SCC File No. 38534

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

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 -

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 COMMERICAL 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

REPLY FACTUM OF THE APPELLANTS UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and RASIER OPERATIONS B.V.

(Pursuant to the Order of Moldaver J. dated October 8, 2019 and
Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. In this Reply, Uber responds to the arguments of certain interveners.[1] The submissions of these interveners misstate the legislative framework governing arbitration agreements in Ontario. They also advance policy arguments, which ought to be addressed by the legislature, in the guise of factors relevant to unconscionability. Contrary to those submissions:

(a) the arbitrator must decide whether the *Employment Standards Act, 2000* (*"ESA"*) applies in this case;

(b) there is no evidence to conclude that the arbitrator would not apply the *ESA*;

(c) the Arbitration Agreement has no independent forum selection clause;

(d) the indemnity clauses in the Services Agreements are irrelevant;

(e) the Arbitration Agreement need not explicitly carve out section 96 of the *ESA*;

(f) there is no evidence that Uber knowingly took advantage of the respondent; and

(g) if the *Arbitration Act* governs, then it bars any appeal of the motion judge's decision granting Uber's motion for a stay of proceedings.

PART II – STATEMENT OF ARGUMENT

The arbitrator must decide whether the ESA applies in this case

2. Certain interveners argue that whether the Arbitration Agreement is invalid under the *ESA* is a question of pure law that can be determined by a court without violating competence-competence. This is incorrect. A determination of employment status is a complex issue of mixed fact and law. It is a threshold issue that cannot be resolved by a court without violating competence-competence.

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[1] Attorney General of Ontario, Canadian Internet Policy and Public Interest Clinic, Community Legal Assistance Society, Consumers Council of Canada, Don Valley Community Legal Services, United Food and Commercial Workers Canada.

The prohibition on misclassification in s. 5.1 does not resolve whether the ESA applies

3. Section 5.1 of the *ESA* confirms that the issue of whether the respondent is an employee must be determined by the arbitrator before considering the merits of his claim for *ESA* relief. Section 5.1 provides that "[A]n employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act". Only persons who are "employees" are entitled to the relief sought by the respondent. Employment status is therefore a threshold issue. It is also a complex question of mixed fact and law that can only be decided by the arbitrator in accordance with competence-competence.[2]

4. The respondent's pleading confirms the necessity of resolving the issue of whether the *ESA* applies. He seeks various relief, including declarations and orders for specific performance, asking the court to conclude that the *ESA* governs his relationship with Uber. The application of the *ESA* to this claim is clearly disputed. This is unlike any of the other cases in which this Court has considered whether a statute restricts arbitration.[3] None sought threshold declarations that the statute at issue governed the parties' relationship. Instead, the parties agreed the statute applied.

5. Certain interveners rely on section 5.1 as a basis for making policy arguments about the importance of adjudicating *ESA* disputes in Ontario. However, unlike the *Privacy Act* at issue in *Facebook v. Douez* ("*Douez*"), which required a privacy cause of action to be heard in the Supreme Court of British Columbia,[4] the *ESA* contains no such legislative direction to adjudicate disputes in Ontario. The Ontario legislature expressly considered the issue of whether misclassification was occurring in the "gig economy" before introducing section 5.1, yet it did not legislate that employment misclassification issues must be resolved exclusively in Ontario.

There is no evidence to conclude that the arbitrator would not apply the *ESA*

6. Certain interveners argue that the parties' agreement to rely on the laws of the Netherlands (excluding its rules on conflicts of laws) means the arbitrator could not apply the *ESA* to the

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[2] See paragraphs 44-48, 51 of Uber's main factum.
[3] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35.
[4] *British Columbia Privacy Act*, R.S.B.C. 1996, c. 373, ss. 3(2), (4).

respondent's dispute. This argument lacks the necessary evidentiary foundation and must fail. It also ignores the clear and express words of the Arbitration Agreement that: "[N]othing herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law that cannot be lawfully limited or excluded."[5]

7. The burden to establish an exception to the legislative direction to enforce arbitration agreements lies with the respondent.[6] To establish that the Arbitration Agreement is invalid because it precludes the arbitrator from applying the *ESA*, the respondent was required to lead expert evidence regarding Dutch law. He failed to do so. There is no evidence of:

(a) how the clauses "this Agreement shall be governed by and construed in accordance with the laws of the Netherlands, excluding its rules on conflicts of laws" and "[Nothing] herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law that cannot be lawfully limited or excluded" would be interpreted under Dutch law;

(b) whether the law of the Netherlands applies foreign substantive employment law to disputes where the employee works in a foreign jurisdiction; and

(c) whether Dutch law governing arbitration agreements permits arbitrators to apply conflict of laws rules they determine to be appropriate where the parties have not agreed on a set of conflict of laws rules.

8. Although it would be an issue for the arbitrator to interpret the clause "excluding the conflict of laws rules of the Netherlands" under the laws of the Netherlands (and not under Ontario legislation as certain interveners suggest), the interpretation of this clause is also not resolved under Ontario law.[7] Under Ontario arbitration legislation, because the parties did not select governing

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[5] Affidavit of Rob van der Woude, affirmed October 16, 2017 ("van der Woude Affidavit"), 2016 Portier Agreement, Exhibit "E", s. 15, Appellants' Record ("AR"), Vol. II, Tab 9E, p. 123.
[6] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2); *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Arts. 8, 16; Court of Appeal's Reasons, para. 66, AR, Vol. I, Tab 3, p. 49.
[7] The authorities referred to by the Attorney General do not resolve this issue.

conflict of laws rules (and only agreed to exclude the Dutch conflict rules), the arbitrator may retain the ability to select which conflicts rules to apply.[8]

9. Arbitration clauses that attempt to "exclude the conflict of laws rules" do not necessarily result in an exclusive application of the substantive law of the forum selected.[9] This is particularly true where the parties agree that their choice of law does not limit or exclude any statutory rights available to the parties that cannot be lawfully limited or excluded. Under Ontario law, an arbitrator can choose to apply mandatory rules of a jurisdiction such as the *ESA* even where the parties have agreed to the substantive laws of another jurisdiction.[10]

10. The evidentiary issue regarding whether the *ESA* applies to this dispute is complex. It is one the arbitrator must decide at first instance in accordance with competence-competence.

11. This Court's conclusion in *Douez* that the absence of expert evidence of foreign law was not determinative is not applicable here. In *Douez*, the issue was whether the plaintiff needed expert evidence to meet the second branch of the "strong cause" test which expressly invites consideration of whether public policy factors override a forum selection clause.[11] Here, the Court has no jurisdiction under Ontario arbitration legislation to consider public policy factors. It is an error of law to equate a forum selection clause to an arbitration agreement.[12]

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[8] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 32(1); *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 28. Uber is not aware of any relevant Hansard discussion on these provisions.

[9] Michael Gruson, "Governing Law Clauses Excluding Principles of Conflict of Laws" (2003) 37 Int'l Law. 1023, p. 1025, Appellants' Reply Book of Authorities ("Reply ABOA"), Tab 2.

[10] J. Kenneth McEwan, *Commercial Arbitration in Canada*, loose-leaf (Toronto: Thomson Reuters, 2018), p. 8-8, Reply ABOA, Tab 3. See also: Hong-lin Yu, "Choice of law for arbitrators: two steps or three?" (2001) *International Arbitration Law Review*, Reply ABOA, Tab 6.

[11] *Douez v. Facebook*, 2017 SCC 33, paras. 66-67.

[12] *Haas v. Gunasekaram*, 2016 ONCA 744, para. 31.

The Arbitration Agreement has no independent forum selection clause

12. Certain interveners argue that a forum selection clause is embedded in the Agreement. They suggest the strong cause test set out in *Douez* applies for that reason. These arguments fundamentally misunderstand the nature of arbitration agreements.[13]

13. Parties to arbitration agreements under Ontario arbitral legislation may agree to the rules of law (the seat) and the place for the arbitration while still meeting the definition of arbitration agreement in those statutes.[14] Notwithstanding the parties' agreements on the seat and place of arbitration, the "very strong legislative direction" to courts to enforce arbitration agreements applies.[15]

The indemnity clauses in the Services Agreements are irrelevant

14. The indemnity clauses in the Services Agreements are not relevant on this Appeal. The respondent has not relied on them as a basis to invalidate the Arbitration Agreement and as a result the record contains none of the necessary evidence regarding the context or meaning of these clauses. In any event, even if the indemnity clauses are found to be invalid, the case law is clear that arbitration clauses survive findings that other clauses in an agreement are invalid.[16]

The Arbitration Agreement need not explicitly carve out section 96 of the *ESA*

15. The Attorney General of Ontario acknowledges that the *ESA* does not prohibit arbitration. If this were indeed an employment relationship, and section 96 (recourse to the Ministry) cannot

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[13] It is not sufficient to meet the strong cause test to defeat a motion to stay on the basis of an arbitration agreement that selects the forum for the dispute: *Novatrax International Inc. v. Hagele Landtechnick, Karl Hagele and Benjamin Hagele,* 2013 ONSC 8045 (affirmed in 2016 ONCA 771); *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.,* 2010 ONCA 722, paras. 46-47.

[14] *Arbitration Act, 1991,* S.O. 1991, c. 17, ss. 22, 32; *International Commercial Arbitration Act, 2017,* S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Arts. 1(3)(b), 19-20, 28(1-2).

[15] Motion Judge's Reasons, para. 77, AR, Vol. I, Tab 1, p. 14.

[16] *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, 2002 CarswellOnt 1382, [2002] O.J. No. 1465, para. 20, Reply ABOA, Tab 1; *NetSys Technology Group AB v. Open Text Corp.*, [1999] O.J. No. 3134 (S.C.J.), para. 21.

be contracted out of, the Arbitration Agreement is still valid. The entire Arbitration Agreement is not void because it does not explicitly provide for Drivers to bring a section 96 complaint. To require that would lead to an absurd result: An arbitration clause in any type of contract that might be challenged as governing an employment relationship (even if no such relationship is ultimately found) would need to explicitly carve out *ESA* section 96 complaints to avoid being struck down entirely.

16. Additionally, if the right to bring a section 96 complaint cannot be contracted out of and is to be read in as a standard applicable to an employment relationship, then the Arbitration Agreement cannot be unconscionable, as Drivers (if employees) would have recourse to the Ministry to pursue a resolution of their claims.

There is no evidence that Uber knowingly took advantage of the respondent

17. Several interveners incorrectly suggest that the respondent is a vulnerable member of the "gig economy" who had no choice but to accept the terms of the Arbitration Agreement in support of their arguments that the Arbitration Agreement is unconscionable.[17] This argument must fail for two reasons. First, it incorrectly characterizes the parties' relationship. Second, it is contrary to the record.

18. It is the role of the legislature to determine when to restrict arbitration between parties of unequal bargaining power who enter into digital contracts of adhesion. Certain interveners suggest that the Arbitration Agreement is unconscionable without making reference to the respondent's personal circumstances. They instead rely on policy arguments about a broad group of persons to which they say the respondent belongs. An approach to unconscionability that fails to consider the parties' specific relationship and the stronger parties' conduct and knowledge becomes a weighing of public policy factors, a role reserved for the legislatures.[18]

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[17] These interveners rely on general academic sources describing the conditions of the "gig economy." Broad characterizations about entire categories of people contained in these sources is not relevant to the unconscionability analysis. Rather, these are policy arguments for the legislature to weigh.

[18] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, paras. 79-80.

The parties' relationship here is not akin to the parties' relationship in Douez

19. The parties' relationship here is not a consumer relationship for essential digital services, as in *Douez*. In that case, this Court found that "there are few comparable alternatives to Facebook, a social networking platform with extensive reach" and that individual consumers have little or no choice not to sign up with Facebook. Using Facebook is an essential medium for modern-day free expression.[19] None of these findings can be made here.

20. Nothing in the record supports the conclusion that the Driver App is an essential digital service generally nor did the respondent lead evidence that his own choice to use the Driver App was compelled in any way.

There is no basis to conclude that the respondent had no choice but to accept the Agreement he did not understand

21. Several interveners suggest that Uber knowingly took advantage of the respondent, because he had no choice but to accept the terms of the Agreement even though he did not understand them. They rely on general academic commentary about digital consumer transactions and not the record. That is wrong in law: "the personal characteristics or attributes of the weaker party are a fundamental consideration" to the unconscionability analysis.[20] The factual matrix between the parties in evaluating whether the stronger party knowingly took advantage of the weaker one's vulnerability to extract the improvident bargain is relevant.[21]

22. Knowingly taking advantage cannot be established by inference given the alleged improvidence of the resulting bargain (*i.e.*, the fairness of the costs under ICC Rules, the laws of the Netherlands, and the place of the arbitration).[22] In any event, the doctrine of unconscionability does not confer "general power in the courts to protect people from improvident or foolish

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[19] *Douez v. Facebook*, 2017 SCC 33, paras. 55-56 (majority), 98 (Abella J. concurring).
[20] *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, paras. 39, 54.
[21] This is distinct from the inquiry into whether the agreement was improvident which in a standard form contract does not require an inquiry into the factual matrix: *Input Capital Corp. v. Gustafson*, 2019 SKCA 78.
[22] *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, 2019 SKCA 78, paras. 60-63.

bargains."[23] Permitting it to operate in that way would allow weaker parties to reap the advantages of a bargain for a period of time and then decide on a whim to invalidate the agreement when the bargain is no longer in their favour.

23. The record does not establish that Uber knowingly took advantage of a vulnerability to secure an improvident bargain from the respondent:

(a) There is no evidence that the respondent did not understand the terms of the Agreement, including the express statement that his classification as an independent contractor had to be resolved through arbitration. In fact, he substantively engaged with the terms of the Agreements by making over 300 complaints (resolved by Uber) regarding the Agreement's terms. The respondent actively read the terms of his Services Agreements and where he had concerns, he raised them immediately. For example, the day after pricing changes for UberEATS were communicated by Uber, the respondent spoke to the press about his concerns over the changes.[24]

(b) There is no evidence of why the respondent signed up to use the App (apart from his desire that his mother earn a referral fee), whether he was under duress in doing so, and why he wanted to use the App to earn income.

(c) There is no evidence about whether the respondent could forego using the App to earn income nor about whether he considered using any of Uber's competitors' Apps (nor about the terms of Uber's competitors' agreements).

Unconscionability cannot usurp the legislature's role in weighing policy arguments

24. The fundamental flaw with certain of the interveners' unconscionability submissions is their reliance on policy arguments applicable to broad categories of people. Arguments are

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[23] Angela Swan, Jakub Adamski & Annie Y. Na, *Canadian Contract Law*, 4th ed. (LexisNexis: Toronto, 2018), pp. 984-986, Reply ABOA, Tab 5. See also: *Input Capital Corp. v. Gustafson*, 2019 SKCA 78, paras. 39, 72; *Downer v. Pitcher*, 2017 NLCA 13, para. 64; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 36; *Dolter v. Media House Productions Inc.*, 2002 SKQB 228, para. 20.

[24] Transcript from the Cross-Examination of David Heller, held November 3, 2017, qq. 105-106, 136-139, AR, Vol. III, Tab 13, pp. 123-124, 129.

advanced generally about "application-based workers", "tap 'I Agree' contracts", "masses of consumers, prosumers, and other individuals" and the "gig economy" at large. These arguments incorrectly fail to consider the specific circumstances between the parties.

25. Unconscionability is an equitable remedy available on specific facts to relieve a weaker party from an improvident bargain that was extracted by a stronger party on the basis of a *known* vulnerability. The remedy should not be permitted to morph into a policy tool to generally prohibit arbitration in certain contexts. Only the legislature can make such determinations.[25] The Ministry of Labour explicitly considered Uber's business, the "gig economy", and the potential for misclassification of individuals working in it in a comprehensive review of the *ESA* in 2017.[26] The legislature chose not to restrict arbitration in resulting amendments to the *ESA*.

If the *Arbitration Act* governs the Agreement the motion judge's decision stands

26. Certain interveners assert that the outcome of this Appeal would differ depending on whether the *Arbitration Act* or the *ICAA* governs the Arbitration Agreement.[27] Uber submits that the *ICAA* governs. If the *Arbitration Act* governs the Agreement, then section 7(6) of the *Act* bars any appeal of the motion judge's decision granting Uber's motion for a stay of proceedings.[28]

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of October, 2019

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[25] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, paras. 79-80.
[26] Ontario, Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", S.C. Michael Mitchell & John C. Murray, pp. 19-20, 32, 53-54, Reply ABOA, Tab 4.
[27] Canadian Federation of Independent Business, International Chamber of Commerce, Young Canadian Arbitration Practitioners.
[28] *Ontario Medical Association v. Willis Canada Inc.*, 2013 ONCA 745, para. 47; *SLMSoft.com Inc. v. FirstOntario Credit Union Ltd.* (2003), 172 O.A.C. 201 (Ont. C.A.); *Lamb v. AlanRidge Homes Ltd.*, 2009 ABCA 343; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 91.

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