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Case Comment: Heller v. Uber Technologies Inc.

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Introduction

Canadian courts have accepted mandatory arbitration clauses as presumptively enforceable unless there is legislation that precludes their application. This position was confirmed by the Supreme Court in *Seidel v. TELUS Communications Inc.*[1]

In *Heller v. Uber Technologies Inc.*, the Ontario Court of Appeal considered an arbitration clause in the context of legislation following the approach in *Seidel*, but the Court also undertook an unconscionability analysis.[2] Reviewing a motion that was granted to stay a class action proceeding in favour of an arbitration clause, the Court unanimously held that the clause was invalid on two separate grounds. First, the arbitration clause amounted to an illegal contracting out of the *Employment Standards Act*.[3] This is an application of the core principle from *Seidel*. Second, the Court held that the arbitration clause was unconscionable.[4] This is a

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1. 2011 SCC 15 at para 2 [*Seidel*]. Note that Ontario and Quebec have consumer protection legislation that precludes pre-dispute mandatory arbitration clauses. Alberta requires ministerial approval of consumer arbitration clauses. British Columbia has one consumer provision that the Supreme Court held to preclude arbitration of public interest claims, see *ibid* at paras 25, 40.
2. 2019 ONCA 1 [*Heller*].
3. *Ibid* at paras 23-51; *Employment Standards Act, 2000*, SO 2000, c 41, s 5(1) [*ESA*].
4. *Heller*, *supra* note 2 at paras 52-73.

significant development because it is the first time a Canadian court has held an arbitration clause invalid on the basis of unconscionability.

In the first part of this case comment, I provide context to the Court's principal analysis. I briefly describe the facts and the motion judge's decision. I then discuss the competence-competence principle, which is a preliminary jurisdiction issue. In part two, I explain the two grounds used by the Court to invalidate the mandatory arbitration clause in Uber drivers' contracts. Finally, I argue in part three that the reasoning from this decision can be used to hold other arbitration clauses unconscionable where they prevent class actions involving individually low-value claims.

I. *Context*

1. *Facts*

Mr. Heller lives in Ontario and works delivering food for Uber Eats, which is a food delivery service owned by Uber.[5] He is the representative plaintiff in a proposed class action against Uber. The class includes drivers for both food delivery services and transportation services offered by Uber. The proposed class action argues, among other things, that drivers for Uber are employees and that Uber has violated the *ESA*. It claims damages of $400 million for benefits protected by the *ESA*, including minimum wage, overtime, and vacation pay.[6]

Mr. Heller's ability to proceed with the class action turns on his acceptance of a services agreement. When drivers log in to the Uber App for the first time, they have to accept that agreement, which contains an arbitration clause. The clause states that the agreement is governed by the laws of the Netherlands, all disputes must go through mediation prior to arbitration, and the place of arbitration is the Netherlands.[7]

Uber applied for a motion to stay the class action in favour of arbitration, in accordance with the services agreement. The motion was granted.[8] The motion judge held that the plain language of the *ESA* does not preclude arbitration. He also held that whether Mr. Heller is an employee is a complex issue of mixed fact and law, which should be decided by the arbitrator at first instance according to the competence-competence principle.[9] The motion judge rejected the unconscionability argument.

5. *Ibid*, n 1. As the Ontario Court of Appeal did in *Heller*, I use "Uber" for simplicity. Although there are several subsidiaries involved, it does not affect the analysis in the case.
6. *Ibid* at paras 2-4, 59.
7. *Ibid* at paras 5-11.
8. *Heller v Uber Technologies Inc*, 2018 ONSC 1690.
9. *Ibid* at paras 51-66.

Although there was inequality of bargaining power, the agreement was not unfair.[10]

2. *The competence-competence principle*

A preliminary issue in the interpretation of arbitration clauses is the competence-competence principle, which means that arbitrators have the jurisdiction to decide their own jurisdiction. In *Seidel*, the Supreme Court confirmed the general rule that challenges to jurisdiction should be decided at first instance by the arbitrator. The exceptions to this rule are questions of law, and questions of mixed law and fact where the facts only require consideration of documentary evidence on record.[11]

The Ontario Court of Appeal held that there was no issue of jurisdiction in this case because the clause, if valid, would apply to any dispute between a driver and Uber. Validity refers to whether the clause itself is legally enforceable. Applicability refers to whether the clause applies to the dispute in question.[12] The Court apparently views jurisdiction in terms of whether the clause is applicable, and validity as distinct from jurisdiction. The Court concluded that both the *ESA* question and the unconscionability issue were questions of validity.[13] It is unclear why the Court did not hold that the *ESA* issue was a question of law and therefore an exception to the competence-competence principle. This would have been more consistent with the reasoning in *Seidel*, where the Supreme Court held that interpreting whether a statute applied was a question of law since the facts were undisputed.[14] In *Heller*, the fact that Uber drivers are employees was presumed for the purpose of the motion, so the reasoning from *Seidel* could have been used.[15]

Whether the Court intended to or not, drawing a distinction between applicability and validity in this manner increases potential scrutiny of arbitration clauses. Once validity is in question, courts can decide whether the clause stands even when there are questions of mixed law and fact where the facts extend past consideration of documentary evidence, which goes beyond the existing exception. In other words, even if the Court did not presume that Mr. Heller was an employee, it would still

10. *Ibid* at paras 67-79.
11. *Seidel*, *supra* note 1 at para 66, citing *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 84-85 [*Dell*].
12. Historically, there has been some debate as to what jurisdiction includes in the context of the competence-competence principle. See *Dell*, *supra* note 11 at paras 164-166 (where the dissent discusses the concepts of applicability and validity).
13. *Heller*, *supra* note 2 at paras 38-40.
14. *Supra* note 1 at para 30.
15. *Supra* note 2 at para 27.

have the jurisdiction to make a preliminary employee determination prior to deciding whether the arbitration clause is valid.

The Court dismissed Uber's argument that validity should be decided by the arbitrator. This is consistent with section 7(2) of the *Arbitration Act*. However, section 17(1) provides that an arbitrator may decide their own jurisdiction, including the validity of the clause itself.[16] The Court could have been clearer by saying that, although an arbitrator may determine the validity of the clause (e.g., if a party decides to argue validity before an arbitrator instead of a court), courts retain the jurisdiction to determine validity in an application to stay proceedings in favour of arbitration.

II. *The Court of Appeal's analysis of the arbitration clause*

1. *Contracting out of the* Employment Standards Act

The first issue before the Court of Appeal was whether the arbitration clause represented an illegal contracting out of the *Employment Standards Act*. For the purpose of the motion, the Court presumed that Mr. Heller can prove what he pleads, which is that he is an employee of Uber.[17]

Section 5(1) of the *ESA* prohibits an employer from contracting out of, or waiving, an employment standard.[18] The Court held that the arbitration clause contracted out of the complaint mechanism to the Ministry of Labour. A complaint triggers an investigation by an Employment Standards Officer.[19] The Court determined that the investigative process was an employment standard, in part because the Officer can order an employer to pay wages.[20] This means that the arbitration clause illegally contracts out of the *ESA*. The clause is therefore invalid under section 7(2) of the *Arbitration Act*.[21] The Court of Appeal's analysis in interpreting provisions of the *ESA* consistent with its purpose to protect employees follows the Supreme Court's approach in *Seidel*, where the Court held that consumer protection legislation should be interpreted broadly since its purpose is to protect consumers.[22]

The Court of Appeal held that the arbitration clause violates section 5(1) even though a civil action is being pursued, which precludes the right to file a complaint under the *ESA*.[23] This is because there could be Uber

16. *Arbitration Act, 1991*, SO 1991, c 17, ss 7(2), 17(1).
17. *Heller*, *supra* note 2 at para 27.
18. *Supra* note 3, s 5(1).
19. *Ibid*, s 96(1).
20. *Ibid*, ss 1(1), 103 (employment standard is defined as "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee"). *Heller*, *supra* note 2 at paras 35-36.
21. *Supra* note 16, s 7(2).
22. *Heller*, *supra* note 2 at paras 37; *Seidel*, *supra* note 1 at paras 33-37.
23. *Supra* note 3, ss 5(1), 96(1), 98.

drivers who are not part of the civil action but who are also subject to the arbitration clause.[24] This argument is likely where this part of the decision is vulnerable to being overturned. If drivers filed complaints under the *ESA*, then it would be clear that the arbitration clause contracts out of the *ESA*. It could be argued that it was not the legislature's intent that civil actions should be protected under the *ESA* considering that civil actions remove the right to file a complaint.

Perhaps because of this potential weakness, the Court included policy arguments that support its position. For example, the Court reviewed the benefits of class proceedings, including the fact that there would be a public decision on which others can rely. In contrast, the arbitration clause would allow neither a class determination nor a public finding.[25] The Court concluded that determining whether Uber drivers are employees is an important issue that should be determined by an Ontario court.[26] Although these are compelling arguments, they go beyond *Seidel* because the Supreme Court was clear that arbitration clauses are enforceable in the absence of legislation that precludes them.[27] In *TELUS Communications Inc. v. Wellman*, which was decided after *Heller*, the Supreme Court reiterated its position that policy arguments should not be considered in statutory analysis beyond trying to interpret the legislature's intent.[28]

2. *Unconscionability*

Few Canadian cases have examined unconscionability in the context of arbitration clauses. Two lower court decisions involving motions to stay class action proceedings in favour of arbitration show an early divide. In *Huras v. Primerica Financial Services Ltd.*, the motion judge noted in *obiter* that the arbitration clause was invalid on the basis of unconscionability because it would preclude claims that would not be brought individually due to their small size.[29] The Court of Appeal affirmed the motion judge's decision but expressly avoided the issue of unconscionability.[30] In *Kanitz v. Rogers Cable Inc.*, Nordheimer J., who also wrote the Court of Appeal decision in *Heller*, held that the bargain was not unfair because there was

24. *Heller*, *supra* note 2 at paras 42-43.
25. *Ibid* at para 44.
26. *Ibid* at para 50, citing *Douez v Facebook Inc*, 2017 SCC 33 at paras 58-60 [*Douez*] (where the Supreme Court concluded that a statutory privacy tort claim should be decided by a B.C. court).
27. *Supra* note 1 at para 2.
28. 2019 SCC 19 at paras 77-80 [*Wellman*].
29. 58 OR (3d) 299 at paras 36-50, 2002 CarswellOnt 628 (WL Can).
30. 55 OR (3d) 449 at para 20, 2001 CanLII 17321 (CA).

no evidence of costs to the consumer and no evidence that any consumer was deterred from bringing a claim because of the arbitration clause.[31]

The Court of Appeal noted in *Heller* that the test for unconscionability in Canada is not clear.[32] B.C. courts have used a two-part test: 1) imbalance of bargaining power and 2) unfair bargain.[33] Abella J. used this test in *Douez*; however, her opinion was a concurring judgment (the majority decided the case on different grounds).[34] The Ontario Court of Appeal has used a four-part test that includes the two steps from the B.C. test, in addition to a lack of independent legal advice and the powerful party knowingly taking advantage of the weaker party.[35] The Court did not determine whether *Douez* changed the test for unconscionability in Ontario because it held that the clause was unconscionable under either test.[36]

The Court applied the four-part test to the facts. First, the arbitration clause is substantially unfair because it requires the claimant to pay significant up-front costs of $14,500. This does not include legal, travel, and other expenses. Also, the claimant must arbitrate their claim individually in a foreign jurisdiction. Second, Mr. Heller did not receive legal advice prior to entering into the agreement. Third, there is significant inequality of bargaining power between Mr. Heller and Uber. Finally, the Court inferred that Uber knew and intended to use the clause to gain advantage at the expense of their drivers, who are vulnerable parties.[37]

The test for unconscionability is not a major issue for mandatory arbitration clauses in contracts of adhesion because the two extra steps will not generally be determinative. First, there is unlikely to be independent legal advice. As the Court noted, even if there was such advice, the contractual terms are not negotiable. Second, it can be inferred that the powerful party sought to take advantage of the vulnerable party, given the existence of the other parts of the test.[38] However, in the event a court does not make such an inference, the burden would be on the less powerful party to prove that the company knew that they were taking advantage of the unfair bargaining power. This could compound the existing imbalance of power. On balance, the two-step test is preferable.

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31. 58 OR (3d) 299 at paras 42-49, 2002 CanLII 49415 (SC) [*Kanitz*].
32. *Supra* note 2 at paras 60-61.
33. *Morrison v Coast Finance Ltd*, 55 DLR (2d) 710, 1965 CanLII 493 (BCCA).
34. *Supra* note 26 at paras 47-50, 115-117.
35. *Heller*, *supra* note 2 at para 60, citing *Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573 at para 38.
36. *Heller*, *supra* note 2 at paras 62.
37. *Ibid* at para 68.
38. *Ibid.*

III. *Unconscionability and the significance of* Heller

1. *On a narrow reading, this case is limited by its facts*

This decision is significant because it establishes unconscionability as a basis to invalidate mandatory arbitration clauses. Without legislative changes and with a potentially increasing number of contract workers,[39] it will be left to courts to protect the rights of weaker parties. This is a particularly important issue for independent contractors, employees where employment legislation does not preclude arbitration, and consumers where consumer protection legislation does not preclude arbitration. As the Court noted, Uber drivers are similar to consumers in their lack of bargaining power.[40]

It is possible that the reach of this case is limited by its particular facts. The arbitration costs are significant and must be paid up-front. Further, the arbitration must take place in the Netherlands under the law of the Netherlands. The Court used these facts to distinguish this case from *Kanitz*.[41] The Court also noted that Uber is well positioned to absorb the up-front costs.[42] Therefore, on a narrow reading of the decision, the discrepancy between the up-front costs and the size of the claims appear to be a driving force, along with the foreign location and laws. This could limit the precedential value of the decision to arbitration clauses involving similarly obvious signs of unfairness.

2. *On a broad reading, the Court's reasoning applies to class actions generally*

Whether the Court of Appeal would hold an arbitration clause unconscionable where costs are not an issue (i.e., costs are covered by the powerful party) and the arbitration takes place in the claimant's local jurisdiction is unclear. In other words, what if the principal sign of unfairness is that arbitration clauses preclude class actions? The Supreme Court has been clear that class action legislation creates a procedural right, whereas arbitration clauses create a substantive right.[43] Class action

39. See generally Yuki Noguchi, "Freelanced: The Rise of the Contract Workforce," *National Public Radio* (22 January 2018), online: <www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now> [perma.cc/5NLC-LVN7]. There is conflicting data on this issue, in part because it is somewhat difficult to collect and characterize. See, e.g., Ben Casselman, "Maybe the Gig Economy Isn't Reshaping Work After All," *The New York Times* (7 June 2018), online: <www.nytimes.com/2018/06/07/business/economy/work-gig-economy.html> [perma.cc/RX43-XBFB].

40. *Heller*, *supra* note 2 at para 71.

41. *Ibid* at para 72.

42. *Ibid* at para 68.

43. *Bisaillon v Concordia University*, 2006 SCC 19 at para 17; *Dell*, *supra* note 11 at paras 106-108.

legislation does not establish a substantive right to pursue a class action and therefore does not preclude an arbitration clause.

This line of reasoning allows powerful parties to include mandatory arbitration clauses in their standard form contracts and therefore prevent class action claims. In *Griffin v. Dell Canada Inc.*, while deciding whether non-consumer claims should be stayed or remain joined with consumer claims, Sharpe J.A. of the Ontario Court of Appeal wrote: "[t]he choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding."[44] The Supreme Court recently dismissed Sharpe J.A.'s reasoning in *Wellman*. As already mentioned, the Court held that policy considerations should not be used to extend the legislature's intent.[45] The Court referred to *Heller* while pointing out that arguments about unfairness should be made under the doctrine of unconscionability. However, this is *obiter* since no unconscionability arguments were made in *Wellman*.[46] While *Wellman* continues the traditional approach of upholding arbitration clauses in the absence of clear legislative direction, it suggests that the Supreme Court is open to unconscionability arguments.

Under a broad reading of *Heller*, the reasoning is that the excessive costs of arbitration, location, and choice of law raise significant fairness concerns because it is unreasonable to expect anybody to take Uber to arbitration. The same reasoning applies to low-value claims in general because it is unreasonable to expect individual claims to be made. There is evidence to suggest that arbitration is significantly underused relative to court actions, particularly for low-value claims.[47] Also, arbitration costs can be significant, as they are in this case.[48] In other words, if it is unreasonable to have up-front costs and a foreign location, it is similarly unreasonable to expect anyone to bring low-value claims individually. This is as true for class actions as it is for arbitration. The main advantage

44. 2010 ONCA 29 at para 57.
45. *Supra* note 28 at paras 77-80.
46. *Ibid* at para 85.
47. See generally Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018) 96 NCL Rev 679. See also Jessica Silver-Greenberg & Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *The New York Times* (31 October 2015), online: <www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [perma.cc/MCC3-PSCY]. ("The Times found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less.")
48. See, e.g., Public Citizen, "The Costs of Arbitration" (Executive Summary, 2002), online: <www.citizen.org/media/public-citizen-publications-costs-arbitration> [perma.cc/N7EG-FZWW].

of class actions is the ability to group large numbers of small claims, thus converting a low-value claim that could never be pursued to one of many that, collectively, can feasibly be pursued.

In practice, by removing the ability to file a class action, the mandatory arbitration clause effectively eliminates liability for the powerful party. It does this by preventing individuals from bringing what would otherwise be independent small claims in concert with others in similar circumstances. If the only practical recourse for low-value claims is through class actions, then arbitration clauses prevent any dispute resolution. By this reasoning, these clauses are substantively unfair. Therefore, the reasoning from *Heller* can be used to hold that arbitration clauses are unconscionable because they preclude class actions, particularly where there are low-value claims. If the reasoning does not apply to class actions involving a collection of small claims, then companies can simply draft ostensibly generous arbitration agreements (e.g., local venue, local laws, costs covered) to pre-empt unconscionability claims and avoid class actions.

Conclusion

The Supreme Court has shown a clear deference to legislatures to determine when arbitration clauses are not enforceable. However, there have not been any legislative changes in over a decade. The Court generally takes this to mean that the legislative intent is for arbitration clauses to be upheld. On the other hand, it may be that this issue has simply fallen by the wayside in recent years. Regardless, the Court's position on arbitration clauses has created a vacuum because of the lack of legislative response to the apparent unfairness experienced by vulnerable parties who are bound to arbitration clauses through standard form contracts.

The Ontario Court of Appeal's decision in *Heller* represents a possible shift within the arbitration clause jurisprudence in Canada. The decision can be interpreted two ways. On a narrow reading, *Heller* does not significantly alter the position in *Seidel* due to the particular facts that led to the unconscionability holding. Otherwise, the unconscionability reasoning from *Heller* can apply more generally to arbitration clauses that prevent low-value claims from being brought in a class action.

It is possible to build upon *Seidel* without creating a substantive right to class actions, by holding that some categories of arbitration clauses are unconscionable. One option is to establish factors within an existing unconscionability test that determine when an arbitration clause is unfair. Another is to create a specific test for unconscionability of

mandatory arbitration clauses.[49] Either of these would provide a measure of predictability for businesses while protecting the rights of vulnerable parties. Uber has filed leave to appeal to the Supreme Court.[50]

49. See, e.g., *Discover Bank v Superior Court*, 36 Cal 4th 148, 30 Cal Rptr 3d 76 (Sup Ct 2005). The California Supreme Court in *Discover Bank* established a test for the unconscionability of class waiver clauses in consumer contracts: 1) contract of adhesion, 2) disputes that are likely to involve small amounts of money, and 3) a scheme by the stronger party to deliberately cheat large numbers consumers out of. Note that this test was overturned by the US Supreme Court in *AT&T Mobility LLC v Concepcion*, 563 US 333, 131 S Ct 1740 (2011). This test was also mentioned by the Supreme Court of Canada in *Seidel*. However, the Court did not address whether class action waivers are unconscionable because the class waiver clause could not be separated from the invalid arbitration clause. See *Seidel*, *supra* note 1 at para 45.

50. Supreme Court of Canada, Docket 38534, online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38534> [perma.cc/GU2W-8F95].