Rasier Services Agreement. The addenda update: (a) the fare formula; and (b) the fees Uber charges Riders and deducts from Riders. The addenda have added new services such as UberSelect, UberXL, and UberComfort. The addenda added policies for picking up Riders at Ontario airports.

[101] The Uber Eats App was introduced in 2015 first in Toronto. Before November 28, 2016, putative Class Members who wished to provide food delivery services entered into a Rasier Agreement. After November 28, 2016, putative Class Members entered into the 2016 Portier Agreement. There are forty-one different addenda to the 2016 Portier Agreement. The addenda update Uber's delivery fee formula and its fees. The addenda provide new services and have extended service beyond Toronto to new cities.

[102] In the 2012 and 2013 Services Agreements, Uber reserved the right to enforce Driver quality through ratings. The parties to the Services Agreements contractually agreed that Uber would review quality and activity with Drivers not meeting Uber's standards.

[103] Uber offers a variety of incentives to increase the use of the Uber Apps.

a. Surge pricing is an incentive through which Uber encourages Drivers and Delivery People to work at a certain location or at times of high demand in exchange for additional compensation.[26]

b. "Quests" are bonus pay incentives for Drivers and Delivery People who complete a high number of trips in a set time period determined by Uber.

c. The "Uber Pro"[27] and the "Uber Eats Pro"[28] programs offer perks to Drivers and Delivery People who drive more frequently, drive during Uber's preferred times, and maintain high ratings and low cancellation rates. Through Uber Pro, Drivers earn points for providing services at certain times or in certain places determined by Uber. As they accumulate points, they can increase their "status" in the program and earn benefits, including: (a) "Airport Priority Rematch", which gives Drivers a better chance for a quick pickup at an airport terminal after dropping off a Rider at the airport; (b) "Trip Duration and Direction", which allows Drivers to view the estimated duration and direction of all Ride requests before accepting; (c) discounted car and bicycle maintenance; (d) discounted tax

[26] Uber notifies Drivers through the Uber App that it has implemented a "surge". Examples of when Uber has implemented surge pricing during the Class Period include: (a) during sports events; (b) in inclement weather; (c) during a conference; (d) during meal times; (e) late night at closing time for bars and clubs; and (f) around 5:00 pm, when people leave work.

[27] Uber Pro was introduced in August 2019 in Toronto and Ottawa and expanded across Ontario in February 2020.

[28] Uber launched Uber Eats Pro in July 2020.

preparation; and (e) Moneygram discounts.

d. Other examples of financial incentives that Uber offers or has offered to Drivers and Delivery People are: (a) providing referral codes that give Drivers a financial incentive to recruit other Drivers; (b) providing additional compensation for completing a certain number of rides in a given week; and (c) promotions for completing trips overnight in rural areas.

[104] Uber's 2014 Rasier Services Agreement provides that Uber used the rating system for "quality assurance purposes" to determine the level of service provided by Drivers. Uber reserves the right to restrict Drivers with low ratings from accepting fare requests.

[105] Since January 4, 2016, all of Uber's Services Agreements have required Drivers and Delivery People to acknowledge and agree that after providing rides, food delivery or Uber Connects services, Uber will prompt Riders, Eaters, restaurants, or other customers to rate the Driver's services and, optionally, to provide comments or feedback about the Driver. Since January 4, 2016, Drivers and Delivery People have been required to maintain a minimum average rating to maintain access to the Uber App. In the event the Driver's or Delivery People's average rating falls below the minimum requirement, Uber will notify the Driver or Delivery People and may provide them, in Uber's discretion, a limited period of time to raise their average rating above the minimum required. If the Uber user fails to do so, Uber reserves the right to deactivate the user's access to the Uber App.

[106] In March 2015, Uber introduced a Code of Conduct, which in June 2016 was renamed "Community Guidelines." It has been updated from time to time. The Community Guidelines provide that in its sole discretion, Uber may terminate its relationship with the Driver or Delivery People and discontinue access to the Uber App if the App user violates the Community Guidelines.

[107] Under the Community Guidelines, Drivers and Delivery People: (a) must keep all documentation with Uber up to date; (b) must maintain the minimum average rating set by Uber; (c) must not contact Riders or Eaters after a trip or delivery, except to return a lost item; (d) must not share their account with anyone; (e) must not accept street hails; (f) must not solicit payment of fares outside the Uber App; and (g) must not discriminate against someone based on their destination.

[108] Uber enforces its Community Guidelines by asking Riders and Eaters to provide feedback or report any violations to Uber. Since May 2019, Uber has reviewed reports of potentially unsafe driving behaviour, including customer reports of collisions or traffic citations that may have happened during a trip or delivery, and other reports that may indicate "poor, unsafe, or distracted" driving.

[109] From April 2017 to date, for Drivers providing Rides, and since May 2019 for Delivery People providing Uber Eats services, the Community Guidelines provide that Uber reviews and investigates reports of violations submitted by Riders and Eaters. A Driver may be contacted during this process and Uber, in its sole discretion, may disable a Driver's use of the Uber App until the conclusion of the review.

[110] Since April 2017 and May 2019, for Rides and Uber Eats, the Community Guidelines have provided that if a Driver loses access to the Uber App for low ratings, they may have the opportunity to regain access if they meet certain requirements and provide proof that they have successfully taken a quality improvement course offered by third-party experts.

[111] Since the COVID-19 pandemic Uber has imposed additional requirements on Drivers with respect to health and safety. In 2020, Uber introduced a "No Mask. No Ride." Policy, requiring Drivers to wear a face cover or mask. Uber enforces this policy by requiring Drivers to take a photo of themselves before they can begin driving. Uber also requires Drivers to confirm, via a new Go Online Checklist, that they have taken certain preventive measures with respect to COVID-19. Uber has also distributed masks and sanitation materials to Drivers for free.

5. The Arbitration and Class Action Waiver Clause

[112] On August 26, 2020, Uber amended the Service Agreements to provide for arbitration and for the Riders and the Delivery People to waive a right to participate in a class action. However, the amendment provided the Riders and the Delivery People for a right to opt out of the Arbitration and Class Action Waiver Clause.

[113] The Arbitration and Class Action Waiver Clause provides that: (a) Drivers and Delivery People must resolve all disputes arising out of their relationship with Uber on an individual basis through arbitration, pursuant to the Arbitration Rules of the ADR Institute of Canada, Inc., except that they may bring *Employment Standards Act, 2000* complaints to the Ministry of Labour; (b) Drivers and Delivery People are prohibited from participating in or recovering from any collective proceeding; and (c) Drivers and Delivery People can "opt out" of the Arbitration and Class Action Waiver within 30 days by accepting the amendments in the Uber App and then sending an email requesting to opt out to one of three email addresses, depending on the counter party to their Services Agreement. An "opt out" with respect to one Uber entity is ineffective as to other Services Agreement counterparties.

[114] The Arbitration and Class Action Waiver Clause is set out below with the notifications provided to the Uber App users.

> You entered into an agreement ("**Agreement**") with Rasier Operations BV ("**Company**") for your use of certain software and other services. This Addendum is an addendum to that agreement and it sets forth additional terms and conditions that are applicable in the regions in which you provide transportation services. By clicking "Yes, I agree", you agree to be bound by the additional terms below. Capitalized terms used herein but not defined shall have the meanings set forth in the Agreement.
>
> The below replaces section 15 of the Agreement.
>
> **IMPORTANT: PLEASE READ THIS ARBITRATION PROVISION ("ARBITRATION PROVISION") CAREFULLY. IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH US ON AN INDIVIDUAL BASIS THROUGH ARBITRATION, EXCEPT IN CERTAIN CIRCUMSTANCES. YOU MAY CHOOSE TO OPT OUT OF THIS ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS BELOW. IF YOU DO NOT OPT OUT OF THIS ARBITRATION PROVISION AND THEREFORE AGREE TO ARBITRATION WITH US, YOU ARE AGREEING IN ADVANCE, EXCEPT AS OTHERWISE PROVIDED BELOW, THAT YOU WILL NOT PARTICIPATE IN AND, THEREFORE, WILL NOT SEEK OR BE ELIGIBLE TO RECOVER MONETARY OR OTHER RELIEF IN CONNECTION WITH ANY CLASS ACTION OR OTHER COLLECTIVE PROCEEDING. THIS ARBITRATION PROVISION, HOWEVER, WILL ALLOW YOU TO BRING INDIVIDUAL CLAIMS IN ARBITRATION ON YOUR OWN BEHALF.**

15.1. How This Arbitration Provision Applies

(a) All disputes arising out of or in connection with the Agreement, or in respect of any legal relationship associated with or derived from the Agreement, will be finally and conclusively resolved by arbitration, on an individual basis, under the Arbitration Rules ("ADRIC Rules") of the ADR Institute of Canada, Inc. ("ADRIC"), except as modified here.

(b) The ADRIC Rules are available by, for example, searching www.google.ca to locate "ADRIC Arbitration Rules" or by clicking here. You can also contact ADRIC at 1-877-475-4353 or www.adric.ca.

(c) The governing law, known as the Seat of Arbitration, will be that of the province or territory where you reside, or of Ontario if you reside outside Canada. The language of the arbitration will be English or, if the governing law is Québec's, French if you choose.

(d) The arbitration hearings and meetings may be held at any location(s) the arbitrator considers appropriate. Arbitration hearings may be conducted by telephone, email, the Internet, videoconferencing, or other communication methods, unless the arbitrator disagrees. Information about the cost of arbitration is below in section 15.5.

(e) You have the right to consult with counsel of your choice about this Arbitration Provision and to be represented by counsel at any stage of the arbitration process.

(f) If any portion of this Arbitration Provision is unenforceable, the remainder of this Arbitration Provision will be enforceable. This Arbitration Provision survives the termination of your relationship with us, and it continues to apply if your relationship with us is ended but later renewed.

(g) Except as provided below regarding the Class Action Waiver, this Arbitration Provision covers without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the formation, scope, enforceability, waiver, applicability, revocability or validity of this Arbitration Provision or any portion of this Arbitration Provision.

15.2. Limitations On How This Arbitration Provision Applies

(a) Nothing in this Arbitration Provision prevents you from filing a claim with a government agency, or prevents that agency from adjudicating and awarding remedies based on that claim.

(b) Where you allege claims of sexual assault or sexual harassment, you may choose to bring those specific claims in court instead of arbitration. We agree to honour your choice of forum with respect to your individual sexual harassment or sexual assault claim but in doing so we do not waive the enforceability of any other part of this Arbitration Provision (including but not limited to Section 15.3—Class Action Waiver, which will continue to apply in court and arbitration).

15.3. Class Action Waiver

This Arbitration Provision affects your ability to participate in class or collective actions. Both Uber and you agree to bring any dispute in arbitration on an individual basis only, and not on a class or collective basis on behalf of others. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or for you to participate as a member in any such class or collective proceeding ("Class Action Waiver"). Notwithstanding any other provision of this Arbitration Provision or the ADRIC Rules, disputes in court or arbitration regarding the validity, enforceability, conscionability, or breach of the Class Action Waiver, or whether the Class Action Waiver is void or voidable, may be resolved only by a court and not by an arbitrator. In any case in which (1) the dispute is filed as a class or collective action and (2) there is a final judicial determination that all or part of the Class Action Waiver is unenforceable, the class or collective action to that extent must be litigated in court, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

15.4. Starting the Arbitration

(a) Before starting arbitration with ADRIC, the party bringing the claim in arbitration must first deliver a written Notice of Request to Arbitrate ("Notice") within the limitation period that would apply if the claim were brought in a Court in your province or territory of residence, or of Ontario if you reside outside Canada. The Notice must include contact information for the parties, the legal and factual basis of the claim, and the remedy sought and amount claimed. Any demand for arbitration made to us must be served to Uber Canada Inc.'s registered address (c/o McCarthy Tétrault LLP, 66 Wellington Street West, Suite 5300, TD Bank Tower, Toronto ON M5K 1E6).

(b) Before the Notice is delivered to ADRIC, the party bringing the claim shall first attempt to informally negotiate with the other party, in good faith, a resolution of the dispute, claim or controversy between the parties for a period of not less than 30 days but no more than 45 days ("negotiation period") unless extended by mutual agreement of the parties. During the negotiation period, any otherwise applicable limitation period will be tolled (temporarily suspended). If the parties cannot reach an agreement to resolve the dispute within the negotiation period, the party bringing the claim may deliver the Notice to ADRIC.

(c) To commence arbitration, the party bringing the claim must: (1) deliver the Notice to ADRIC and (2) pay their portion of any initial arbitration filing fee (see Section 15.5, below).

15.5. Paying for the Arbitration

(a) Each party shall follow the ADRIC Rules applicable to the initial arbitration filing fees, called the Commencement Fee and Case Service Fee, except that your portion of any initial arbitration filing fees in total will not exceed the amount of the filing fee to start an action in the superior court of the province or territory where you reside, or of Ontario if you reside outside Canada. If you could have brought your claim in a provincial/territorial court in your province/territory of residence for a lower filing fee than the ADRIC Commencement Fee and Case Service Fee, that lower amount applies instead. After (and only after) you have paid your portion of the initial arbitration filing fees, we will make up the difference, if any, between the fee you have paid and the amount required by the ADRIC Rules.

(b) In all cases where required by law, we will pay the arbitrator's fees, as well as all fees and costs unique to arbitration. Otherwise, such fee(s) will be apportioned between the parties in accordance with applicable law, and any disputes in that regard will be resolved by the arbitrator.

(c) Generally, an arbitrator's fees are similar in amount to a lawyer's fee and can vary based on experience and location.

15.6. Your Right To Opt Out Of This Arbitration Provision

(a) Agreeing to this Arbitration Provision is not a mandatory condition of your contractual relationship with us. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision as set out here. To do so, within 30 days of the date that this Arbitration Provision is electronically accepted by you, you must send an email from the email address associated with your driver account to canadaoptout@uber.com , stating your intent to opt out of this Arbitration Provision, as well as your name, the phone number associated with your account, and the city in which you reside.

(b) Your email may opt out yourself only, and any email that tries to opt out anyone other than yourself will be void as to any others. Should you not opt out of this Arbitration Provision within the 30-day period, you and Uber shall be bound by the terms of this Arbitration Provision. You will not be subject to retaliation if you exercise your right to opt out of this Arbitration Provision.

(c) Your acceptance of this Agreement or your decision to opt out of this Arbitration Provision does not affect any obligation you have to arbitrate disputes pursuant to any other agreement you have

> with us or our affiliates. Likewise, your acceptance of or decision to opt out of any other arbitration agreement you have with us or any of our affiliates does not affect any obligation you have to arbitrate claims pursuant to this Arbitration Provision.
>
> 16. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of the province or territory where you reside, or of Ontario if you reside outside Canada, excluding their rules on conflicts of laws.

6. External Regulation of Uber and its Drivers

[115] Within Ontario, Uber and the Drivers are subject to regulation. These regulations, often municipal Bylaws, generally regulate Uber as a "Transportation Network Company", "Personal Transportation Company", or "Personal Transportation Provider", which refer to companies that offer transportation services through software like the Uber App.

[116] Among other things, these regulations require: (a) Uber and the Drivers to have special licenses or permits to work in a particular municipality; (b) Uber and the Drivers to meet certain insurance requirements; (c) Uber to keep records of the Drivers who are providing services; (d) Uber to keep records of fares charged and receipts; and (e) for the Drivers and their vehicles to meet certain safety standards.

[117] Because Uber must comply with these Bylaws and/or ensure compliance with these Bylaws to reliably operate its business, it incorporates some of these regulatory requirements into its Services Agreements and Community Guidelines.

7. Legislative and Ontario Policy Background

[118] Ontario enacted the first *Employment Standards Act* in 1968.[29] Since 1974, the definition of an "employee" has remained substantially similar to the current definition. For present purposes the pertinent provisions from the *Employment Standards Act* and of Ontario regulations, Ont. Reg. 285/01 and Ont. Reg. 288/01, are set out in Schedule "A" to these Reasons for Decision.

[119] In May 2017, the Ontario Ministry of Labour, Training and Skills Development commissioned a 420-page report entitled "*The Changing Workplaces Review*."[30] The report considers the definition of employee in the *Employment Standards Act, 2000* and concludes that "the old definitions are not well suited to the modern workplace." The report recommends adding "dependent contractors" to the definition of "employee" in the Act.

[120] In February 2018, the Ontario Ministry of Finance published "*Sharing Economy Framework*." The framework recognizes that it is the government's role to "develop policies and take actions that effectively realize the social and economic benefits afforded by innovative business models and mitigate the negative consequences of market disruption to the economy, individuals and the public interest." One of the "potential gaps" identified is "worker protection mechanisms in emerging sectors of the sharing economy."

[121] In December 2020, the Ontario legislature enacted Bill 236, the *Supporting Local*

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[29] *Employment Standards Act*, 1968, S.O. 1968, c. 35.

[30] C.M. Mitchell and J.C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights: Final Report* (May 2017)

Restaurants Act, 2020.[31] The statute sets limits on service fees that "food delivery services providers", like Uber Eats, can charge to certain restaurants. The Act prohibits services providers from reducing employee or contractor compensation and payment in order to comply with the Act.

[122] In June 2021, Ontario's Minister of Labour Training and Skills Development established the Ontario Workforce Recovery Advisory Committee. The Committee plans to "lead recommendations on the future of work" focused on three pillars, one of which is "[ensuring] Ontario's technology platform workers benefit from flexibility, control, and security."[32] The Committee is currently in the consultation stage.

I. <u>The Significance, if any, of the Arbitration and Class Action Waiver Clause</u>

[123] In the immediate case, although the Plaintiffs were not entirely clear about the precise relief that they seek, it appears that in addition to certification of their proposed class action, they ask the court to strike down the Arbitration and Class Action Waiver Clause.

[124] The Plaintiffs rely on several cases about the court's authority under s. 12 of the *Class Proceedings Act, 1992* or other procedural mechanisms to act to preserve the integrity of the opt-out process or the prosecution of the class action by making orders regulating the communications made by a defendant to putative Class Members or to Class Members.[33]Although those cases are of assistance in the sense that they show that the court has the jurisdiction to control the communications by defendants to putative Class Members or to Class Members, those cases are different than the case at bar and raise different factual and legal questions and these cases focus on Defendants' communications to Class Members and not substantive orders.

[125] In the immediate case, a review of the factual background and of the procedural background, reveals three certainties associated with the Arbitration and Class Action Waiver Clause. First, that Uber does not wish to have its relationship with Drivers and Delivery People to be an employer and employee relationship. Second, that Uber wishes any disputes with Drivers and Delivery People to be arbitrated not litigated. Third, Uber wishes to avoid class proceedings under the *Class Proceedings Act, 1992*. All those aspirations existed before Mr. Heller commenced his proposed class action against Uber.

[126] None of these aspirational certainties are *per se* illegal. For the immediate case, while Uber cannot contract out of the *Employment Standards Act, 2000* - if the Act applies - Uber can contract so that the Act does not apply, and there is nothing *per se* illegal about contracting parties agreeing to a referral to arbitration. For the immediate case, there is no legislation; for instance, like sections 7 and 8 of Ontario's *Consumer Protection Act, 2002*,[34] set out below, that would foreclose resort to arbitration and that would protect the rights of a class member to participate in a class action

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[31] *Supporting Local Restaurants Act*, 2020, S.O. 2020 c. 31, s. 2.

[32] Ontario Ministry of Labour, Training and Skills Development, *Ontario's Workforce Recovery Advisory Committee: Leading the Future of Work in Ontario*" (June 17, 2021).

[33] *Del Giudice v. Thompson*, 2021 ONSC 2206; *Arsalani v. Islamic Republic of Iran*, 2021 ONSC 1334; *de Muelenaere v. Great Gulf Homes Ltd.*, 2015 ONSC 7442; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377; *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.); *1176560 Ontario Limited v. The Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Pearson v. Inco*. (2001), 57 O.R. (3d) 278 (S.C.J.), leave to appeal refused [2002] O.J. No. 2134 (Div. Ct.); *Vitelli v. Villa Giardino Homes Ltd*, [2001] O.J. No. 2119 (S.C.J.).

[34] S.O. 2002, c. 30, Sched. A.

notwithstanding contractual provisions that would bar participation.

> *No waiver of substantive and procedural rights*
>
> 7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> *Limitation on effect of term requiring arbitration*
>
> (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.
>
> *Procedure to resolve dispute*
>
> (3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.
>
> […]
>
> *Non-application of Arbitration Act, 1991*
>
> (5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.
>
> *Class proceedings*
>
> 8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding. 2002, c. 30, Sched. A, s. 8 (1).
>
> *Procedure to resolve dispute*
>
> (2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.
>
> […]
>
> *Non-application of Arbitration Act, 1991*
>
> (4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

[127] In *Seidel* v. *TELUS Communications Inc*.[35] Ms. Seidel signed a standard form TELUS cellular phone services contract. The contract included an arbitration agreement and a waiver of any right to commence or participate in a class action. Nevertheless, Ms. Seidel commenced a

[35] 2011 SCC 15 (Chief Justice McLachlin and Justices Binnie, Fish, Rothstein and Cromwell JJ.; Justices LeBel, Deschamps, Abella and Charron dissenting).

proposed class action in British Columbia, and she asserted common law causes of action and also statutory causes of action under British Columbia's consumer protection statutes. She alleged that TELUS falsely represented to her and other consumers how it calculated time for billing purposes. Relying on the arbitration clause, TELUS applied for a stay of all proceedings. Varying the judgment of the British Columbia Court of Appeal, a majority of the Supreme Court, stayed all the causes of action except one of the statutory causes of action that was available to consumers. The *Seidel* v. *TELUS Communications Inc.* demonstrates that courts will enforce agreements designed to resolve disputes by individual arbitration without a class action.

[128] Although the Plaintiffs have reasonably strong arguments that the Arbitration and Class Action Waiver Clause (like the original arbitration agreement contained in the Service Agreements) is unenforceable on the grounds that: (a) it offends the principles of contract formation;[36] (b) it is unconscionable;[37] or (c) it is contrary to public policy,[38] these arguments raise serious genuine issues that require a trial.

[129] These arguments cannot be summarily determined on a certification motion, and, moreover, at first blush these arguments would appear to be individual issue determinations that require individual determinations. (If the parties think otherwise, they may apply for an additional common issue.) And, in any event, these arguments do not negate the circumstance that an agreement to arbitrate is not *per se* illegal.

[130] As the procedural history reveals, when this class action commenced Uber attempted to have it stayed for arbitration. However, that gambit failed when the Court of Appeal and the Supreme Court of Canada found the arbitration provision in the Service Agreements to be unenforceable on the grounds of the contractual doctrine of unconscionability.

[131] As the factual background above reveals, on August 26, 2020, Uber amended the Service Agreements to provide for arbitration and for the Riders and the Delivery People to waive any right to participate in a class action. However, the amendment provided the Riders and the Delivery People for a right to opt out of the arbitration provision. Uber's new gambit is not to move for a stay for arbitration for the Riders and Delivery People who have not exercised their right to opt-out of arbitration; rather, the new gambit is to have the class definition exclude those Riders and Delivery People who did not exercise their right to opt-out of arbitration, which would be a right to opt-in (*i.e.* a right not to opt-out) to the current class proceedings, which was already underway in August 2020.

[132] I can safely assume that if I were to amend the class definition, it would gut the class action. However, I shall not do so.

[133] Uber is confident that it has addressed all of the contracting elements that led the Court of Appeal and the Supreme Court to hold that the former arbitration agreement was unconscionable. Uber is confident that the August 2020 amendment to the Service Agreements is valid and

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[36] *77 Charles Street Ltd v. Aspen Ridge Homes Ltd*., 2021 ONSC 2732; *Georgian Windpower Corp. v. Stelco Inc.*, 2012 ONSC 3759; *Olivieri v. Sherman*, 2007 ONCA 491; *Consulate Ventures Inc v. Amico Contract & Engineering (1992) Inc.*, 2007 ONCA 324; *Van Kruistum v. Dool*, [1997] O.J. No 6336 (Gen. Div.); *Calmusky v. Karaloff*, [1947] S.C.R. 110; *Loranger v. Haines*, [1921] O.J. No 203 (C.A.).

[37] *Pearce v. 4 Pillars Consulting Group Inc*., 2021 BCCA 198; *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

[38] *Pearce v. 4 Pillars Consulting Group Inc*., 2021 BCCA 198; *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, aff'd 2020 SCC 16.

enforceable. At this juncture, it is not for me to say whether Uber may be overconfident, but I can say that the Plaintiffs raise strong arguments that the notifications to the class were insufficient for them to appreciate the significance of the Arbitration and Class Action Waiver Clause.

[134] In any event, the Plaintiffs disagree that the Arbitration and Class Action Waiver Clause is enforceable, and the Plaintiffs submit that what Uber is attempting to do is to interfere with the integrity of the class proceeding and to interfere with the rights of the putative Class Members, including the right to make a decision about opting out of a class proceeding after it has been certified. The Plaintiffs ask the court to strike down the Arbitration and Class Action Waiver Clause for the putative Class Members.

[135] However, in my opinion, striking down the Arbitration and the Class Action Waiver Clause for the putative Class Members is none of possible, appropriate, or necessary at this juncture of the proposed class proceeding since I shall not be amending the class definition to exclude the putative Class Members that may be bound by the Arbitration and the Class Action Waiver Clause.

[136] Striking down the Arbitration and Class Action Waiver Clause is not possible because the *Class Proceedings Act, 1992* is a procedural statute, and it would take a substantive determination not available on a certification motion to strike down a contract term. In the cases where the Court has exercised its jurisdiction under the *Class Proceedings Act, 1992* to oversee the proper prosecution and defence of the class proceeding, the focus has been on controlling communications not on making substantive orders.

[137] Striking down the Arbitration and Class Action Waiver Clause for the putative Class Members is not appropriate for two reasons. First, the persons for whom the substantive order would be made are just putative Class Members and so no binding order can be made to benefit a class that has not yet been certified. Second, it has not been determined that the enforceability, unconscionability, or legality of the Arbitration and Class Action Waiver Clause is a common or an individual issue.

[138] In any event, striking down the Arbitration and Class Action Waiver Clause is unnecessary at this juncture of the proposed class proceeding. Rather, what is necessary is adequate notice of the legal significance, if any, of the Arbitration and Class Action Waiver Clause. The putative Class Members must be provided with sufficient information about the significance of opting out and of not opting out.

[139] With respect to necessity, as already foreshadowed above, I shall be certifying this action as a class action. The *Class Proceedings Act, 1992* requires that the putative Class Members be given notice of this certification of the action. The Class Members will be informed of their right to opt-out and of the significance of not opting out.

[140] In the immediate case, what the putative Class Members need to be told, among other information, is that if they did not opt out of the Arbitration and Class Action Waiver Clause, then should the court determine at the common issues trial that they are employees with rights and should they wish to pursue claims for compensation from Uber at individual issues trials, then they will be met with a defence that they have waived the right to do so in accordance with the Arbitration and Class Action Waiver Clause. The determination of the merits of that defence would be determined at the individual issues trials, unless the enforceability of the Arbitration and Class Action Waiver Clause is made an additional common issue.

[141] In the immediate case, once the putative Class Members are fully informed about the

Arbitration and Class Action Waiver Clause, they can make a reasoned decision about whether: (a) to opt-out to pursue arbitration; (b) to opt-out to pursue a claim directly under the *Employment Standards Act, 2000*, which is not precluded by the Arbitration and Class Action Waiver Clause; (c) to not opt-out and wait and see whether there is a successful common issues determination in which case depending on whether they did not opt-out of the Arbitration and Class Action Waiver Clause, they may have to establish that they are not bound by the provision.

[142] Further, with respect to necessity of making an order about the Arbitration and Class Action Waiver Clause at this juncture of the class action, it may be noted that should Uber succeed at the common issues trial, then the question of the enforcement of the clause is moot.

[143] In the result, I do not propose to do anything at this juncture about the Arbitration and Class Action Waiver Clause.

J. Certification: General Principles

[144] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[145] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[39] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[40] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (a) to provide access to justice for litigants; (b) to encourage behaviour modification; and (c) to promote the efficient use of judicial resources.[41]

[146] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[42]

[147] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court

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[39] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).
[40] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[41] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[42] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[43] In particular, there must be a basis in the evidence to establish the existence of common issues.[44] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[45]

[148] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[46]

[149] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.[47] The evidence on a motion for certification must meet the usual standards for admissibility.[48] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[49]

K. <u>The Cause of Action Criterion</u>

1. <u>General Principles</u>

[150] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,[50] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.[51]

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[43] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[44] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[45] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[46] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[47] *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[48] *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc*., 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd*. 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.
[49] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).
[50] [1990] 2 S.C.R. 959.
[51] *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City*), 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.

2. Discussion and Analysis: Cause of Action Criterion

(a) The Statutory and Employment Contract Claims

[151] In their Statement of Claim, the Plaintiffs advance four causes of action; namely: (a) breach of the *Employment Standards Act*; (b) breach of contract; (c) negligence; and (c) unjust enrichment.

[152] Having reviewed the Statement of Claim, I conclude that the Plaintiffs satisfy the cause of action criterion for (a) breach of the *Employment Standards Act*; and (b) breach of contract.

(b) Unjust Enrichment

[153] The Plaintiffs pleaded that Uber has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Drivers and other unpaid statutory payments, as well as the out-of-pocket expenses paid for gas, insurance, maintenance, parking fines, and cell phone data in connection with the use of personal vehicles and/or mobile phones to perform work for Uber. The Drivers were deprived of unpaid minimum wage, overtime pay, vacation pay and public holiday and premium pay, EI and CPP contributions, and their out-of-pocket expenses.

[154] The Defendants dispute that there is a viable claim for unjust enrichment. I agree that the claim for unjust enrichment does not satisfy the cause of action criterion.

[155] The elements of a claim of unjust enrichment are: (a) the defendant being enriched; (b) a corresponding deprivation of the plaintiff; and, (c) no juristic reason for the defendant's enrichment at the expense of the plaintiff.[52] Disgorgement, a remedy that provides compensation to the plaintiff measured by the defendant's gain, is a remedy for unjust enrichment.[53]

[156] I agree with the Defendants' submission in paragraph 197 of their Responding Factum:

> 197. Unjust enrichment claim should be struck. The plaintiffs' case rises and falls on whether the services agreement violates the ESA. If it does, the proposed class will be entitled to contractual remedies for the defendants' breach of the employment contract. There is no basis for unjust enrichment in this pleading. This is because any "remedial consequences for breach of contract are typically captured by the law of contract."[54] Put simply, "restitutionary relief is not available if the claimant possesses a right to contractual relief."[55] When the parties' relationship is governed by contract, so too are their remedies.

[157] The Plaintiffs' claims for *Employment Standards Act, 2000* entitlements, other unpaid statutory payments, as well as the out-of-pocket expenses are all breach of employment contract claims.

[158] I would add that in the immediate case, even if there was a viable unjust enrichment claim, the Supreme Court in *Atlantic Lottery v. Babstock* confirmed that disgorgement is not generally available for breach of contract and is available only in extraordinary circumstances where other remedies are inadequate. There is nothing in the circumstances of the immediate case that would justify a disgorgement remedy. A gains-based remedy is not appropriate. As was the case for the

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[52] *Moore v. Sweet*, 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para 30; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at p. 784; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848.
[53] *Atlantic Lottery v. Babstock*, 2020 SCC 19.
[54] *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 at para. 47; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 at para. 9.
[55] M. McInnes, *The Canadian Law of Unjust Enrichment*, (Toronto: LexisNexis, 2014) at p. 645.

majority in *Atlantic Lottery v. Babstock*, in the immediate case, there is no reasonable chance of achieving disgorgement damages for unjust enrichment or for breach of contract.[56]

(c) **The Common Law Negligence Claim**

[159] At the certification motion hearing, having recently addressed in other class actions the issue of negligence law's treatment of claims for pure economic loss,[57] I questioned the legal viability of this claim, and the viability of the negligence cause of action was fully argued. Uber added the related issue of the matter of concurrent liability in contract and tort.

[160] The Plaintiffs' pleading of negligence is found in paragraphs 102 and 103 of the Amended Fresh as Amended Statement of Claim, as follows:

> SYSTEMIC NEGLIGENCE
>
> 102. Uber owed Heller, and the Class Members, a duty to take reasonable steps to properly characterize their employment relationship when retaining the Class Members to provide services to Uber's customers. Uber systemically breached that duty by, *inter alia*:
>
> > (a) improperly and arbitrarily misclassifying the Class Members as "Partners" and/or independent contractors;
> >
> > (b) misrepresenting to Class Members that the Class Members were "Partners" and/or independent contractors;
> >
> > (c) failing to monitor and keep track of the hours worked by the Class Members; and,
> >
> > (d) encouraging, directing, requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold;
> >
> > (e) failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday Pay and Premium Pay;
> >
> > (f) failing to pay the Class Members Termination Pay, as applicable; and
> >
> > (g) failing to apply income tax, EI, and CPP deductions at the source and to remit EI and CPP contributions on behalf of the Class Members.
>
> 103. As a result of Uber's negligence in mischaracterizing the relationship between Uber and the Class Members, the Class Members have suffered damages and losses, including: lost Minimum Wages; Overtime Pay; Vacation Pay; Public Holiday and Premium Pay; Termination Pay, if applicable; employer EI and CPP contributions, and Out-of-Pocket Expenses; and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not "Partners" and/or independent contractors, all of which were reasonably foreseeable to Uber.

[161] The negligence claim is a claim for pure economic losses. A pure economic loss is economic loss that is unconnected to physical or mental injury to the plaintiff's person, or to physical damage to property.[58] However, tort claims for pure economic losses are available only

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[56] Justice Karakatsanis dissented in part because her opinion was there was a viable breach of contract claim and a possibility of disgorgement remedy.
[57] *Del Giudice v. Thompson*, 2021 ONSC 5379; *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138.
[58] *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35 at para. 17; *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 34.

in rare circumstances.[59]

[162] In *Martel Building Ltd. v. Canada,*[60] Justices Iacobucci and Major stated for the Supreme Court of Canada at para. 37:

> 37. […] In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[163] Although the categories are not closed, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,[61] the Supreme Court recognized five established categories where recovery for pure economic losses was permitted in negligence; namely: (a) negligent misrepresentation; (b) negligence of public authorities; (c) negligent performance of a service; (d) supply of shoddy goods or structures; and (e) relational economic losses. None of these recognized categories is available in the immediate case.

[164] In *1688782 Ontario Inc. v. Maple Leaf Foods*, in a majority decision written by Justices Brown and Martin,[62] the Supreme Court dismissed a negligence claim in a proposed class action by Mr. Submarine franchisees, whose supply chain for sandwich meats was disrupted for several months when the defendant Maple Leaf Foods, the franchisor's supplier, recalled its goods because of a listeria outbreak at its processing plant. The facts of *Maple Leaf Foods* are obviously far different from the immediate case, but the case demonstrates that the legal policy of the law of negligence is that with a few exceptions that can be justified on public policy grounds, tort law leaves pure economic losses to be addressed by the law of contract. In the immediate case, the putative Class Members' economic loss claims are more than adequately addressed by the *Employment Standards Act* and the alleged contracts of employment.

[165] Turning to the matter of concurrent liability in contract and tort, the leading cases are *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*[63] and *Central Trust Co. v. Rafuse*.[64] In *BG Checo International Ltd.*, B.C. Hydro was found liable for breach of contract and one issue for the Supreme Court of Canada was whether it was also liable in tort. Relying on *Central Trust Co. v. Rafuse,* a majority of the court concluded that tort liability may, but does not always, yield to the parties' superior right to arrange their rights and duties by contract. In their joint judgment, Justice La Forest and Justice McLachlin, as she then was, (L'Heureux-Dubé and Gonthier, JJ., concurring) stated at paragraphs 15 and 16:

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[59] *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35; *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, affd. 2013 ONCA 657; Winnipeg Condominium *Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.
[60] 2000 SCC 60 (McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.).
[61] [1992] 1 S.C.R. 1021.
[62] Abella, Moldaver, Côté, and Rowe, JJ. concurring with Justice Brown. Justice Karakatsanis wrote the dissent for herself and Wagner C.J., Martin and Kasirer JJ.
[63] [1993] 1 S.C.R. 12.
[64] [1986] 2 S.C.R. 147

> 15. In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. ... So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on <u>how</u> they have dealt with it.
>
> 16. Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. [...]

[166] In my opinion, the case at bar, is one of the cases where tort liability does yield to the principle of private ordering in contract. The claim in negligence would be based on a duty of care to properly classify the Class Member as an employee of Uber pursuant to the Service Agreement. But whether the Class Member is an employee of Uber pursuant to the Service Agreement is precisely the subject matter dealt with by the parties by their private ordering in contract. This is not an occasion for concurrent liability in contract and tort.

[167] Put somewhat differently, just as there is no duty of care in negotiating a contract, there is no duty of care in how to perform it. Rather, there is strict liability in contract (without considering the standard of a care of a reasonable contracting party), if the contract is breached. Moreover, any claim in negligence would be redundant and cumbersome and would not satisfy the preferable procedure criterion.

[168] I conclude that the negligence claim does not satisfy the cause of action criterion.

L. <u>Identifiable Class Criterion</u>

1. <u>General Principles</u>

[169] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (a) it identifies the persons who have a potential claim against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (d) it describes who is entitled to notice.[65]

[170] In *Western Canadian Shopping Centres v. Dutton*,[66] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> 38. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment.

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[65] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[66] 2001 SCC 46 at para. 38.

> It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[171] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[67] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[68] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[69] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[70] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[71]

2. Analysis and Discussion: Identifiable Class Criterion

[172] A modest revision is required to the proposed class definition which otherwise satisfies the principles of a proper class definition.

[173] The proposed definition defines a class member as "any person who …. worked or continues to work in Ontario transporting passengers and/or providing delivery services pursuant to a Service Agreement with … " The problem with this definition is it obscures the fundamental issue that is the critical issue in the immediate case which is whether the Class Members all of whom are Uber App users are working for Uber or working for themselves.

[174] A better definition for the class by which they can identify themselves and decide whether to participate in the class proceeding is as follows:

> Any person who, since January 1, 2012, in Ontario used an Uber app to transport passengers and/or to provide delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL,

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[67] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[68] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[69] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[70] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.
[71] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).

Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

3. The Temporal Length of the Class Period and the *Limitations Act, 2002*

[175] Uber submitted that the class definition should be amended to exclude Uber App users whose claims are presumptively barred under the *Limitations Act, 2002*.[72]

[176] The proposed class period commences on January 1, 2012, and Mr. Heller commenced the proposed class action on January 22, 2018. If Uber's submission was accepted then the class definition would need to be amended to commence on January 22, 2016, disqualifying from class membership some persons who used the Uber App between January 1, 2012, and January 21, 2016.

[177] I say "some" persons who used the Uber App because a person who used the Uber App between January 1, 2012 and January 21, 2016 may have continued its use after January 21, 2016 and while the quantum of his or her claim for compensation might be trimmed by the *Limitations Act, 2002*, he or she would not be disqualified from class membership. I also say some persons who used the Uber App because the presumptive limitation period is rebuttable based on discoverability principles.

[178] In these circumstances of the immediate case, in my opinion, the temporal length of the class period should not be amended and that the matter of limitation periods should be addressed at individual issues trials if the action goes that far.[73]

[179] I conclude that the identifiable class criterion is satisfied.

M. Common Issues Criterion

1. General Principles

[180] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[74]

[181] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[75]

[182] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[76] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[183] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue

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[72] S.O. 2002, c. 24, Sched. B
[73] *Smith v Inco Ltd.*, 2011 ONCA 628.
[74] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[75] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[76] 2013 SCC 57 at para. 106.

for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[77]

[184] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[78] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[79]

[185] The common issue criterion presents a low bar.[80] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[81] Even a significant level of individuality does not preclude a finding of commonality.[82]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[83]

[186] From a factual perspective, the Plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and, (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class Members and the proposed common issues.[84]

2. Analysis and Discussion: Common Issues Class Criterion

[187] As observed at the outset of these Reasons for Decision, the commonality or the idiosyncrasy of the fundamental proposed common issue questions is the major factual and legal battleground of this proposed class action. The contest between the parties is over whether there is some basis in fact for a common issue about whether the relationship between Uber and the putative Class Members is that of: (a) service provider and customer; (b) employer and employee;

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[77] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 48; *McCracken v. CNR*, 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40.

[78] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

[79] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[80] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[81] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[82] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[83] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[84] *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.).

or (c) employer and independent contractor.

[188] The Plaintiffs argue that there is some basis in fact for the commonality of all the proposed common issues that would determine and classify the relationship between Uber users and Uber. The Plaintiffs submit that there is some basis in fact for commonality based on the commonality of: (a) the functionality of the Uber App; (b) standard form service contracts that are not negotiable; and, (c) associated rules of contract performance imposed on Drivers and Delivery People and some external rules and regulations imposed by municipalities on the users of the Uber apps.

[189] Uber argues, however, that whatever may be the relationship between Uber users and Uber, there is no basis fact for a finding that there is commonality across the putative Class Members. Uber argues that whatever relationship it has or had with the 366,359 putative Class Members is intrinsically, inherently, and fundamentally idiosyncratic. Uber submits that however the relationship might be classified, the classification would have to be determined on an individual case-by-case basis. Uber therefore submits that there are no common issues and that the common issues and the preferable procedure criteria for certification cannot be satisfied.

[190] I will discuss the matter of the preferable procedure criterion later in these Reasons for Decision, but as I have already foreshadowed above, in my opinion, there is some basis in fact for proposed common issues 1 to 13.

[191] I come to this conclusion not by putting myself in the position of the common issues judge, which would take me into the forbidden territory on a certification motion of a merits decision, but I rather place myself in the position of determining whether there is some basis in fact for a common issues judge making a determination that would bind all the putative Class Members who did not opt out of the class proceeding.

[192] In this regard, based on the voluminous evidentiary record that I have reviewed and considered there is some basis in fact for any of the following answers to the common issue questions, including several answers that would be favourable to the putative Class Members and some that would be favourable to Uber; visualize there is some basis in fact for concluding:

a. In some or all Uber Service Agreements, there was no employment or independent contractor relationships between the Uber App users and Uber and the relationship between Uber users and Uber was of a customer and a service provider.

b. In some or all of the Uber Service Agreements, the relationship between Uber App users and Uber is that of independent contractor and employer.

c. In some or all of the Uber Service Agreements, the relationship between Uber App users and Uber was or is that of employee and employer.

d. In all Uber Service Agreements, it will take a case-by-case analysis to determine whether there was an employment or independent (or dependent) contractor relationship but either relationship is possible depending upon the circumstances of the particular case.

[193] Notwithstanding Uber's arguments to the contrary, there is some basis in fact that there is a genuine dispute about whether the Uber App users are working only for themselves in a shared economy with Uber or are working for Uber as an employee or as an independent contractor.

[194] And there is some basis in fact that there is a commonality of evidentiary factors including principally the system and controls imposed by the Uber App and by the associated Service Agreements. All of the putative Class Members used Uber Apps that along with the associated

standard form Service Agreements established a business model. A model is a system or thing used as an example to follow or imitate. Synonyms of a model are prototype, stereotype, archetype, version, mold, template, framework, pattern, design, and exemplar. It will be for the common issues trial judge to determine whether the model designed by Uber in the immediate case amounts to an employment relationship or some other kind of relationship, but at this juncture of the proceeding, I am satisfied that there is some basis in fact that there are common issues to determine that will bind all the Class Members.

[195] It should be noted that whatever the answers to the common issues there would be a quite robust class proceeding in terms of access to justice for either Uber or for the Class Members. If the answer to the common questions was (a) or (b) as set out in paragraph 192, then Uber would be discharged of liability to up to 366,359 Class Members. If the answer to the common questions was (c) or (d), then Uber would be exposed to liability, but the actions would have to proceed to individual assessments of damages because there is no prospect of an aggregate assessment of damages. While in theory, Uber would be exposed to up to 366,359 claims, the take up of individual assessment trials might be quite small because of the attrition of Class Members who for their own idiosyncratic reasons do not want to be working for Uber or whose own idiosyncratic experience is such that they do not have a provable claim that they were working for Uber or no provable breaches of the *Employment Standards Act, 2000*.

[196] I do not certify the proposed common issues associated with the unjust enrichment and negligence causes of action for the obvious reason that those causes of action do not satisfy the cause of action criterion and while I shall not develop the point, those causes of action would also not satisfy the preferable procedure criteria principally because they would make the class action unmanageable and they are either redundant or derivative of the causes of action that do satisfy the cause of action criterion.

[197] I do not certify the aggregate damages common issue. Pursuant to s. 24 (1) of the *Class Proceedings Act, 1992*, aggregated damages are only available when: (a) monetary relief is claimed on behalf of Class Members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate of the defendant's liability can reasonably be determined without proof by individual class members.

[198] The *Class Proceedings Act, 1992* is a procedural statute, and it does not create a new type of damages known as aggregate damages. All that s. 24 (1) of the *Class Proceedings Act, 1992* does is that it recognizes that in certain circumstances depending upon the nature of the Class Members' claims, it may be possible to avoid individual assessments of damages and arrive at a calculation of damages equal to what the defendant would have to pay if there were individual assessments. The case at bar is not that type of case.

[199] In the immediate case, individual questions of fact relating to the determination of each Class Member's damages remain to be determined. There is no statistical sampling that would assist in determining what individual Class Members are owed. Granted that these assessments will be facilitated by the Uber Apps detailed record keeping and tracking of the Drivers' and Delivery Peoples' activities, but the determinations are still individual assessments. Uber's liability remains to be determined, and the aggregate of its liability cannot be determined without proof by individual Class Members of their individual claims, which some of them may not wish to advance at individual issues trials.

[200] I do not certify the punitive damages common issue question. Punitive damages are awarded when a defendant's conduct is so reprehensible and outrageous that the conduct merits punishment. There is no basis in fact for concluding on an individual much less on a class wide basis that Uber's conduct was reprehensible or outrageous or meriting punishment.[85]

N. Preferable Procedure Criterion

1. General Principles

[201] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[86]

[202] In *AIC Limited v. Fischer*,[87] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[203] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[88] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[89]

[204] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[90]

2. Analysis and Discussion: Preferable Procedure Criterion

[205] Uber's arguments about preferable procedure are largely a reprise of their arguments about

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[85] *Omarali v. Just Energy*, 2016 ONSC 4094 at paras. 99-103; *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 110-112.
[86] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[87] 2013 SCC 69 at paras. 24-38.
[88] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[89] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[90] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

the lack of the commonality of the common issues and a class action defendant's prosaic argument - which sometimes works - that the individual issues will so overwhelm the common issues that the class action will be unmanageable or unproductive or futile and the Class Members are better off without the drag of a class proceeding impeding access to justice. Uber adds an argument that waiting legislative action is the better alternative to a class action since the Ontario government (and also other governments or public authorities) are investigating the regulation of the sharing economy workplace.

[206] For the reasons expressed above, there are viable common issues and a class action in the immediate case is a meaningful route to access to justice for both the Class Members and for Uber. In so far as the preferable procedure criterion is concerned, the immediate class action would be manageable and the common issues trial would provide considerable momentum for individual issues trials if the common issues favoured the Class Members.

[207] Waiting for legislative reform is of no use to the Class Members who have present day claims. If the class action gets that far, the court will be able to use s. 25 of the *Class Proceedings Act, 1992* to develop protocols for the resolution of the individual issues trials.[91]

[208] In short, in my opinion, the Plaintiffs satisfy the preferable procedure criterion.

O. Representative Plaintiff Criterion

[209] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[92]

[210] In the immediate case, the Defendants do not dispute that the fifth criterion for certification is satisfied and that both Mr. Heller and Ms. Garcia are qualified to be Representative Plaintiffs.

P. Conclusion

[211] For the above reasons, I grant the Plaintiffs' certification motion as set out above. Order accordingly.

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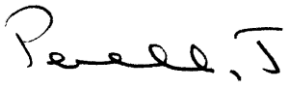
[91] See for example how the courts of Ontario and Québec are administering the administrative segregation class actions which will have thousands of claimants: *Brazeau v. Canada (Attorney General)*, 2021 ONSC 4982 (No. 4); *Brazeau v. Canada (Attorney General)*, 2021 ONSC 4294 (No. 3); *Brazeau v. Canada (Attorney General)*, 2021 ONSC 1828 (No. 2); *Brazeau v. Canada (Attorney General)*, 2020 ONSC 7229 (No. 1).

[92] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

[212] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within thirty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further thirty days.



Perell, J.

Released: August 12, 2021

Schedule A: *Employment Standards Act, 2000*, Ont. Reg. 285/01, and Ont. Reg. 288/01

***Employment Standards Act, 2000*, S.O. 2000, c. 41**

Definitions

1 (1) In this Act,

"employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or

(d) a person who is a homeworker, and includes a person who was an employee;

[…]

PART III

HOW THIS ACT APPLIES

To whom Act applies

3 (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Exception, federal jurisdiction

(2) This Act does not apply with respect to an employee and his or her employer if their employment relationship is within the legislative jurisdiction of the Parliament of Canada.

Exception, diplomatic personnel

(3) This Act does not apply with respect to an employee of an embassy or consulate of a foreign nation and his or her employer.

[…]

Other exceptions

(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

1. A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled.

2. An individual who performs work under a program approved by a college of applied arts and technology or a university.

2.1 An individual who performs work under a program that is approved by a private career college registered under the Private Career Colleges Act, 2005 and that meets such criteria as may be prescribed.

3. A participant in community participation under the *Ontario Works Act, 1997*.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary, is being held in a detention facility within the meaning of the *Police Services Act* or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act (Canada)*, if the individual participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act (Canada)*, if the individual participates inside or outside the institution, penitentiary or place in a work project or rehabilitation program.

5. An individual who performs work under an order or sentence of a court or as part of an extrajudicial measure under the *Youth Criminal Justice Act (Canada)*.

6. An individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation.

7. A holder of political, religious or judicial office.

8. A member of a quasi-judicial tribunal.

9. A holder of elected office in an organization, including a trade union.

10. A police officer, except as provided in Part XVI (Lie Detectors) or in a regulation made under clause 141 (2.1) (c).

11. A director of a corporation, except as provided in Part XX (Liability of Directors), Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title).

12. Any prescribed individuals.

Dual roles

(6) Where an individual who performs work or occupies a position described in subsection (5) also performs some other work or occupies some other position and does so as an employee, nothing in subsection (5) precludes the application of this Act to that individual and his or her employer insofar as that other work or position is concerned.

[…]

Ont. Reg. 285/01, (*When Work Deemed to be Performed, Exemptions and Special Rules*)

DEFINITIONS

Definitions

1. In this Regulation,

"taxi cab" means a vehicle, with seating accommodation for not more than nine persons exclusive of the driver, used to carry persons for hire; ("taxi")

EXEMPTIONS RE OVERTIME PAY

Exemptions from Part VIII of Act

8. Part VIII of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;

(b.1) Revoked: O. Reg. 498/18, s. 7.

(c) a person employed as a hunting or fishing guide or a wilderness guide;

(d) a person employed,

(i) as a landscape gardener, or

(ii)to install and maintain swimming pools;

(e) a person whose employment is directly related to,

(i) the growing of mushrooms,

(ii) the growing of flowers for the retail and wholesale trade,

(iii) the growing, transporting and laying of sod,

(iv) the growing of trees and shrubs for the retail and wholesale trade,

(v) the breeding and boarding of horses on a farm, or

(vi) the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;

(f) a person employed as a student to instruct or supervise children;

(g) a person employed as a student at a camp for children;

(h) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the Income Tax Act (Canada) and whose work or duties are directly connected with the recreational program;

(i) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(j) a person employed as a taxi cab driver;

(k) a person employed as an ambulance driver, ambulance driver's helper or first-aid attendant on an ambulance; or

(l) an information technology professional.

EXEMPTIONS RE PUBLIC HOLIDAYS

Exemptions from Part X of Act

9. (1) Part X of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person employed as a hunting or fishing guide or a wilderness guide;

(c) a person employed,

(i) as a landscape gardener, or

(ii) to install and maintain swimming pools;

(d) a person whose employment is directly related to,

(i) mushroom growing,

(ii) the growing of flowers for the retail and wholesale trade,

(iii) the growing, transporting and laying of sod,

(iv) the growing of trees and shrubs for the retail and wholesale trade,

(v) the breeding and boarding of horses on a farm, or

(vi) the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;

(e) a person employed as a student to instruct or supervise children;

(f) a person employed as a student at a camp for children;

(g) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act (Canada)* and whose work or duties are directly connected with the recreational program;

(h) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(i) a person employed as a taxi cab driver; or

(j) a person who is employed as a seasonal employee in a hotel, motel, tourist resort, restaurant or tavern and provided with room and board.

(k) Revoked: O. Reg. 443/08, s. 1.

***ONT. 288/01,* (*Termination and Severance of* Employment)**

Employees not entitled to notice of termination or termination pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

1. Subject to subsection (2), an employee who is hired on the basis that his or her employment is to terminate on the expiry of a definite term or the completion of a specific task.

2. An employee on a temporary lay-off.

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

5. An employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer.

6. An employee whose employment is terminated after refusing alternative employment made available through a seniority system.

7. An employee who is on a temporary lay-off and does not return to work within a reasonable time after having been requested by his or her employer to do so.

8. An employee whose employment is terminated during or as a result of a strike or lockout at the place of employment.

9. A construction employee.

10. Revoked: O. Reg. 397/09, s. 4.

11. An employee whose employment is terminated when he or she reaches the age of retirement in accordance with the employer's established practice, but only if the termination would not contravene the Human Rights Code.

12. An employee,

i. whose employer is engaged in the building, alteration or repair of a ship or vessel with a gross tonnage of over ten tons designed for or used in commercial navigation,

ii. to whom a legitimate supplementary unemployment benefit plan agreed on by the employee or his or her agent applies, and

iii. who agrees or whose agent agrees to the application of this exemption.

(2) Paragraph 1 of subsection (1) does not apply if,

(a) the employment terminates before the expiry of the term or the completion of the task;

(b) the term expires or the task is not yet completed more than 12 months after the employment commences; or

(c) the employment continues for three months or more after the expiry of the term or the completion of the task.

(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

CITATION: Heller v. Uber Technologies Inc., 2021 ONSC 5518
COURT FILE NO.: CV-17-567946-00CP
DATE: 20210812

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID HELLER

Plaintiff

- and -

UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., RASIER OPERATIONS B.V. and UBER PORTIER B.V.

Defendants

REASONS FOR DECISION

PERELL J.

Released: August 12, 2021

ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 2845-19-R
Certification (Industrial)

United Food and Commercial Workers International Union (UFCW Canada), Applicant v Uber Canada Inc., Rasier Operations B.V. and Uber B.V. d.b.a. Uber Black and Uber Black SUV, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - May 04, 2021

DATED: May 04, 2021

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

The Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, Ontario M5G 2P1
Tel: 416-326-7500
Toll-free: 1-877-339-3335
Fax: 416-326-7531

ONTARIO LABOUR RELATIONS BOARD

THIS IS AN OFFICIAL NOTICE OF THE BOARD

OFFICIAL NOTICES OF THE BOARD MUST NOT BE REMOVED, DEFACED OR DESTROYED

ALL NOTICES MUST IMMEDIATELY BE POSTED BY THE EMPLOYER (IN LOCATIONS WHERE THEY ARE MOST LIKELY TO COME TO THE ATTENTION OF EMPLOYEES OR OTHER INDIVIDUALS AFFECTED BY THE APPLICATION) NEXT TO THE APPLICATION, THE BOARD'S NOTICE TO EMPLOYEES OF APPLICATION, AND/OR THE BOARD'S DECISION

NOTICES MUST REMAIN POSTED FOR 45 BUSINESS DAYS

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2845-19-R**

United Food and Commercial Workers International Union (UFCW Canada), Applicant v **Uber Canada Inc., Rasier Operations B.V. and Uber B.V. d.b.a. Uber Black and Uber Black SUV**, Responding Party

BEFORE: Matthew R. Wilson, Alternate Chair

APPEARANCES: Brendan McCutchen, Michael Wright, Kevin Shimmin and Debora De Angelis appearing for the applicant; Matthew Badrov, Allyson Lee and Jeremy Millard appearing for the responding party

DECISION OF THE BOARD: May 4, 2021

1. This is an application for certification filed by United Food and Commercial Workers International Union (UFCW Canada) ("the UFCW") under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act") seeking to represent a group of Uber Drivers referred to as Uber Black Car Drivers ("the drivers"). Without conceding that the drivers are employees under the Act, Rasier Operations B.V. ("Rasier") asserts that it is the correct responding party.

2. This decision deals with the UFCW's request to apply the "greatest attachment" test to further narrow the list of employees eligible to be counted for the s. 8.1 notice. Rasier opposes any further parameters on the bargaining unit that it says, for the purpose of the s. 8.1 notice only, may be appropriate. For the reasons that follow, the Board denies the UFCW's request to apply the "greatest attachment" test.

3. The UFCW's certification application is to represent a bargaining unit described as follows:

> all Uber Black and Uber Black SUV drivers registered/ licensed as limousine drivers by the City of Toronto engaged

> by the Responding Party d.b.a. Uber Black and Uber Black SUV as direct employees and/or dependent contractors in and out of the City of Toronto and the City of Mississauga, Ontario, including those operating in and out of Toronto Pearson International Airport, save and except any managers, those above the rank of manager, office staff, dispatch staff, marketing and/or sales staff, technical and/or information technology staff, human resources staff, reception and/or administrative staff, and accounting staff.
>
> CLARITY NOTE:
>
> The bargaining unit proposed by the Applicant Union includes Uber Black and Uber Black SUV drivers exclusively. The bargaining unit does not include Uber drivers who are not Uber Black or Uber Black SUV.

4. An electronic vote was held over the course of a 24-hour period commencing on January 20, 2020. The ballot box has been sealed pending the disposition of certain issues raised by the responding parties.

5. At a Case Management Hearing held on March 3, 2020, the Board determined that the first issue that the Board would deal with was Rasier's notice under s. 8.1 of the Act. On July 31, 2020, after extensive submissions filed by the parties that were supplemented by oral submissions at a hearing, the Board issued a decision that addressed three issues ("the Board's July 31 decision") with respect to the s. 8.1 notice.

6. First, the Board determined that only individuals on Rasier's alternative employee list who drove at least one Uber Black/ Uber Black SUV trip, or who accepted such a trip, but that the rider subsequently cancelled, in the sixty days prior to the date of application had a sufficient connection to the UFCW's primary bargaining unit. Second the Board determined that the driver must be licensed as a limousine driver by the City of Toronto on the application date as argued by the UFCW. Third, the Board determined that individuals that were not challenged by the UFCW remain on the list of employees.

7. In a decision dated November 24, 2020, the Board dismissed Rasier's request for reconsideration.

The parties' positions

8. The union seeks to argue that the next phase in determining the list of employees for the s. 8.1 notice ought to deal with which individuals have the greatest attachment to the bargaining unit. It asks the Board to conduct a hearing and determine the parameters that should be applied to the list of individuals that have the greatest attachment.

9. Rasier opposes this analysis and resists any inquiry into the "greatest attachment" argument for three reasons. First, it argues that adding the "greatest attachment" criterion is a collateral attack on the Board's July 31 decision and overlaps with the "sufficient connection" test that was litigated by the parties. Second, it argues that the UFCW is now changing its position from the challenges it made prior to the Board's July 31 decision. Rasier points to correspondence from the UFCW dated February 14, 2020 where it identified its challenges without reference to the "greatest attachment" test. Finally, it argues that the "greatest attachment" test is inapplicable because the Board's cases are very different than these circumstances and it has already been addressed with the licensing requirement. Thus, it asks the Board to deny the UFCW's request to conduct a hearing on the issue of the "greatest attachment" test.

10. The UFCW argues that it is necessary for the Board to establish certain parameters and analyze the circumstances of the individuals on Rasier's list so that it can be determined if those individuals have their greatest attachment to this particular bargaining unit. It proposes the following test:

> To have a "greatest attachment" to the Applicant's primary bargaining unit, over the eight months before the date of application:
>
> (a) an individual must have taken more Uber Black/Uber Black SUV trips in the geographic scope of the bargaining unit than in any other municipality; and
>
> (b) the individual must also have taken more Uber Black/Uber Black SUV trips in the geographic scope of the bargaining unit than other types of trips (for example, Uber X, Uber Eats, Uber Comfort) for the Responding Parties.

11. The UFCW relies on previous correspondence with Rasier to argue that it had raised other challenges to the list and that it anticipated that such challenges would be dealt with after the Board ruled on the "sufficient connection" test. It argues that the "greatest attachment" test is a separate test applied by the Board and does not overlap with the "sufficient connection" test.

12. This is only a brief summary of the parties' positions. Their comprehensive written and oral submissions have been duly considered.

Analysis

13. For the reasons that follow, the Board accepts Rasier's argument that the question of which individuals ought to be counted for the purpose of the s. 8.1 notice has been fully answered. It would be inappropriate to allow the UFCW to now relitigate the issues through the lense of the "greatest attachment" test. The bargaining unit description and the additional parameters contain adequate descriptions of the geographical location of the work and the frequency and type of work for the purpose of determining which employees ought to be counted for the purpose of the s. 8.1 notice.

The "greatest attachment" test

14. The greatest attachment test has been used by the Board when an employer has employees working at multiple locations. In circumstances where a union applies for certification of a bargaining unit of employees who work in and out of a location, there is a risk that the employee could be covered by a different bargaining unit when working at a location outside of the bargaining unit description. While it is permissible for an employee to be in different bargaining units at different times, the concept of exclusivity of bargaining units does not permit an employee to be in two bargaining units at the same time. The greatest attachment test is applied in these circumstances to determine which bargaining unit the employee falls within at any particular time. The test is applied even where there is only one bargaining unit, but it is possible that a union could seek certification of a bargaining unit at other locations in the future.

15. An early decision addressing the "greatest attachment" test is *Board of Education for the City of Hamilton,* [1987] OLRB Rep. June 847. That case dealt with "occasional teachers" as there was a risk that such

teachers could fall with in two potential units (elementary or secondary). Thus, the Board stated:

> 7. The employees of any particular employer may constitute more than one bargaining unit or potential bargaining unit for the purposes of collective bargaining. In the industrial context, for example, office and clerical employees are ordinarily regarded as forming an appropriate bargaining unit separate and distinct from the "plant" unit of employees engaged in production.
>
> 8. A bargaining unit comprises the employees for whom a particular trade union is to be the exclusive bargaining agent. The notion of exclusivity requires that bargaining units be so defined as to ensure that an employee falls within only one such unit at any particular point in time. Returning to the industrial example in which office and clerical employees are excluded from the unit into which plant employees fall, an employee may move back and forth between the office and the plant and so fall within the plant unit and the office unit at different times, but that employee cannot be in both units at the *same* time: see *Laurent Lamoureux Co. Ltd.* [1985] OLRB Rep. Nov. 1618 at paragraph 15.
>
> 9. In circumstances in which teachers receive a variety of teaching assignments in the course of a year, the application as of a particular date of the test propounded in *City of York Board of Education, supra,* can lead to the conclusion that the employee was in two or more bargaining units simultaneously on that date. The Board had to deal with this problem in *The Board of Education for the City of Scarborough,* [1987] OLRB Rep. Jan. 119. In that decision, the Board concluded that teachers who "ordinarily" acted as substitutes for secondary school teachers but "occasionally" worked in the elementary schools in the year preceding the relevant date, should not be regarded as falling within the bargaining unit of elementary panel occasional teachers as of that date. We take this to mean that when the application of the *York* test places a particular teacher in more than one existing or potential unit of teachers, that teacher will be treated as falling within the bargaining unit to which he or she has the greatest attachment as of that time, in terms of the relative quantities of work performed during the year preceding the relevant date in each of the bargaining units of teachers employed by the subject school board.

16. In *Labourers' International Union of North America, Ontario Provincial District Council v Rhude Drilling & Blasting Inc*., 2020 CanLII 16778 (ON LRB), the Board explained the genesis of the greatest attachment test:

> 21. The greatest attachment test was developed, among other reasons, to address those situations where employees who may work at a number of varying locations where the employer provides services, and where in the cases cited by the Union (except for one) the bargaining unit applied for was described as those employees working "in or out" of a home base. As expressed in *Western Inventory Services Inc., supra*:
>
>> 23. In respect of the notion of the exclusivity of bargaining units we note that, upon certification the trade union becomes the exclusive bargaining agent for employees in the bargaining unit. That concept of the exclusivity of the bargaining agent to represent the employees in the bargaining unit has a concomitant requirement that the bargaining unit be defined in a manner which ensures that an employee falls only within one bargaining unit at any particular point in time. <u>An employee may be in different bargaining units at different times, but cannot be in two or more bargaining units of a single employer simultaneously. Furthermore, in those instances where circumstances indicate that a particular employee may be in more than one bargaining unit, either existing or potential, that employee should be treated as falling within the bargaining unit to which he or she has a greatest attachment as of that time.</u>

17. In that case, the applicant applied for the following bargaining unit:

> all employees of Rhude Drilling & Blasting Inc., working at Dufferin Aggregates Milton Quarry at 9410 Dublin Line, Milton, Ontario, save and except office, clerical, sales staff and supervisors and persons above the rank of supervisor.

Following the vote, where the segregated ballots could have been numerically significant, the issue was whether Thibault was a member of the bargaining unit. The applicant argued that Thibault did not have a sufficient connection to the bargaining unit.

18. The employer argued that Thibault worked regularly at the Milton Quarry and was integral to its operations at that site. As it was an "all employee" unit, and Thibault worked at the Milton site, the employer argued that he should be included in the bargaining unit. The union argued that Thibault's home base was in Sudbury and that he worked out of that location. His supervisor was located in Sudbury and he was dispatched from Sudbury.

19. The Board framed the legal question as follows:

> The proper question is as effectively posed by the Labourers' OPDC, i.e. whether it is appropriate to place Thibault in the bargaining unit applied for given his lack of "greatest attachment" to the Milton location. Expressed differently, it calls for the Board to apply its caselaw concerning what has been termed "the greatest attachment test".

20. The Board considered that Thibault had worked 83 days in Sudbury, 27 days in Milton and 38 days at other locations. These work days, along with being dispatched and supervised out of Sudbury, led to the conclusion that Thibault should not be included in the bargaining unit as his greatest attachment was not to Milton.

21. Of some interest, the Board noted that if the applicant had applied to represent employees employed at or out of the Sudbury location, Thibault would have been included in that unit. The same was true if the applicant applied for other units at the locations where Thibault worked. Thus, the Board rejected the employer's argument that Thibault could be in two bargaining units at the same time.

22. The Board was also referred to the decision of the Ontario Divisional Court in *Rainbow Concrete Industries Ltd. v. International Union of Operating Engineers*, 2010 ONSC 723 (CanLII). In that case, the Board had excluded 11 drivers from the bargaining unit (and thus did not count their ballots) on the basis that they were not working in, at, or out of the Sudbury location. The parties had agreed to a bargaining unit description that was limited in geographical scope. The Divisional Court dismissed the application for judicial review after finding that it was reasonable for the Board to "emphasize the factor of how much time was physically spent in each location".

Should the "greatest attachment" test be applied here?

23. It is helpful to start the analysis with a review of the issue before the Board at this stage of the proceeding. At the Case Management Hearing, the Board determined that it would first deal with Rasier's notice under section 8.1 of the Act. That is, the Board is required to determine whether there is any merit to Rasier's assertion that the union did not have the requisite membership support (40%) to be entitled to a representation vote. For the purpose of determining the s. 8.1 issue only, Rasier agreed that the Uber Black Car drivers are dependent contractors (and therefore employees under the Act) and that the Primary Unit could be appropriate for the purposes of collective bargaining as contemplated by section 8.1(5) paragraph 3 of the Act.

24. In the Board's July 31 decision, it explained that although the section 8.1 issue is distinct from determining whether an individual is eligible to cast a ballot in a representation vote, the two issues are closely related and the Board has historically applied the same legal test (see for example *Copernicus Lodge*, 2004 CanLII 47757 (ON LRB)). There is no meaningful difference, and nor should there be, in determining who is eligible to be counted for the purpose of the s. 8.1 notice and who is eligible to vote.

25. Thus, at this stage of the proceeding, the Board must determine which employees are eligible to be counted for the purpose of the s. 8.1 notice. The Board's July 31 decision addressed the governing principle as follows:

> 36. The governing principle is that employees who have a stake in the workplace – that is the work that would fall within the proposed bargaining unit – ought to have a say in whether they will be represented by the union. Over the years, the Board has phrased this principle in various ways without much distinction.

26. This was reiterated in the Board's reconsideration decision where it stated:

> 37. Without repeating the reasons set out in the Board's decision, the objective is to identify the employees who have a stake in the workplace so that they have a say in whether they will be represented by the union (See *Madeira Residential and Counselling Services Glendonwynne House,* [1999] OLRB Rep. Jan./Feb. 66; *Executive Marketing*

> *Services, Inc.*, 2000 CanLII 11882 (ON LRB); *Riverine Crownridge Health*, 2001 CanLII 12221, [2001] O.L.R.D. No. 3286; and *Ability Janitorial Services Ltd.*, 2004 CanLII 26714 (ON LRB)). Rasier proposed a broad criteria that essentially included all drivers on the application date and all drivers who previously used the Uber Black Car App and had a current account (See paragraph 17 of Rasier's April 22, 2020 submissions). The UFCW proposed a much narrower criteria that included drivers who accepted a trip in the past thirty days and had a valid City of Toronto limousine license as of the date of the application (see para 63 of the UFCW's May 6, 2020 submissions). The parties agreed that the Board could craft its own criteria and that is precisely what the Board did in its decision. Having considered the parties submissions and with regard to the Board's jurisprudence and labour relations expertise, the Board determined a clear criteria to be applied to the scope of the bargaining unit.

27. The result of that decision was that there was a bargaining unit description with additional parameters that were to be applied to determine which employees were to be counted for the purpose of the s. 8.1 notice. The bargaining unit description is as follows:

> all Uber Black and Uber Black SUV drivers registered/ licensed as limousine drivers by the City of Toronto engaged by the Responding Party d.b.a. Uber Black and Uber Black SUV as direct employees and/or dependent contractors in and out of the City of Toronto and the City of Mississauga, Ontario, including those operating in and out of Toronto Pearson International Airport, save and except any managers, those above the rank of manager, office staff, dispatch staff, marketing and/or sales staff, technical and/or information technology staff, human resources staff, reception and/or administrative staff, and accounting staff.
>
> CLARITY NOTE:
>
> The bargaining unit proposed by the Applicant Union includes Uber Black and Uber Black SUV drivers exclusively. The bargaining unit does not include Uber drivers who are not Uber Black or Uber Black SUV.

28. The result of the Board's July 31 decision was the imposition of the following additional parameters to ensure that only those employees who have a stake in the workplace are eligible to be counted:

i) only individuals on Rasier's alternative employee list who drove at least one Uber Black/ Uber Black SUV trip, or who accepted such a trip, but that the rider subsequently cancelled, in the sixty days prior to the date of application; and

ii) the driver must be licensed as a limousine driver by the City of Toronto on the application date.

29. Thus, the bargaining unit description was further narrowed by both a temporal period of work activity and a licensing requirement on the application date.

30. To be clear, this was not the result sought by Rasier. It sought a much broader requirement of including any driver who had been licensed by the City of Toronto without temporal limitations. It was the UFCW that sought to narrow and focus the parameters to avoid what it said was a "flooding of the list".

31. In making its submissions at the hearing, the UFCW did not pursue any argument that the Board ought to engage in a "greatest attachment" argument, nor did it raise a concern that some drivers may spend more time driving outside of the bargaining unit so that their attachment to the bargaining unit was either tenuous or at risk of being duplicative. While the UFCW has now pointed to references in its written submissions where it mentioned "other challenges" or concerns about the "attachment" to the bargaining unit, these were not presented as separate arguments to be made at a separate phase of litigation. It is only now that the UFCW has identified the "next phase" as being an analysis about the "greatest attachment" to the bargaining unit.

32. The UFCW also did not seek reconsideration of the Board's July 31 decision. To the contrary, it vigorously resisted Rasier's request for reconsideration by arguing that the parameters imposed by the Board were appropriate.

33. To now return to litigate which employees who, despite having a City of Toronto license on the application date and have a 60-day driving requirement, ought not be permitted to have their ballot counted, is returning to the same issue the Board addressed in the Board's July 31 decision. In essence, the UFCW's argument is that the list of employees should be further reduced by applying additional parameters to the bargaining unit that it proposed and successfully

narrowed. The problem with its argument is that it is simply refining what it has already argued before the Board. It is seeking to refine what has already been decided in the Board's July 31 decision. The Board recognized that the parameters may not be perfect; however, the parameters were principled and clear. I refer to the Board's comments at paragraph 38 of the reconsideration decision:

> 38. To argue that it is internally inconsistent because it is not precisely aligned with the evidence about licenses being temporarily suspended or expired fails to recognize that the Board was determining an appropriate middle ground between two extreme positions. The Board's criteria provides clarity to the parties with a principled basis about which individuals have a stake in the workplace so that those individuals have a say in whether they will be represented by the union. It may not be perfect; it may not reflect the workforce months later. But, it does reflect the Board's jurisprudence and is consistent with the stated objectives in defining the parameters for a s. 8.1 analysis.

34. The Board accepts Rasier's argument that the UFCW is attempting to re-litigate the issues that were dealt with in the Board's July 31 decision. Moreover, even if the Board were inclined to revisit the parameters of the bargaining unit, it is the Board's view that the existing bargaining unit, combined with the parameters that it imposed in the Board's July 31 decision, is sufficiently clear and discernable to allow the parties to identify those individuals who have a stake in the bargaining unit and should be counted for the purposes of the s. 8.1 notice.

35. There may be circumstances in the future where a union is certified for a bargaining unit of Uber drivers that has overlap with the work of this bargaining unit. This issue can arise from time to time in any setting and there are mechanisms to deal with such issues (e.g. jurisdictional disputes at the Board, grievances).

36. It is important to keep s. 8.1(5)4 in perspective as it clearly sets out the task before the Board:

> 8.1(5) 4. If the Board determines that the description of the bargaining unit included in the application for certification could be appropriate for collective bargaining, the Board shall determine the number of individuals in the unit as described in the application.

37. For the purposes of the s. 8.1 notice only, Rasier has agreed that the UFCW's proposed bargaining unit is appropriate. The parties sought further direction from the Board about the parameters to be applied to that bargaining unit. To go further would be to repeat the exercise. The Board is not persuaded that it is appropriate or necessary to do so.

38. The UFCW relies on *Rhude Drilling*, *supra*, in support of its argument that the "greatest attachment" test is separate from the "sufficient connection" test. It points out that the Board does not recognize overlap in these tests and that it is logical for the Board to apply one test (e.g. "sufficient connection" test) before the other (e.g. "greatest attachment" test).

39. In my view, the UFCW is oversimplifying the analysis. In *Rhude Drilling, supra*, the Board rejected the employer's position that the employee could be in different bargaining units at the same time. Furthermore, it was the employer's position that since there was no dispute that the individual was an employee and performing bargaining unit work, the individual fell within the bargaining unit. The union did not dispute the facts. However, it argued that the individual had a greater attachment outside of the bargaining unit. The Board determined that it needed to deal with the union's argument. This is evident from the opening paragraph of its analysis:

> *The legal question is not whether Thibault should be considered an employee of Rhude and thus placed in the bargaining unit applied for, i.e. an all employee unit of those working at the Milton Quarry in Milton, Ontario. The proper question is as effectively posed by the Labourers' OPDC, i.e. whether it is appropriate to place Thibault in the bargaining unit applied for given his lack of "greatest attachment" to the Milton location.*

40. Thus, the decision does not stand for the principle that there cannot be overlap between the greatest attachment test and sufficient connection test.

41. The applicant argues that the greatest attachment test has two elements: geographical location of the work and frequency and type of work performed. The applicant frames this argument as follows:

> The Board's "greatest attachment" case law has two elements, both of which are relevant here. The first is an

> element based in geography, asking where an employee most often worked. The second is an element based on type of work, asking what kind of work an employee most often did. The application of both elements of the test is straightforward, giving rise to none of the logistical concerns that the Responding Parties have cursorily claimed.

42. While it is true that these two elements have been applied by the Board in determining the employee's greatest attachment, there is no reason to restrict the Board's analysis to only these two elements. In appropriate cases, the Board may consider other relevant factors to determine which bargaining unit the employee ought to fall. In instances where there is no second bargaining unit (such as the circumstance in this case), the analysis has an element of speculation.

43. In the instant matter, the bargaining unit description and the additional parameters contain adequate descriptions of the geographical location of the work and the frequency and type of work for the purpose of determining which employees ought to be counted for the purpose of the s. 8.1 notice. The question of which individuals ought to be counted for the purpose of the s. 8.1 notice has been fully answered.

44. Thus, for these reasons, the Board declines the UFCW's request to conduct an inquiry into the "greatest attachment" test.

45. The matter is referred to the Manager of Field Services to continue working with the parties to review the list of employees eligible to be counted for the purpose of the s. 8.1 notice filed by Rasier under the Act.

46. I remain seized.

"Matthew R. Wilson"
for the Board

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