Court File Number: 38534

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N :

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

APPELLANTS
(Respondents)

\- and -

DAVID HELLER

RESPONDENT
(Appellant)

\- and -

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TABLE OF CONTENTS

PART I ~ OVERVIEW **1**

PART II ~ QUESTIONS IN ISSUE **2**

PART III ~ STATEMENT OF ARGUMENT **3**

A. Ontario's Arbitration Law Regime Is Guided by the Principles of Freedom of Contract and the Requirement That Parties Be Held to Their Bargains *3*

B. The Ontario Court of Appeal's Approach Creates Uncertainty and Unpredictability for Canadian Businesses *6*

(i) "Competence-competence" 7

(ii) Alleged employment relationship 7

(iii) Unconscionability 8

PART IV ~ SUBMISSIONS ON COSTS **10**

PART V ~ TABLE OF AUTHORITIES & LEGISLATION RELIED UPON **11**

PART I ~ OVERVIEW

1. The Canadian Chamber of Commerce (the "**Chamber**") takes no position on the outcome of this appeal. Instead, the Chamber limits its submissions to the overarching principles that should guide a court's analysis when considering the enforceability of an arbitration agreement. In brief, commercial certainty demands that parties be held to their bargains. Adopting strained interpretations of (i) the principle of "competence-competence", (ii) the *Employment Standards Act, 2000* and (iii) the unconscionability doctrine in order to avoid an arbitration clause undermines commercial certainty, and should be avoided.

2. The Chamber is Canada's largest and most representative business organization. The Chamber represents the interests of more than 200,000 businesses from across Canada, of all sizes, and from every sector of the economy. Many of the Chamber's members will be directly impacted by potential changes to the law concerning the enforcement of arbitration agreements by Canadian courts.

3. Freedom of contract—and the concomitant obligation that parties abide by their bargains—are the guiding principles that underlie Ontario's arbitration legislation (as well as the arbitration legislation of other Canadian provinces and a host of jurisdictions internationally). When parties enter into a mandatory arbitration agreement, they have decided that any disputes governed by that agreement do not warrant judicial intervention. Absent unconscionability, parties should be held to such agreements. These guiding principles work together to provide a sense of certainty and confidence that when parties agree to arbitrate, Ontario courts will respect that agreement and enforce it according to its terms, absent certain clearly defined exceptions.

4. It is critical to the Canadian economy that entities doing business in Canada enjoy a sense of certainty and predictability in their commercial dealings, including with respect to the enforcement of arbitration agreements. It is well-established that arbitration can offer a fast, private, effective, and low-cost means of resolving disputes, subject to pre-defined rules agreed upon by the parties to the arbitration. For these and other reasons, businesses operating in Canada frequently choose to include mandatory arbitration provisions in their contracts. When businesses make the choice to arbitrate their disputes, they are entitled to expect that the courts will respect their agreements, subject to clearly defined exceptions. This fosters commercial certainty, which is indispensable to successful business relations.

5. The decision of the Ontario Court of Appeal did not give sufficient regard to freedom of contract and the requirement that parties be held to their bargains. First, by removing challenges to the validity of the arbitration clause from the scope of the "competence-competence" principle, the Court of Appeal eroded a key bulwark protecting parties' freedom to contract in favour of arbitration. Second, by assuming that the Respondent "can prove that which he pleads" about his employment status, the Court of Appeal has condoned parties simply pleading around express agreements to arbitrate. Third, by adopting a weakened test for a finding of unconscionability, the decision below creates the risk that any arbitration agreement between parties of unequal bargaining power may be found to be unconscionable and unenforceable.

6. The combined effect of the Court of Appeal's decision on these issues is to undermine commercial certainty and predictability, to the detriment of the Chamber's membership, including international entities doing business in Canada. This has the potential to deter commercial parties from arbitration, to undermine the purposes of Ontario's arbitration legislation, and to encourage commercial parties to demand other terms in agreements in order to protect their interests. The decision below calls into question Canada's reputation as an arbitration-friendly state,[1] to the potential detriment of the Canadian economy more broadly (and Canadian society as a whole).

7. For these reasons, the Chamber asks that this Court expressly affirm the central importance of the guiding principles of freedom of contract and the requirement that parties be held to their bargains when considering the enforceability of arbitration agreements.

PART II ~ QUESTIONS IN ISSUE

8. As set out in detail in Part III of this Factum, the Chamber's submissions on this appeal are restricted to (i) the importance of the principles of freedom of contract and the requirement that parties be held to their bargains freely made in analyzing the enforceability of arbitration agreements, and (ii) the practical issues that the Court of Appeal's decision gives rise to for Canadian businesses and companies that do business in Canada.

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[1] Uniform Law Conference of Canada, "International Commercial Arbitration – Report of the Working Group" (August 18, 2012) at paras. 4-5 [ULCC Working Group Report].

PART III ~ STATEMENT OF ARGUMENT

A. Ontario's Arbitration Law Regime Is Guided by the Principles of Freedom of Contract and the Requirement That Parties Be Held to Their Bargains

9. This Court has repeatedly and consistently emphasized the importance of freedom of contract generally.[2] As noted by Cartwright C.J. in *Hofer v. Hofer* nearly 50 years ago, "one of the liberties chiefly prized by a normal man is the liberty to bind himself."[3] This foundational principle allows individuals and businesses to structure their affairs as they see fit and benefit from the resulting certainty. Freedom of contract is the "value recognized in the strong policy enforcing arbitration agreements"[4] and "the parties' freedom to contract governs the arbitration process and must be respected."[5] Indeed, this Court has observed that arbitration agreements reflect "the autonomy of the parties"[6] and that "consensual arbitration and party autonomy are inseparable."[7]

10. Freedom of contract animates, and is "the fundamental premise"[8] that underpins, Ontario's arbitration legislation.[9] Ontario (among other provinces)[10] has based its domestic *Arbitration Act,*

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2 *National Trust Co. v. Mead,* [1990] 2 S.C.R. 410 at p. 426; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at p. 378; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108 at paras. 36-37; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 16.

3 *Hofer v. Hofer,* [1970] S.C.R. 958 at p. 963 (concurring).

4 *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339 at para. 85 [*Jean Estate*].

5 Alberta Law Reform Institute, "Final Report No. 103, *Arbitration Act*: Stay and Appeal Issues" (2013) at p. 4, para. 10.

6 *GreCon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46 at paras. 20-22 [*GreCon*].

7 *TELUS Communications Inc. v Wellman*, 2019 SCC 19 at para. 52 [*Wellman*].

8 J. Brian Casey, "Arbitration Notebook" 25 Advocates' Soc. J. No. 3, 23-25, Winter 2006 at para. 12 [Casey].

9 See *Wellman* at paras. 8, 131-132. See also *Jean Estate* at paras. 29, 85, where the Ontario Court of Appeal observed that freedom of contract is "the value recognized in the strong policy enforcing arbitration agreements". See also, more generally: *BWV Investments Ltd. v. Saskferco Products Inc.,* [1994] S.J. No. 629 at para. 28 (Sask. C.A.) [*BWV*]; Casey at para. 12.

10 These other provinces are Alberta, Saskatchewan, Quebec, New Brunswick, Manitoba, and Nova Scotia. See J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in*

1991[11] on the *Uniform Arbitration Act*[12] adopted by the Uniform Law Conference of Canada in 1990.[13] The *Uniform Arbitration Act* reflects the propositions contained in the Alberta Commissioners' report to the 1989 Conference on Domestic Arbitrations [the "**Alberta Report**"].[14] The Alberta Report recognized that "people choose arbitration…to escape the judicial system, and…the judicial system should not be imposed upon them."[15] The Alberta Report recommended that the *Uniform Arbitration Act* identify "specific circumstances" for judicial intervention in arbitration agreements, contrary to the broad discretion that previously existed[16] which enabled "judicial interference with the parties' freedom to contract."[17] This proposal was reflected in section 6 of the *Uniform Arbitration Act*, titled "Court intervention limited", which specified the narrow circumstances in which the courts could intervene in arbitration matters.[18]

11. Freedom of contract similarly guides the *International Commercial Arbitration Act, 2017* [the "***ICAA***"].[19] As noted above, the 1990 *Uniform Arbitration Act* emphasizes party freedom in crafting arbitration agreements, and its principles are "recognisably those of the [*UNCITRAL Model Law on International Commercial Arbitration*]" [the "**Model Law**"].[20] Party autonomy, which as noted above necessarily encompasses freedom of contract, is one of the Model Law's

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Canada: A Guide to Domestic and International Arbitrations (Canada: Thomson Reuters; 2018) at p. 1:13 [McEwan & Herbst].

11 S.O. 1991, c. 17.

12 Uniform Law Conference of Canada, *Uniform Arbitration Act* (1990) [*Uniform Arbitration Act*].

13 *Wellman* at para. 49; "Bill 42, *An Act to Revise the Arbitrations Act*", 2nd reading, Ontario, *Official Report of Debates (Hansard)*, 35-1 (November 5, 1991) (available online) at 1550 [Hansard of Second Reading of Bill 42].

14 *Uniform Arbitration Act* at p. 2-3 (Commentaries – General).

15 Uniform Law Conference of Canada, "Proceedings of the Seventy-First Annual Meeting" (August 1989), Appendix B "Report of the Alberta Commissioners" at p. 125 (emphasis added) [Alberta Report].

16 Alberta Report at p. 125.

17 *Wellman* at para. 131.

18 *Uniform Arbitration Act,* s. 6; see also *Wellman* at paras. 131-132 regarding the important consideration given to freedom of contract by the drafters of the *Uniform Arbitration Act*.

19 S.O. 2017, c. 2, Sched. 5 [*ICAA*].

20 *Uniform Arbitration Act* at p. 2-3 (Commentaries – General).

"philosophical cornerstone[s]."[21] As the *ICAA* serves to implement the Model Law in Ontario,[22] the *ICAA* is equally guided by the principle of freedom of contract and its emphasis on party autonomy.

12. Parties doing business in Canada frequently include mandatory arbitration provisions in their contracts.[23] In doing so, they have (subject to certain clearly defined exceptions) freely decided that any disputes arising between them do not warrant judicial intervention. Such provisions afford commercial certainty by confirming the parties' preferred procedure for resolving their disputes in a timely, inexpensive and predictable manner.

13. Freedom of contract is hollow without the requirement that parties adhere to their bargains freely made. Parties (including both businesses and individuals) that agree to arbitrate their disputes should have confidence that they will enjoy arbitration's many benefits if disputes arise, because they know that their counterparty is bound by their agreement. Indeed, Ontario's (then) Attorney General noted that the *Arbitration Act, 1991* is guided by the principle that "parties to a valid arbitration agreement should abide by their agreements."[24] As recently confirmed by this Court in *Wellman*,[25] under a properly functioning arbitration regime, "the law and the courts…ensure that the parties stick to their agreement to arbitrate."[26]

14. As with freedom of contract, the requirement that parties be held to their bargains animates the *ICAA*. A guiding principle of the 1990 *Uniform Arbitration Act*, shared with the Model Law incorporated by the *ICAA*, is that parties "who enter into valid arbitration agreements should be held to those agreements."[27] The principle that parties should abide by their arbitration agreements goes "hand in hand" with the policy of limited court intervention in arbitration

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21 United Nations Commission on International Trade Law, "UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration" (2012) at p. 34, para. 6 [UNCITRAL Digest].

22 Schedule 2 of *ICAA*.

23 *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531 at para. 23 [*Seidel*]; *10718 Nfld. Inc. v. St. John's (City)*, 2018 NLSC 82 at para. 74.

24 "Bill 42, *An Act to Revise the Arbitrations Act*", 1st reading, Ontario, *Official Report of Debates (Hansard)*, 35-1 (March 27, 1991) (available online) at 1510; see also generally 1340-1350, 1500-1510.

25 *Wellman* at paras. 50-51; Hansard of Second Reading of Bill 42 at 1550.

26 *Wellman* at para. 50.

27 *Uniform Arbitration Act* at p. 2-3 (Commentaries – General).

matters[28] which "finds expression throughout modern Canadian arbitration legislation."[29] Under the *ICAA*, a court may stay proceedings upon referring the parties to arbitration, giving effect to this principle.[30]

15. Freedom of contract and adhering to one's bargain are therefore essential considerations when assessing the enforceability of arbitration agreements governed by the laws of Ontario. These principles work in tandem to foster "certainty and foreseeability" for businesses.[31] Indeed, "predictability in the enforcement of dispute resolution provisions is an indispensable precondition" to various business transactions.[32] These benefits explain why, absent legislative intervention, courts enforce contracts "freely entered into, even a contract of adhesion, including an arbitration clause."[33] To do otherwise would create commercial uncertainty and undermine the emphasis on private ordering at the core of Canada's economy.

16. Exceptions to mandatory arbitration should only be enacted by the legislature, as Ontario did in amending the *Consumer Protection Act*[34] following the decision in *Kanitz v. Rogers Cable Inc.*[35] Such exceptions cannot be unilaterally manufactured by a party to an arbitration agreement simply by (for example) pleading the applicability of the *Employment Standards Act, 2000*.[36] If parties can evade their bargains so easily, businesses will be less likely to adopt such illusory provisions and will seek to protect their interests by other means, thus undermining the entire purpose of, and benefits from, the *Arbitration Act, 1991* and the *ICAA*.

B. The Ontario Court of Appeal's Approach Creates Uncertainty and Unpredictability for Canadian Businesses

17. In disregarding the parties' contractual arrangement in a manner that was inconsistent with the principles underlying Ontario's arbitration legislation and governing jurisprudence, the Court of Appeal's decision creates uncertainty and unpredictability for companies doing business in

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28 *Wellman* at para. 55.
29 *Wellman* at para. 55.
30 *ICAA,* s. 9.
31 *GreCon* at para. 22.
32 UNCITRAL Digest at p. 35, para. 6; see also *BWV* at para. 32.
33 *Seidel* at para. 2.
34 S.O. 2002, c. 30, Sched. A.
35 [2002] O.J. No. 665 (Ont. S.C.J.).
36 S.O. 2000, c. 41.

Canada.

(i) "Competence-competence"

18. The Court of Appeal's interpretation of, and refusal to apply, the "competence-competence" principle allowed the Respondent to sidestep his express agreement to arbitrate. The understanding of "competence-competence" adopted by the Court of Appeal significantly broadens the potential scope for judicial intervention in the arbitration process, and results in uncertainty surrounding the enforceability of arbitration clauses.

19. The doctrine of "competence-competence" is intended to minimize unnecessary and unwarranted judicial intervention in the arbitration process and helps to ensure that parties cannot shirk express agreements to arbitrate by raising potentially unmeritorious jurisdictional arguments.[37] In *Dell Computer Corp. v. Union des consommateurs*,[38] this Court recognized that "competence-competence" reduces "the danger that a party will obstruct the [arbitration] process by manipulating procedural rules."[39]

20. By narrowly interpreting "competence-competence", the Court of Appeal expanded the opportunity for parties to escape arbitration agreements by making arguments premised on the alleged invalidity of such agreements. In doing so, the decision below heightens risks of procedural delays, increases in litigation costs, and significant uncertainty over whether Ontario courts will respect businesses' choice to arbitrate their disputes. [40]

(ii) Alleged employment relationship

21. The Court of Appeal's assumption that the Respondent "can prove that which he pleads" regarding his alleged employment status also undermines commercial certainty and predictability.

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[37] Anthony Daimsis, "Like a Poor Marksman, ONCA Keeps Missing the Arbitration Target" (August 8, 2019) 1:1 Can J Comm Arb, Forthcoming at p. 11.

[38] 2007 SCC 34 [*Dell*].

[39] *Dell* at para. 84.

[40] See McEwan & Herbst at p. 2-20.1: "Avoiding procedural disputes at the commencement of the arbitration (thus minimizing delay and additional cost) and making the process of arbitration as predictable as possible are two key matters for consideration in drafting an arbitration clause."

22. In the present case, the agreement between the parties explicitly states that it does not create an employment relationship.[41] More importantly, the parties freely agreed that "any dispute" connected to their licensing agreement would be resolved by way of binding arbitration.[42] Absent express legislative language to the contrary, this necessarily included disputes over employment status. By assuming that the Respondent "can prove that which he pleads"[43] regarding his employment status, the Court of Appeal endorsed an approach whereby an individual seeking to avoid an arbitration agreement need only plead the application of legislation that may serve to invalidate such an agreement, regardless of whether the legislation actually applies. This Court has cautioned against an approach to arbitration clauses that expands opportunities for parties to avoid their agreements and seek relief in court.[44] By accepting uncritically the Respondent's pleading about his employment status, the Court of Appeal did precisely that.

(iii) Unconscionability

23. Finally, the Court of Appeal's conclusion that the arbitration agreement at issue in this case was unconscionable disregarded the parties' agreement to arbitrate such issues.

24. The approach to unconscionability adopted by the Court of Appeal not only vitiated the parties' agreement to arbitrate, it did so on entirely unforeseeable grounds—this is, to the Chamber's knowledge, the first time a Canadian court has held an arbitration clause invalid on the basis of unconscionability.

25. Of significant concern is the fact that the Court of Appeal has lowered the test for unconscionability. The Court of Appeal's analysis suggests that the doctrine has been altered to apply any time the parties to a contract are not equal in bargaining power, and the court determines that the arbitration agreement is "unfair".

26. The Court of Appeal all but confirmed that its analysis of unconscionability in the present case was focused primarily on the inequality of bargaining power between the parties, stating that the "fundamental flaw" in the motion judge's approach to this issue was to assume that the impugned arbitration clause was of the type agreed upon by parties of "relatively equal

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41 *Heller v. Uber Technologies Inc.,* 2018 ONSC 718 at para. 45 [*Heller ONSC*].
42 *Heller ONSC* at para. 21.
43 *Heller v. Uber Technologies Inc.,* 2019 ONCA 1 at para. 27 [*Heller ONCA*].
44 *Wellman* at para. 83.

sophistication and strength."[45]

27. The Court of Appeal's approach to unconscionability presents a significant and unnecessary alteration to the law. In particular, the analysis fails to sufficiently distinguish "legitimate forms of advantage-taking from illegitimate."[46] An agreement is not inherently unconscionable simply because one party possesses greater bargaining power than the other, nor is it so because one party to the agreement has favoured themselves.[47] The unconscionability doctrine already attracts criticism by introducing uncertainty into contract law[48] and by offering "novelty at the cost of predictability."[49] The Court of Appeal's decision compounded these concerns by eliminating the requirement that one party take advantage of another, and by looking at the arbitration agreement in isolation from the rest of the contract.

28. Contracts, by definition, involve a *quid pro quo*. Some provisions favour one party, and others favour the other party. Therefore, the fact that an arbitration clause favours one party over another is neither surprising nor objectionable. The Court of Appeal, however, has now singled out arbitration clauses for particular scrutiny such that one party can evade their effect if it can assert an inequality of bargaining power. This eliminates the certainty craved by commercial parties and will force them to seek to protect their interests in other ways, thereby undermining Ontario's public policy in favour of promoting arbitration. If such a fundamental change to Ontario arbitration law is to occur, it should be enacted by the legislature, not the courts.

29. The Court of Appeal's analysis of unconscionability appears to suggest that businesses are only free to enter into arbitration agreements with, and have these contracts enforced against, entities possessing equal bargaining power. This is false.[50] Canadian businesses of all sizes have

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45 *Heller ONCA* at para. 70.

46 David Tiplady, "The Judicial Control of Contractual Unfairness" (1983) 46:5 Modern L Rev 601 at p. 614 [Tiplady].

47 *Pitcher v. Downer*, 2017 NLCA 13 at para. 46.

48 John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012) at p. 436; Tiplady at p. 618.

49 Tiplady at p. 616.

50 See *Wellman* at para. 84, where a majority of this Court held that "nothing in the [*Arbitration Act,* 1991] suggests that standard form arbitration agreements…are per se unenforceable. Indeed, this Court's decision[s]…confirm that the starting presumption is the opposite."

a legitimate interest in resolving many types of disputes by way of arbitration,[51] and even equally situated commercial parties often do not heavily negotiate dispute resolution clauses.[52] Further, some degree of inequality of bargaining power is present in almost all contractual negotiations. However, under the Court of Appeal's approach, any arbitration clause entered into between a commercial entity and an individual risks being declared unconscionable. Even where businesses adduce unchallenged evidence to rebut a finding of unconscionability, a court adopting the Court of Appeal's analysis may ignore it as "unpersuasive" and instead rely on their own inferences.[53]

30. In sum, the decision appealed from in this case unduly and improperly interfered with the parties' agreement to arbitrate. By allowing the Respondent to escape his contractual obligations in the manner it did, the decision results in commercial uncertainty and undermines the predictability at the core of business arrangements. Indeed, as Lord Mansfield observed more than two hundred years ago in the decision of *Milles v Fletcher*, "[t]he great object in every branch of the law, but especially in mercantile law, is certainty."[54]

31. The Chamber encourages this Court to expressly affirm that the principles of freedom of contract and holding parties to their bargains should guide a court's analysis when considering the enforceability of an arbitration agreement. To do otherwise risks undermining Canada's reputation as an "arbitration-friendly state"[55] and could create turmoil for the many businesses who participate in the Canadian economy.

PART IV ~ SUBMISSIONS ON COSTS

32. The Chamber undertakes not to seek any costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October, 2019.

Matthew Milne-Smith and Chantelle Cseh
Counsel for the Intervener, Canadian Chamber of Commerce

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51 Andrew D. Little, "Canadian Arbitration Law after Dell Computer Corp. v. Union Des Consommateurs" (2007) 45:3 Can Community LJ 356 at p. 376 [Little].

52 Little at p. 377.

53 *Heller ONCA* at para. 68.

54 *Milles v. Fletcher* (1779), 1 Dougl 231 at 232, 99 ER 151 (KB).

55 Smith Affidavit (Leave to Intervene Motion Record, Tab 2) at para. 13; ULCC Working Group Report at paras. 4-5.

PART V ~ TABLE OF AUTHORITIES & LEGISLATION

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10.	*Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339	9-10
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