

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and
RASIER OPERATIONS B.V.

**Appellants
(Respondents)**

- and -

DAVID HELLER

**Respondent
(Appellant)**

**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, ATTORNEY GENERAL
OF ONTARIO, 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

**FACTUM OF THE INTERVENER, CONSUMERS COUNCIL OF CANADA
(Pursuant to Order of this Honourable Court dated October 8, 2019)**

SOTOS LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

Mohsen Seddigh / mseddigh@sotosllp.com
Tel: 416-572-7320
Daniel Hamson dhamson@sotosllp.com
Tel: 416-572-7307 / Fax: 416-977-0717

**Counsel for the Intervener,
Consumers Council of Canada**

CONWAY BAXTER WILSON LLP
400 -411 Roosevelt Avenue
Ottawa ON K2A 3X9

David Taylor / dtaylor@conway.pro
Tel: 613-691-0368 / Fax: 613-688-0271

**Agent for the Intervener Consumers
Council of Canada**

ORIGINAL TO:

THE REGISTRAR OF THE SUPREME COURT OF CANADA

Supreme Court of Canada Building

Ottawa, ON K1A 0J1

AND TO: **TORYS LLP**
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto ON M5K 1N2
Fax: 416.856.7380

Linda Plumpton
Tel: 416.856.819 / lplumpton@torys.com
Lisa Talbot
[Tel: 416.865.8222](tel:416.865.8222) / ltalbot@torys.com

Sarah Whitmore
Tel: 416.865.7315 / swhitmore@torys.com

Davida Shiff
Tel: 416.865.8190 / dshiff@torys.com

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

AND TO: **GOWLING WLG (CANADA) LLP**
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Fax: 613.788.3587

Jeffrey W. Beedell
Tel: 613.786.0171 / Jeff.beedell@gowlingwlg.com

Agent for Counsel for the Appellants,
Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V.

AND TO: **WRIGHT HENRY LLP**
200 Wellington Street West, Suite 602
Toronto ON M5V 3C7
Fax: 416.306.8281

Michael D. Wright
Tel: 416.306.8270 / mwright@wrighthenry.ca
Danielle Stampley
Tel: 416.306.8272 / dstampley@wrighthenry.ca

SAMFIRU TUMARKIN LLP

350 Bay Street, 10th floor
Toronto ON M5H 2S6
Fax: 416-361.0993

Lior Samfiru
Tel: 416.861.9065 / lior@stlawyers.ca

Stephen Gillman
Tel: 416.861.9065 / stephen@stlawyers.ca

Counsel for the Respondent, David Heller

AND TO: **MICHAEL J. SOBKIN**
331 Somerset Street West
Ottawa, ON K2 0J8

Tel: (613) 282-1712 / msobkin@sympatico.ca
Fax: (613)-288-2896

Agent for Counsel for the Respondent, David Heller

AND TO: **THE ATTORNEY GENERAL OF ONTARIO**
Crown Law Office – Civil
720 Bay Street, 8th floor
Toronto, ON M7A 2S9

Christopher P. Thompson
Paul Sheridan

Tel: 416-605-3857/416-467-7781
Fax: 416-326-4181

christopher.p.thompson@ontario.ca
paul.sheridan@ontario.ca

Counsel for the Intervener, The Attorney General of Ontario

AND TO: **JURISTES POWER LAW**
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4

Maxine Vincelette
Tel/Fax: 613-702-5573
mvincelette@powerlaw.ca

Agent for Counsel for the Intervener, Attorney General of Ontario

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
100 King Street West
1 First Canadian Place
Suite 6200, PO Box 50
Toronto ON M5X 1B8

Eric Morgan
Tel: 416-862-5871 / emorgan@osler.com
Fax: 416-862-6666

PERLEY-ROBERTSON, HILL & McDOUGALL LLP
1400-340 Albert Street
Ottawa ON K1R 0A5

John Siwiec
Tel: 613-566-2814 / jsiwiec@perlaw.ca
Fax: 613-238-8775

Counsel for the Intervener, Young Canadian Arbitration Practitioners

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
1900 – 340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1015 / glangen@osler.com
Fax: 613-235-2867

Agent for the Intervener, Young Canadian Arbitration Practitioners

AND TO: **BORDEN LADNER GERVAIS LLP**

1200 – 200 Burrard Street
Waterfront Centre, PO Box 48600
Vancouver BC V7X 1T2

Robert Deane
Craig Chiasson
Hugh Meighen

Tel: 604-640-4250/ 4221
Fax: 604-622-5876/ 416-367-6749

rdeane@blg.com
cchiasson@blg.com
hmeighen@blg.com

Counsel for the Intervener, Arbitration Place

AND TO: **BORDEN LADNER GERVAIS LLP**

World Exchange Plaza
1300 – 100 Queen Street
Ottawa ON K1P 1J9

Karen Perron

Tel: 613-369-4795 / kperron@blg.com / neffendi@blg.com
Fax: 613-230-8842

Agent for the Intervener, Arbitration Place

AND TO: **GOLDBLATT PARTNERS LLP**

20 Dundas Street West, Suite 1039
Toronto ON M5G 2C2

Steven Barrett

Tel: 416-977-6070 / sbarrett@goldblattpartners
Fax: 416-591-7333

Counsel for Intervener, United Food And Commercial Workers Canada

AND TO: **GOLDBLATT PARTNERS LLP**
30 Metcalfe Street, Suite 500
Ottawa ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463 / cbauman@goldblattpartners.com
Fax: 613-235-3041

Agent for Counsel for Intervener, United Food And Commercial Workers Canada

AND TO: **WORKERS' HEALTH AND SAFETY LEGAL CLINIC**
2000 – 180 Dundas Street West, Box 4
Toronto ON M5G 1Z8

Kevin Simms
John Bartolomeo
Tel: 416-971-8832, ext 203/ 202

simmsk@lao.on.ca
bartolj@lao.on.ca

Counsel for the Intervener, Workers Health and Safety Legal Clinic

AND TO: **SUPREME ADVOCACY LLP**
100 – 340 Gilmour Street
Ottawa ON K2P 0R3

Marie-France Major
Tel: 613-695-8855, ext 102 / mfmajor@supremeadvocacy.ca

Agent for the Intervener, Workers Health and Safety Legal Clinic

AND TO: **MONKHOUSE LAW**
220 Bay Street, Suite 900
Toronto ON M5J 2W4

Andrew Monkhouse
Alexandra Monkhouse
Tel: 416-907-9249 / andrew@monkouselaw.com
Fax: 1-888-501-7235

Counsel for the Intervener, Don Valley Community Legal Services

AND TO: **SUPREME LAW GROUP**
900 – 275 Slater Street
Ottawa ON K1P 5H9

Moira S. Dillon

Tel: 613-691-1224 / mdillon@supremelawgroup.ca
Fax: 613-691-1338

Agent for the Intervener, Don Valley Community Legal Services

AND TO: **CANADIAN FEDERATION OF INDEPENDENT BUSINESS**
C/O Corinne Pohlmann
Senior Vice-President
National Affairs and Partnerships
1202-99 Metcalfe Street
Ottawa ON K1P 6L7

Anthony Daimsis

Tel: 613-562-5800, ex 3211 / adaimsis@uottawa.ca
Fax: 613-562-5124

Counsel for the Intervener, Canadian Federation of Independent Business

AND TO: **Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**
University of Ottawa, Faculty of Law
Common Law Section
57 Louis Pasteur Street
Ottawa ON K1N 6N5

David Fewer

Tel: 613-562-5800, ext 2558 / dfewer@uottawa.ca
Fax: 613-562-5417

Agent for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith

Tel: 416-863-5595 / Mmilne-smith@dwpv.com
Fax: 416-863-0871

Chantelle Cseh
Tel: 416-367-7552 / ccseh@dwpv.com

Counsel for the Intervener, Canadian Chamber of Commerce

AND TO: **GOWLING WLG (CANADA) LLP**
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Matthew Estabrooks

Tel: 613.786.0211 / matthew.estabrooks@gowlingwlg.com
Fax: 613.788.3573

Agent for Counsel for the Intervener, Canadian Chamber of Commerce

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
595 Burrard Street, PO Box 49314
Suite 2600, Three Bentall Centre
Vancouver BC V7X 1L3

Joe McArthur
Rahat Godil
Laura Cundari
Justin Manoryk
Andrew Kavanagh

Tel: 604-631-3300 / Joe.mcarthur@blakes.com
Fax: 604-631-3309

Counsel for the Interveners, Chartered Institute of Arbitrators (Canada) Inc. and
Toronto Commercial Arbitration Society

AND TO: **GOWLING WLG (CANADA) LLP**
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt

Tel: 613.786.8695 / lynne.watt@gowlingwlg.com
Fax: 613.788.3587

Agent for Counsel for the Interveners, The Chartered Institute of Arbitrators
(Canada) Inc. and Toronto Commercial Arbitration Society

AND TO: **CAZA SAIKALEY LLP**
350-220 Laurier Avenue
Ottawa ON K1P 5Z9

Alyssa Tomkins
James Plotkin

Tel: 613-565-2292
Fax: 613-565-2087

atomkins@plaideurs.ca
jplotkin@plaideurs.ca

Counsel for the Intervener, The Canadian American Bar Association

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
100 King Street West
1 First Canadian Place
Suite 6200, PO Box 50
Toronto ON M5X 1B8

Robert Carson
Lauren Harper

Tel: 416-862-4235 / rcarson@osler.com
Fax: 416-862-6666

Counsel for the Intervener, Montreal Economic Institute

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
1900 – 340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen

Tel: 613-787-1015 / glangen@osler.com
Fax: 613-235-2867

Agent for the Intervener, Montreal Economic Institute and Parkdale Community
Legal Services

AND TO: **INCOME SECURITY ADVOCACY CENTRE**
1500-55 University Avenue
Toronto ON M5J 2H7

Nabila Qureshi

Karin Baqi
Tel: 416-597-5820, ext. 5156/5157
Fax: 416-597-5821

qureshn@lao.on.ca
baqikr@lao.on.ca

PARKDALE COMMUNITY LEGAL SERVICES
1229 Queen Street West,
Toronto ON M6K 1L2

John No
Tel: 416-531-2411, ext. 227 / noj@lao.on.ca
Fax: 416-531-0885

Counsel for the Interveners, Income Security Advocacy Centre and Parkdale
Community Legal Services

AND TO: **GOLDBLATT PARTNERS LLP**
30 Metcalfe Street, Suite 500
Ottawa ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463 / cbauman@goldblattpartners.com
Fax: 613-235-3041

Ottawa Agent for Counsel for the Interveners, Income Security Advocacy Centre
and Parkdale Community Legal Services

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
1 Place Ville Marie, Suite 2500
Montreal, PQ H3B 1R1

Pierre Bienvenu
Andres C Garin
Alison FitzGerald

Tel: 514-847-4747
Fax: 514-286-5474

Pierre.bienvenu@nortonrosefulbright.com
andres.garin@nortonrosefulbright.com
Alison.fitzgeral@nortonrosefulbright.com

Counsel for the Intervener, The International Chamber of Commerce

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
45 O'Connor Street, Suite 1500
Ottawa ON K1P 1A4

Matthew J. Halpin
Tel: 613-780-8654 / matthew.halpin@nortonrosefulbright.com
Fax: 613-230-5459

Agent for Counsel for the Intervener, The International Chamber of Commerce

AND TO: **ALLEN/ McMILLAN LITIGATION COUNSEL**
1550- 1185 West Georgia Street
Vancouver BC V6E 4E6

Wes McMillan
Greg J. Allen
Tel: 604-282-3982

greg@amlc.ca
wes@amlc.ca

Counsel for the Intervener, Community Legal Assistance Society of BC

AND TO: **GIB VAN ERT LAW**
148 Third Avenue
Ottawa ON K1S 2K1

Gib Van Ert
Tel: 613-408-2497 / gib@gibvanertlaw.com
Fax: 613-651-0304

Agent for the Intervener, Community Legal Assistance Society of BC

AND TO: **BENNETT JONES LLP**
3400 One First Canadian Place
PO Box 130
Toronto ON M4X 1A4

Andrew D. Little
Ranjan K. Agarwal
Charlotte Harman

Tel: 416-863-1200
Fax: 416-863-1716

littlea@bennettjones.com

agarwalr@bennettjones.com
harmanc@bennettjones.com

Counsel for the Intervener, ADR Chambers Inc.

AND TO: **BENNETT JONES LLP**
World Exchange Plaza
1900 – 45 O’Connor Street
Ottawa ON K1P 1A4

Mark Jewett
Tel: 613-683-2328 / jewettm@bennettjones.com
Fax: 613-683-2323

Agent for the Intervener, ADR Chambers Inc.

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and
RASIER OPERATIONS B.V.

**Appellants
(Respondents)**

- and -

DAVID HELLER

**Respondent
(Appellant)**

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS..... 1

PART II - POSITION ON THE QUESTIONS IN ISSUE..... 1

PART III - ARGUMENT..... 1

PART IV - COSTS..... 8

PART V - ORAL ARGUMENT 8

PART VI – TABLE OF AUTHORITIES..... 10

PART VII – STATUTES..... 12

PART I - OVERVIEW AND STATEMENT OF FACTS

1. The intervener, Consumers Council of Canada (“CCC”), focusses these submissions on its proposed analytical framework for a doctrine of unconscionability that is consistent with modern-day realities.
2. Freedom and sanctity of contracts, party autonomy, and economic certainty and efficiency, ought not lead to the enforcement of contracts regardless of circumstances. An overly restrictive approach to the equitable doctrine of unconscionability risks encasing the law in 19th Century norms that no longer reflect 21st Century realities. Tipping the balance too far in favour of enforcing arbitration agreements in the modern Canadian reality ignores access to justice.
3. The analytical framework for the doctrine of unconscionability in the context of a contract of adhesion, as is the case before the Court, should allow for consideration of how the contract was formed and the actual effects of the contract. If both the formation process and substance of the contract are manifestly unfair and improvident, the contract should be read down or found to be unconscionable. This approach would be responsive to the realities of the modern economy and society, prevent abuse, and at the same time not jeopardize the governing policies underlying contract law and arbitration.

PART II - POSITION ON THE QUESTIONS IN ISSUE

4. CCC takes no position on the outcome of this appeal. Regarding the issue of the applicable test for unconscionability, CCC submits that the four-factor test developed in some Ontario caselaw and supported on this appeal by the appellants, Uber Technologies Inc., Uber Canada, Inc., Uber B.V., and Rasier Operations B.V. (collectively, “Uber”), is erroneous and should be abandoned. In its place, a principled analytical framework, as described herein, should be adopted.

PART III - ARGUMENT

A. Canadian Law on Unconscionability Requires Clarification

5. The doctrine of unconscionability is an equitable exception to the proposition that contracts, including arbitration agreements, must always be enforced. In this regard, as a majority

of this Court recently held in *TELUS Communications Inc. v Wellman* (“*TELUS*”),¹ “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”.

6. Canadian courts have employed inconsistent approaches to the doctrine due in part to the absence of guidance from this Court. This has resulted in what one academic has referred to as the “inconsistency, instability or vacuity of [the doctrine’s] internal application criteria”.²

7. As this appeal demonstrates, legal and factual issues that often arise in modern society call for a versatile and pragmatic analytical framework for the doctrine of unconscionability. That framework needs to appropriately balance competing legislative, economic, and societal policies and realities. This appeal provides an opportunity for the Court to clarify the law.

B. Competing Policies Support a Versatile and Principled Approach to Contracts and Equity

8. In the digital era, the global rise of entities such as Uber allows persons to provide goods and services online or for a succession of short-term engagements. This economic model is known as the “gig economy”.³ Coinciding with the expansion of the gig economy has been a rise in online contracts of adhesion.⁴ A defining characteristic of such agreements is how easy it is for parties to enter into them. Offerors of these types of contracts typically only require prospective offerees to tap “I Agree” in order to accept their terms.⁵ Such agreements will be referred to in this factum as “tap ‘I Agree’ contracts”.

9. The increase in tap “I Agree” contracts and similar online contracts of adhesion impacts masses of consumers, prosumers, and other individuals. The common thread amongst these persons is that they must constantly tap “I Agree” to complex, non-negotiable contracts in order

¹ *TELUS Communications Inc. v Wellman*, 2019 SCC 19 at para 85 [*TELUS*].

² Rich Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine,” (2005) 84: 2 Can Bar Rev 171 at 172.

³ Nicole Kobie, “What is the gig economy and why is it so controversial?,” (14 September 2018, *Wired*, online: <<https://www.wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy>>).

⁴ *Douez v Facebook, Inc.*, 2017 SCC 33 at para 36 [*Douez*].

⁵ *Douez*, *supra* note 4 at paras 98-99.

to access goods and services. Everyday experience tells us that very few people actually read these lengthy terms and conditions.

a. Freedom of Contract and Party Autonomy

10. Uber and some interveners on this appeal rely on the concepts of freedom of contract and party autonomy as bases for enforcing the arbitration clause at issue in any and all circumstances.⁶

11. However, freedom of contract and party autonomy are not absolute values,⁷ and cannot be enlisted to enforce all contracts irrespective of the context. While this Court has emphasized the significance of party autonomy as a rationale for enforcing arbitration agreements, most recently in *TELUS*,⁸ it acknowledged that the weight to be afforded to that concept is not absolute, but instead fluctuates according to the circumstances. On this point, writing for the majority in *TELUS*, Justice Moldaver observed that “the concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully depending on the context”.⁹

12. There can be no doubt that party autonomy and freedom of contract are fully engaged at one end of the spectrum where, for example, contracts result from negotiations between sophisticated commercial parties with equal bargaining power. As one moves farther down the spectrum, however, where parties’ sophistication and relative bargaining power become polarized, the concepts of party autonomy and freedom of contract devolve into legal fictions.¹⁰ As noted by Justice Abella in the analysis of one such agreement in *Douez*, these contracts are defined by the fact of their non-negotiable nature:

[T]here is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. ... [O]ne must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.¹¹

⁶ See e.g., Factum of the Appellants Uber Technologies Inc. et al., at para 64 [Factum of the Appellants].

⁷ SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 303 [Waddams, *Law of Contracts*].

⁸ *TELUS*, *supra* note 1 at para 52.

⁹ *TELUS*, *supra* note 1 at para 53.

¹⁰ *TELUS*, *supra* note 1 at paras 160, 165.

¹¹ *Douez*, *supra* note 4 at para 98.

13. The disparity of bargaining power, and the casual and instantaneous creation of complex agreements, could not have been envisioned by the courts of the 19th Century, which viewed party autonomy as the preeminent and often sole factor in contractual interpretation.

c. Economic Certainty and Efficiency

14. Another set of interrelated policy objectives that are often cited in support of the enforcement of arbitration agreements is that of economic certainty and efficiency. Like the concepts of freedom of contract and party autonomy, Uber and certain interveners urge this Court to accept certainty and efficiency as rationales for upholding the subject arbitration clause on this appeal.¹²

15. At the core of the concept of certainty, insofar as it relates to the enforcement of arbitration agreements, is the notion that parties who mutually agree to resolve their disputes by way of an alternative dispute resolution procedure ought to be able to trust that this procedure will be adhered to when a dispute arises.

16. Economic efficiency is typically expressed in terms of reductions in time and cost in respect of the management or resolution of disputes. The late Justice Scalia advanced this argument in a line of decisions of the US Supreme Court¹³ where that court held, by slim majority, that individual arbitration is to be preferred to both class actions and class arbitrations because of its simplicity, informality, expeditiousness, efficiency and costs saving features.¹⁴ According to these decisions, the concept of “efficiency”, as it relates to the administration of justice, is an economic concept measured by “costs”, “savings”, and “speed”.¹⁵

17. Like freedom of contract and party autonomy, however, the concepts of certainty and efficiency are not absolute values.¹⁶ They exist on a spectrum, at the farthest end of which

¹² Factum of the Appellants, *supra* note 6 at para 20.

¹³ *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011) [AT&T]; *American Express Co. et al. v Italian Colors Restaurant*, 570 US 228 (2013); *DIRECTV v Imbrugia et al.*, 577 US ___ (2015).

¹⁴ *AT&T*, *supra* note 13 at paras 344-356.

¹⁵ Hila Keren, “Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity” (2016) 2:1 Can J Comparative & Contemporary L 339 at 363.

¹⁶ *Cukurova Finance International Limited et al (Appellants) v Alfa Telecom Turkey Limited (Respondent)* [2013] UKPC 20 at para 43.

arbitration agreements contain prohibitive conditions for commencing a proceeding. In such instances, “certainty” and “efficiency” are not the certainty and efficiency of arbitration. Rather, certainty is merely “a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually”.¹⁷ The only certainty is impunity, which also provides efficiencies to the powerful party.

18. For example, one study found that only about 0.008% of non-unionized American employees covered by an arbitration agreement, filed an arbitral claim per year between 2003 and 2008.¹⁸ Similarly in Canada, in the recent *TELUS* case, there was no evidence on the record of a single person amongst a two-million-person class having commenced arbitration to resolve their dispute with Telus.¹⁹

19. Economic “certainty” and “efficiency” in these circumstances is code for impunity. Such impunity clashes with other desired policy objectives, including the legislative objective of providing access to justice for those with claims that are not individually viable through the procedural mechanism of a class proceeding.²⁰

C. The Court Should Adopt a Pragmatic and Versatile Unconscionability Test

20. The doctrine of unconscionability needs an analytical framework that recognizes the limits of the policies that govern the enforcement of adhesion contracts generally, and arbitration agreements specifically. The framework needs to reflect the realities of the modern Canadian society and economy. Acknowledging the reasonable limits of these concepts will preserve and ultimately promote their appropriate application. Put another way, concepts such as “freedom of contract [are] best preserved, not by denying the court’s power to relieve for unconscionability, but by openly recognizing it”.²¹ Arbitration as an institution does not benefit from being used as a tool for impunity rather than its intended dispute resolution function.

¹⁷ *Seidel v TELUS Communications Inc.*, 2011 SCC 15 at para 1 [*Seidel*], citing *Griffin v Dell Canada Inc.*, 2010 ONCA 29 at para 30.

¹⁸ Jean R Sternlight, “Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection” (2015) 80:4 Brook L Rev 1309 at 1330.

¹⁹ *TELUS*, *supra* note 1 (Admission by TELUS at the hearing).

²⁰ *Seidel*, *supra* note 17 at para 135.

²¹ Waddams, *Law of Contracts*, *supra* note 7 at 454.

21. One thread of Canadian caselaw has resembled the jurisprudence of some other common law countries by focussing the unconscionability analysis to some extent on the following two elements: (a) The process that led to contract formation; and (b) The substance or terms of the contract.²²

22. Variations of this two-pronged approach to the doctrine of unconscionability have been adopted in British Columbia,²³ Australia, and New Zealand.²⁴ The clearest manifestation of this analytical approach can be found at the state level in the United States where a contract needs to be both “procedurally” and “substantively” unconscionable.²⁵

23. On this appeal, there are at least two competing tests for the doctrine of unconscionability: (a) a four-element test developed by some caselaw in Ontario²⁶ (the “**Ontario Test**”) and (b) the two-element test developed under BC law referenced above.

²² SM Waddams et al., *Cases and materials on contracts*, 6th ed (Toronto: Emond Montgomery Publications Limited, 2018) at 557.

²³ Courts in British Columbia and elsewhere have applied a test focused on the two factors of (a) inequality of bargaining power, and (b) unfairness or improvidence in the contract. See e.g., *Harry v Kreutziger* (1978), 9 BCLR 166 at para 14 [*Harry*]; *Klassen v Klassen*, 2001 BCCA 445 at paras 56-57 [*Klassen*], citing *Harry* at para 14; *McNeill v Vandenberg*, 2010 BCCA 583 at para 15, citing *Harry* and *Klassen*; *Roy v 1216393 Ontario Inc.*, 2011 BCCA 500 at para 29 [*Roy*], citing *Principal Investments Ltd. v Thiele Estate*, [1987] 12 BCLR (2d) 258 at 263 [*Principal Investments Ltd.*]; *Loychuk v Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para 31, citing *Roy* at para 29, citing *Principal Investments Ltd.* at 263; *Marshall v Canada Permanent Trust Co.*, [1968] 69 DLR (2d) 260.

²⁴ Bigwood, *supra* note 2 at 179; The test for unconscionability in Australia and New Zealand similarly focusses on (a) equitable “wrongdoing” by one party; and (b) that party took “unconscientious advantage” of the other party’s “disabling condition or circumstances”.

²⁵ American state law on the doctrine of unconscionability is more explicit about the binary analytical divide: A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” *AT&T*, *supra* note 13. See also generally Willy E Rice, “Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees’ Contractual Rights?—Legal and Empirical Analyses of Courts’ Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses under the Federal Arbitration Act, 1800-2015” (2016) 25 BU Pub Interest LJ 143 at 168-169.

²⁶ The test outlined in the Ontario Court of Appeal’s 2007 decision in *Titus v William F. Cooke Enterprises Inc.*, 2007 ONCA 573 at para. 38, which Nordheimer JA applied here, determines whether a contractual provision is unconscionable if all the following elements are present:

- (a) a grossly unfair and improvident transaction;
- (b) a victim’s lack of independent legal advice or other suitable advice;
- (c) 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
- (d) the other party's knowingly taking advantage of this vulnerability.

24. CCC submits that this Court ought to adopt a two-pronged process/substance framework as described in the section below.

D. CCC's Proposed Test

25. CCC submits that Canada's unconscionability test should focus on the process through which a contract was formed and the terms of the contract to determine whether it would be unconscionable to enforce that contract. A contract would have to be found to be sufficiently unfair and improvident both in terms of process and substance to be deemed unconscionable.

26. The focus of the procedural inquiry in each case must be on the factors relevant to that case. Not all factors will be present or relevant in every case, nor should their presence be required in all circumstances—as is the case with the Ontario Test. A non-exhaustive list of examples of procedural factors includes the following:

- Whether an overwhelming imbalance in bargaining power existed at the time of contracting caused by, for example, the evolving forces and circumstances of the gig economy, disparate economic circumstances, commercial sophistication, or differing mental or physical capacity;
- Whether surrounding circumstances decreased a party's reasonable opportunity to understand the contract's terms;
- Whether one party knowingly took advantage of the other's vulnerability;
- Whether the agreement is a tap "I Agree" contract or other contract of adhesion;
- Whether the vulnerable party received independent legal advice;²⁷ or
- Whether the drafter of the contract concealed material terms in fine print or the sheer length of the agreement.

27. The focus of the substantive inquiry must similarly be on the factors relevant to each particular case. Not all factors will be present or relevant in every case, nor should their presence

²⁷ While BC courts have generally applied a binary analysis, they have considered factors such as independent legal advice relevant and indeed "overwhelming" where that factor was present and applicable. See e.g., *Ma v MIV Therapeutics Inc.*, 2004 BCCA 483 at para 24.

always be required. A non-exhaustive list of examples of substantive factors includes the following:

- Whether the contractual terms unreasonably favour or benefit the more powerful party;
- Whether the contract contains unfair, overly harsh or oppressive terms;
- Whether the contract produces absurd consequences for one party;
- Whether the allocation of risks between the parties is grossly imbalanced or unfair;
- Whether the contract purports to take away statutory protections; or
- Where the agreement contains an arbitration clause:
 - whether the terms governing arbitration create a viable and proportionate arbitration mechanism; and
 - whether it is reasonably foreseeable that parties will successfully use the arbitration mechanism to resolve a typical dispute.

28. A two-pronged test that scrutinizes both the formation process and substance of contracts will be able to provide consistent and fair results. A contract that meets only one branch of the test would not be unconscionable. For example, an arbitration agreement borne out of a one-sided process such as a tap “I Agree” contract that nevertheless provides a viable and proportionate arbitration mechanism will not be found to be unconscionable. By the same token, an arbitration agreement truly and freely negotiated between sophisticated commercial parties with similar bargaining power would not be unconscionable even if its terms are unduly onerous for one party.

PART IV - COSTS

29. CCC seeks no costs and requests that no costs be awarded against it.

PART V - ORAL ARGUMENT

30. By an Order dated October 8, 2019, the Court granted CCC leave to present oral argument not exceeding five minutes at the hearing of this appeal.

DATED at Toronto, Ontario, this 17th day of October, 2019

Mohsen Seddigh
for Mohsen Seddigh

Daniel Hamson
Daniel Hamson

Counsel for the Intervener, Consumers Council of Canada

PART VI – TABLE OF AUTHORITIES

Cases	Paragraphs
1. <i>American Express Co. et al. v Italian Colors Restaurant</i> , 570 US 228 (2013)	
2. <i>AT&T Mobility LLC v Concepcion</i> , 563 US 333 (2011)	344-356
3. <i>Cukurova Finance International Limited et al (Appellants) v Alfa Telecom Turkey Limited (Respondent)</i> [2013] UKPC 20	43
4. <i>DIRECTV v Imbruglia et al.</i> , 577 US ____ (2015)	
5. <i>Douez v Facebook, Inc.</i> , 2017 SCC 33	36, 98, 115, 116
6. <i>Griffin v Dell Canada Inc.</i> , 2010 ONCA 29	30
7. <i>Harry v Kreutziger</i> (1978), 9 BCLR 166	14
8. <i>Hunter Engineering Co. v Syncrude Canada Ltd.</i> , [1989] 1 SCR 426	
9. <i>Klassen v Klassen</i> , 2001 BCCA 445	56, 57
10. <i>Loychuk v Cougar Mountain Adventures Ltd.</i> , 2012 BCCA 122	31
11. <i>Ma v MIV Therapeutics Inc.</i> , 2004 BCCA 483	24
12. <i>Marshall v Canada Permanent Trust Co.</i> , [1968] 69 DLR (2d) 260	
13. <i>McNeill v Vandenberg</i> , 2010 BCCA 583	15
14. <i>Norberg v Wynrib</i> , [1992] 2 SCR 226	
15. <i>Principal Investments Ltd. v Thiele Estate</i> , [1987] 12 BCLR (2d) 258	
16. <i>Roy v 1216393 Ontario Inc.</i> , 2011 BCCA 500	29
17. <i>Seidel v TELUS Communications Inc.</i> , 2011 SCC 15	1, 135
18. <i>TELUS Communications Inc. v Wellman</i> , 2019 SCC 19	52, 53, 85, 160, 165
19. <i>Tercon Contractors Ltd. v British Columbia (Transportation and Highways)</i> , 2010 SCC 4	69, 121-123
20. <i>Titus v William F. Cooke Enterprises Inc.</i> , 2007 ONCA 573	38
Secondary Sources	
21. Rich Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine,” (2005) 84: 2 Can Bar Rev 171, <access here>	172, 179

22. Hila Keren, “Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity” (2016) 2:1 Can J Comparative & Contemporary L 339 < access here >	363
23. Nicole Kobie, “What is the gig economy and why is it so controversial?”, (14 September 2018, <i>Wired</i> , online: < https://www.wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy >	
24. Willy E Rice, “Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees’ Contractual Rights?—Legal and Empirical Analyses of Courts’ Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses under the Federal Arbitration Act, 1800-2015” (2016) 25 BU Pub Interest LJ 143 < access here >	168-169
25. Jean R Sternlight, “Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection” (2015) 80:4 Brook L Rev 1309, < access here >	1330
26. SM Waddams, <i>The Law of Contracts</i> , 7th ed (Toronto: Thomson Reuters, 2017), < access here >	303, 454
27. SM Waddams et al, <i>Cases and materials on contracts</i> , 6th ed (Toronto: Emond Montgomery Publications Limited, 2018), < access here >	557

PART VII – STATUTES

None