

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

BETWEEN:

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

Appellants

- and -

DAVID HELLER

Respondent

- and -

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,
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and ADR CHAMBERS INC.

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BETWEEN:

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Appellants

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Interveners

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PART I - OVERVIEW

1. At issue in this appeal is whether a proposed class proceeding against Uber Technologies, Inc., Uber Canada, Inc., Uber B.V., and Rasier Operations B.V. should be stayed in favour of arbitration. The Court of Appeal for Ontario declined to stay this action because, among other reasons, it found that the contractual arbitration provision was unconscionable.¹ As described below, the Court of Appeal's approach lowered the evidentiary threshold required for a finding of unconscionability.

2. The intervener Montreal Economic Institute (the "MEI") is an independent, non-partisan, research and educational organization. It analyzes economic matters and, through publications and media appearances, stimulates debate on public policies in Quebec and across Canada.

3. The MEI's central argument as an intervener on this appeal is that the sharing economy, a vital and growing sector of Canada's economy, could be stifled if a lower threshold for unconscionability is adopted. Much of the sharing economy depends on standardized terms and conditions that are agreed to electronically by the people and businesses who participate in the sharing economy. If those agreements are undermined, it could have a range of unintended consequences for Canadians, including: (i) putting innovative Canadian businesses in the sharing economy at a competitive disadvantage as they seek to grow; (ii) limiting opportunities for unemployed and underemployed Canadians to generate income by providing goods or services in the sharing economy; and (iii) limiting Canadians' access to new marketplaces and the many benefits that come with them.

PART II - QUESTION IN ISSUE

4. One of the main questions in this appeal, and the key question for the purposes of these submissions, is: what is the appropriate test for unconscionability in Canadian law?

¹ *Heller v Uber Technologies Inc*, 2019 ONCA 1 at para 73 [*Heller*].

PART III - ARGUMENT

5. In setting the test for unconscionability, it is crucial for this Court to consider the economic context within which contractual relationships are formed in the sharing economy and the potential unintended consequences that could flow from a lower threshold of unconscionability.

(a) **The sharing economy is a vital and growing sector of the Canadian economy**

6. Generally speaking, the sharing economy refers to people or companies who use online platforms to sell, rent, or supply property, goods or services.² Businesses that operate in the sharing economy typically use technology to provide innovative means to facilitate transactions by making them easier to complete, more convenient, more affordable, and more trustworthy. These businesses often serve an intermediary function by providing a platform or marketplace that permits independent buyers and sellers to come together and transact goods or services.

7. The sharing economy has created new marketplaces across a range of industries, including:

- (a) **Retail:** online marketplaces like Etsy and Kijiji have opened markets for independent merchants and craftspeople on a previously unknown scale;
- (b) **Accommodation:** new business models such as Airbnb facilitate renting spare rooms and homes;
- (c) **Transportation:** new business models have supplemented traditional forms of transportation through car-sharing services like ZipCar and Car2Go, ride-sharing services like Uber and Lyft, and delivery services like Foodora and Instacart;
- (d) **Service and Staffing:** entrepreneurs use platforms like TaskRabbit and Handy to sell their services and labour, such as “handyman” work, directly to consumers; and
- (e) **Finance:** business ventures and creative projects can access new sources of funding and voluntary contributions through platforms like KickStarter and Indiegogo.

² Others refer to this economy in terms like “trust economy” or the “peer-to-peer economy”.

8. The sharing economy is also moving into many other sectors such as utilities, education, and dining.³ In each of these areas, the sharing economy can provide more affordable and accessible goods and services to Canadians.

9. The sharing economy does not only empower Canadians as consumers. It also creates new opportunities for Canadians to generate income by providing goods or services. A recent Bank of Canada study found that nearly one-third of Canadians participate in informal “gig” work, with higher rates among youth and in provinces with historically high unemployment rates.⁴

10. Consumer participation in the sharing economy is similarly widespread. Statistics Canada estimated that in the one-year period from 2015-2016, approximately 9.5% (or 2.7 million people) of adults living in Canada participated in the sharing economy by using transportation or private accommodation services alone and overall spending on both services totalled approximately \$1.31 billion.⁵ PricewaterhouseCoopers estimated that five key sharing sectors had the potential to increase global revenues from roughly \$15 billion in 2015 to around \$335 billion by 2025.⁶

11. In short, the sharing economy is becoming a critical part of the Canadian economy that many Canadians increasingly rely on, including to earn or supplement their income. It can be expected to serve an increasingly important social function by giving Canadians access to new

³ Noah Zon, “The Sharing Economy and Why It Matters for Policy Makers, The Mowat Centre, Public Sector Digest” (December 2015), online: *The Mowat Centre* <https://munkschool.utoronto.ca/mowatcentre/wp-content/uploads/publications/PublicSectorDigest_TheSharingEconomyandWhyitMattersforPolicyMakers.pdf> [perma.cc/G87U-TZ45].

⁴ Olena Kostyshyna, Corinne Luu, “The Size and Characteristics of Informal (“Gig”) Work in Canada” (February 2019), online: *Bank of Canada* <<https://www.bankofcanada.ca/2019/02/staff-analytical-note-2019-6/>> [perma.cc/NN4X-9F96].

⁵ Statistics Canada, “The Sharing Economy in Canada” (February 28, 2017), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/daily-quotidien/170228/dq170228b-eng.htm>> [perma.cc/R6U7-RDVE].

⁶ PriceWaterhouseCoopers, “The Sharing Economy” (2015) at 14, online (pdf): *PriceWaterhouseCoopers* <https://www.pwc.fr/fr/assets/files/pdf/2015/05/pwc_etude_sharing_economy.pdf> [perma.cc/E3HC-APJP]. The five key sectors were: travel, car sharing, finance, staffing and music and video streaming.

marketplaces to transact goods and services and by creating opportunities for unemployed and underemployed Canadians to earn income outside of the traditional labour force.

(b) The sharing economy depends on standardized terms and conditions that are agreed to electronically by the people and businesses who use the platforms

12. It is also important to consider the role of standardized terms and conditions, which are indispensable to the effective and efficient functioning of the sharing economy.

13. First, because of the large number of participants on most platforms, much of the sharing economy is based on standardized contracts that are agreed to electronically by the people and businesses that use the platforms. It will generally be impractical for platforms to negotiate individualized contracts with each of their users.

14. Second, platforms in the sharing economy need to ensure that they are protected against misconduct by third parties. These platforms, it must be emphasized, often serve as an intermediary to permit independent buyers and sellers to transact goods or services. Accordingly, as the platform is typically not one of the parties transacting the goods, performing the services, or interacting in the marketplace, the platform needs a method to control the conduct on the platform. For example, a platform may wish to have a contractual term that ensures there is no discrimination on its platform or that transactions with minors on the platform are prohibited. Such protections may be necessary for the effective operation of platforms and serve the public interest and, practically, can be safeguarded only through the standardized terms and conditions.

15. Third, standardized terms and conditions are a critical means for platforms to structure their businesses and manage risks. This might take the form of limitations of liability that protect against the actions of others carried out over the platform or arbitration clauses or forum selection clauses. Small and medium-sized Canadian businesses, in particular, benefit from a consistent and predictable approach to enforcing standard terms in contracts of adhesion. For example, a Canadian platform may be prepared to open its marketplace to merchants and consumers outside of Canada if it has confidence that a valid limitation of liability clause or arbitration clause will be upheld; however, that platform may not expand and innovate if it will be exposed to expensive litigation and the potential for inconsistent results in many foreign jurisdictions.

16. At first glance, some standard terms and conditions, viewed in isolation, could seem unfair to the user or weighted in favour of the platform. It is critical to understand, however, that much of the sharing economy is premised on the sharing of benefits and burdens. The circumstances should be considered in their entirety — including the role of the platform, the benefits and burdens of the relationship, and the manner in which the platform is structured to benefit its participants as a whole — in assessing whether an aspect of the relationship is unfair and unlawful.

17. It is also critical to understand that the contractual relationships between the platforms and their users do not necessarily fit into typical frameworks like purely consumer or commercial relationships. In many cases, the sharing economy is characterized by a different power dynamic: on some platforms a person can be engaging with the marketplace as a merchant that is contracting as a commercial business, or both merchant and a consumer, or a consumer of other merchant's goods and services.

18. All of these dynamics should inform the approach to the doctrine of unconscionability in the context of the sharing economy.

(c) The Court of Appeal's approach to unconscionability could imperil many of the standardized terms underlying the sharing economy in Canada

19. The manner in which the Court of Appeal applied the unconscionability test in this case has the potential to threaten many standardized terms underlying the sharing economy. As the Court of Appeal noted, the existing case law in Ontario established that there are four elements to the test for determining whether a contractual provision is unconscionable. These elements are:

- 1) a grossly unfair and improvident transaction;
- 2) a victim's lack of independent legal advice or other suitable advice;
- 3) an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
- 4) the other party's knowingly taking advantage of this vulnerability.⁷

⁷ *Heller, supra*, at para 60.

20. The Court of Appeal interpreted this test in manner that would tend to ignore whether the stronger party knowingly took advantage of the weaker party's vulnerability (the fourth factor) and reduce the analysis to whether, in the case of the standardized terms and conditions frequently used in the sharing economy, a particular term is a "substantially improvident or unfair bargain" (the first factor). That is the potential effect of the Court of Appeal's reasoning because:

- (a) the second factor (lack of independent legal advice) will often be met because, applying the Court of Appeal's approach, users know these are standardized contracts and have "no reasonable prospect of being able to negotiate any of the terms".
- (b) the third factor (overwhelming imbalance in bargaining power caused by the weaker party's vulnerability) will often be met if the weaker party is not required to establish a particular disability or other vulnerability⁸ because platforms will, generally speaking, have more bargaining power than users; and
- (c) the Court of Appeal reasoned that when the first three factors are met, it can be "safely concluded" or inferred that the fourth factor (knowingly taking advantage of vulnerability) is met.⁹

21. Limiting the unconscionability test to the first factor alone would be inconsistent with other aspects of this Court's jurisprudence in the context of arbitration clauses (*i.e.*, outside of the doctrine of unconscionability). In particular, in *Seidel v TELUS Communications Inc.*, Justice Binnie, writing for a five-justice majority, stated: "[t]he choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent 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".¹⁰ This premise was reiterated and confirmed by this Court more recently in *TELUS Communications Inc. v Wellman*.¹¹

⁸ The Court of Appeal stated that its drivers were "vulnerable to the market strength of Uber" and "at the mercy of [the terms] set by Uber": *Heller, supra*, at paras 68 and 71.

⁹ *Heller, supra*, at para 68.

¹⁰ 2011 SCC 15 at para 2.

¹¹ 2019 SCC 19 at para 40.

Although those cases did not apply the doctrine of unconscionability, the Court's reasoning emphasizes that, even in consumer contracts of adhesion between parties with unequal bargaining power who did not receive independent legal advice, arbitration clauses are generally enforceable.

22. There is nothing inherently unfair about the reliance on arbitration clauses (or other analogous clauses) *per se* – and even if it could be said that there were some element of unfairness to some parties, there must still be principles that impose reasonable limits on the doctrine of unconscionability to contracts that are freely entered into. Indeed, unconscionability is often characterized as a species of “equitable fraud” in the sense that the conduct of one party was of such a character that upholding the ensuing contract would be to perpetrate an injustice and produce an unfair result.¹² Based on established law in Ontario, what takes a given contract of adhesion case from the general abstention of courts' intervention to a finding on unconscionability must be rooted in some form of taking advantage of a party's vulnerability (factor four), resulting in a grossly unfair or improvident transaction (factor one). It should not be sufficient to impute a deliberate attempt by a stronger party to take advantage of weaker parties' vulnerabilities based solely on the fact that an agreement is a contract of adhesion and a particular clause is interpreted to be unfair.

23. Further, if one takes into consideration the underlying economic rationales for selecting a particular method of dispute resolution, there is nothing unusual or atypical about the resort to arbitration clauses. Many platforms will inevitably select dispute resolution mechanisms to reduce costs and increase consistency and certainty to the greatest extent possible, thereby allowing all users (including consumers, businesses, and people who seek to provide goods or services) to continue to benefit from the platform at the most efficient level.

24. Accordingly, context is critical in addressing unconscionability in contracts of adhesion. One-sided clauses in contracts of adhesion are not necessarily prejudicial or inherently “unconscionable”. The circumstances have to be considered in their entirety — including the benefits and burdens of the relationship — to assess whether a clause is unfair and unlawful. After all, one-sided clauses can promote efficiency and fairness by giving a business the discretion to

¹² Mitchel McInnes, *The Law of Unjust Enrichment and Restitution* (Markham: LexisNexis, 2014), at 537-538; G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thomson Reuters, 2011) at 318-319.

prevent egregious conduct. For example, Professor Lucian A. Bebchuk and former judge Richard A. Posner explain that one-sided clauses in consumer contracts can permit firms to enforce terms against consumers who fail to act in good faith, without the need to specify terms to cover every contingency.¹³

25. If platforms do not have the ability to obtain agreement to reasonable terms of use, they will be either forced to shut down or increase the costs of their services. The ramifications of such an outcome on the Canadian economy, the sharing economy, businesses, consumers, and individuals who want to earn income through the sharing economy are significant and can prejudice everyone engaged in this subset of our economy.

(d) A lower threshold for unconscionability could stifle the sharing economy in Canada

26. Indeed, lowering the threshold for unconscionability could have unintended consequences throughout the sharing economy. It could impair innovation and expansion in Canadian businesses if critical terms and conditions that are perceived as unfair when viewed in isolation are presumed to be unconscionable or if those businesses cannot rely on a consistent and predictable approach to enforcing standard terms.

27. As explained above, much of the sharing economy is based on platforms and marketplaces that use internet-based technology to permit independent buyers and sellers to transact goods or services. The businesses that are creating and running these platforms need the ability to structure themselves appropriately to manage their businesses and their risks. Many businesses in the sharing economy organize themselves in particular ways that are intended to benefit their participants — or even society at large — by facilitating access to efficiencies and to new forms of marketplaces for businesses, consumers, and those who seek to generate income.

28. To that end, this Court should develop Canadian law on unconscionability in a way that fosters opportunities for unemployed and underemployed Canadians to generate income; does not

¹³ Richard A. Posner & Lucian Arye Bebchuk, "One-Sided Contracts in Competitive Consumer Markets" (2006) 104 Mich L Rev 827 at 833-834 online: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2839&context=journal_articles> [perma.cc/AUH8-NTGB].


put Canadian businesses at a disadvantage in a rapidly growing sector of the world economy; and does not limit Canadians access to new marketplaces and the many benefits that come with them.

29. It can do so by requiring a contextual analysis of what constitutes unfairness in the context of the particular platform and the sharing economy, and by requiring adherence to the knowingly taking advantage component of the unconscionability test.

PART IV - SUBMISSIONS ON COSTS AND ORDER SOUGHT

30. The MEI does not seek costs and asks that it not be liable to pay the costs of any party or intervener. No order is sought.

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

per 

Robert Carson
Lauren Harper

OSLER, HOSKIN & HARCOURT LLP
Counsel for the Montreal Economic Institute

PART V - TABLE OF AUTHORITIES

BOA Tab	Cases	Paragraph Referred to
	<u>Heller v Uber Technologies Inc., 2019 ONCA 1.</u>	60, 68, 73
	<u>Seidel v TELUS Communications Inc., 2011 SCC 15.</u>	2
	<u>TELUS Communications Inc. v Wellman, 2019 SCC 19.</u>	40
BOA Tab	Secondary Sources	Paragraph Referred to
1	G.H.L. Fridman, <i>The Law of Contract in Canada</i> (Toronto: Thomson Reuters, 2011).	318-319
2	Mitchel McInnes, <i>The Law of Unjust Enrichment and Restitution</i> (Markham: LexisNexis, 2014).	537-538
	Olena Kostyshyna, Corinne Luu, " <u>The Size and Characteristics of Informal (“Gig”) Work in Canada</u> " (February 2019), online: Bank of Canada.	
	Richard A. Posner & Lucian Arye Bebchuk, " <u>One-Sided Contracts in Competitive Consumer Markets</u> " (2006) 104 Mich L Rev 827, online.	833-834
	PriceWaterhouseCoopers, " <u>The Sharing Economy</u> " (2015), online.	14
	Statistics Canada, " <u>The Sharing Economy in Canada</u> " (February 28, 2017), online.	
	Noah Zon, " <u>The Sharing Economy and Why It Matters for Policy Makers, The Mowat Centre, Public Sector Digest</u> " (December 2015), online.	

PART VI - STATUTORY PROVISIONS

N/A