SCC File No. _____

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.

APPLICANTS
(Respondents)

- and -

DAVID HELLER

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL

(UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and RASIER OPERATIONS B.V., APPLICANTS)
(Pursuant to Section 40 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case provides this Court with an opportunity to answer questions of national and public importance related to the interpretation of arbitration agreements in Canada. Further, it allows the Court to clarify the test for unconscionability, which has been developed inconsistently by courts across the country. This Court has not addressed unconscionability in over 25 years—and never in the context of enforcing an arbitration agreement.

2. Access to justice in Canada has been a pressing objective for this Court over the past decade. This Court has encouraged litigants to seek out creative solutions to resolving their disputes that moves the emphasis towards efficiency. Over the same time period, this Court has repeatedly acknowledged the virtues of arbitration.

3. Legislatures across Canada have recognized that access to justice does not necessarily require access to the public court system. Provincial legislatures have enacted legislation respecting parties' contractual freedom to select arbitration as their preferred method for dispute resolution. In turn, this Court has confirmed on numerous occasions that it is the role of legislatures to limit access to alternative dispute resolution mechanisms, such as arbitration. The historical era when judges viewed alternative dispute resolution as antithetical to the parties' interests is gone.

4. Courts no longer have a monopoly over dispute resolution. Instead, they have adopted a "deferential approach" to arbitration in Canada. The competence-competence principle, which allows the arbitrator, and not a court, to decide at first instance the arbitrator's jurisdiction is codified in all provincial arbitration legislation.

5. Organizations in a variety of industries and sectors have embraced the use of arbitration to resolve disputes in an efficient, consistent, and predictable manner. Relying on their freedom to contract and legislative direction regarding the bounds for arbitration, organizations across Canada and international companies with connections to Canada are increasingly turning to the use of arbitration agreements to resolve disputes with licensees, competitors, suppliers, independent contractors, and even employees.

6. The decision of the Court of Appeal for Ontario in this case creates significant uncertainty in the use of arbitration agreements. First, the Court created a novel standard to be applied on motions to stay in favour of arbitration and abandoned the competence-competence principle. Second, the Court usurped the legislature's role to determine when to restrict arbitration and engaged in its own weighing of public policy factors.

7. The Court of Appeal's approach was based on a number of unproven assumptions about the parties, the operation of the arbitration agreement at issue, and the status of proposed class members. The Court also appears to have reverted to the historical era where courts jealously guarded their jurisdiction over the resolution of disputes, disregarding this Court's jurisprudence and the Ontario legislature's clear directions supporting the use of arbitration, including in the employment context.

8. This case presents this Court with an opportunity to resolve the uncertainty created by the Court of Appeal's decision. The Court of Appeal's decision has far-reaching consequences for the use of arbitration in Ontario and the rest of Canada. It has led to the consequence that mandatory arbitration clauses in employment contracts – which are used in many workplaces in a variety of industries – are now invalid under the Ontario *Employment Standards Act* (and other similar legislation).[1] Finally, this case allows this Court to provide guidance on the test for the unconscionability doctrine in the context of arbitration agreements.

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[1] Tamryn Jacobson, Julie Rosenthal & Ryan Cookson, "Court of Appeal Invalidates Uber's Arbitration Clause", Case Comment, (15 January 2019), Applicant's Leave Application ("ALA"), Tab 18; Paul Willetts, "Arbitration Clause Illegal & Unconscionable: Uber Drivers Taken for Ride", Case Comment, (7 January 2019), ALA, Tab 13; Rebecca Shoom, "A Roadblock to Arbitration: ONCA Invalidates Arbitration Clause in Heller v. Uber Technologies Inc.", Case Comment, (10 January 2019), ALA, Tab 16; Kyle Lambert & Jeffrey B. Simpson, "Uber Drivers Given a Low-Arb Diet: Ontario Court of Appeal Invalidates Arbitration Clauses", Case Comment, (January 2019), ALA, Tab 12; Paul-Erik Veel, "Ontario Court of Appeal Rules in Heller v. Uber Technologies Inc.: A Sensible Result with Challenging Implications", Case Comment, (15 January 2019), ALA, Tab 14; Summer Danakas et al., "Ontario Court of Appeal Hits the Brakes on Arbitration Clauses", Case Comment, (31 January 2019), ALA, Tab 17; Daniel Urbas, "Ontario – Determination of Exceptions to Mandatory Stay are for Court to Make and not Arbitrator", Case Comment, (2019), ALA, Tab 8; Practical Law Canada, "Featured: Enforceability of Arbitration Clauses", Case Comment, (9 January 2019), ALA, Tab 15.

Background

The Uber Apps

9. The respondents, Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V., are part of a larger group of companies (collectively "Uber")[2]. Uber is a technology company that invents, develops, licenses, operates, and continues to improve, innovative software applications, including the apps at issue in this litigation (the "Uber Apps").[3]

10. To date, the most widely licensed of the Uber Apps are the "Rider App" and the "Driver App". Through GPS-enabled smartphones, these Apps enable lead generation services in the personal transportation market. The Apps facilitate requests for personal transportation service from individuals seeking transportation ("Riders") to individuals offering transportation services ("Driver-Partners").[4]

11. Under the banner "UberEATS", Uber also licenses its lead generation services to facilitate connections between individuals ordering food ("Eaters"), restaurant merchants, and people providing food delivery services ("Delivery Partners").[5] Delivery Partners use the Driver App to receive food delivery requests from restaurants and then pick up the food from the restaurant and deliver it to the Eater.[6]

Uber's worldwide business

12. Uber B.V., Rasier Operations B.V., and Portier B.V. (which is not a defendant) are incorporated under the laws of the Netherlands with offices in Amsterdam (collectively, referred to herein as the "Dutch Uber Entities"). The Dutch Uber Entities carry on the worldwide business of selling lead generation services. Uber does not provide transportation services.[7]

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[2] The use of the term Uber in this Memorandum of Argument is not a reference to each of the defendants, unless otherwise indicated.

[3] Affidavit of Rob van der Woude, affirmed October 16, 2017 ("van der Woude Affidavit"), para. 3, ALA, Tab 4.

[4] Court of Appeal's Reasons ("CA Reasons"), para. 5, ALA, Tab 2C.

[5] CA Reasons, para. 6, ALA, Tab 2C.

[6] CA Reasons, para. 6, ALA, Tab 2C.

[7] Motion Judge's Reasons ("MJ Reasons"), paras. 8-10, ALA, Tab 2A.

13. Uber Canada Inc. is incorporated under the laws of Canada. Uber Canada provides marketing and administrative support to Uber B.V. in Canada.[8] Uber Technologies Inc. is incorporated under the laws of Delaware. It does not operate in Canada.[9]

Driver-Partner or Delivery Partner Agreements

14. Partners in Ontario do not enter into contracts with Uber Technologies Inc. or Uber Canada Inc.[10] Instead, anyone who wishes to use the Uber Apps must first enter into a license agreement to download the Apps from one of the Dutch Uber Entities. Any person with a smartphone and an internet connection can do so. This process can occur over the internet anywhere in the world. There is no interview process.[11]

15. To license the Driver App, a Partner must first enter into a "Services Agreement" with one of the Dutch Uber Entities. The Services Agreements all contain an exclusive arbitration clause (the "Arbitration Clause"). These clauses require that any disputes, conflicts, or controversies arising out of or broadly in connection with the agreements be resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce.[12]

16. In addition to the Arbitration Clause, the Services Agreements contain the following:

(a) a grant of the right to use Uber's services and an agreement that the Partner will pay a service fee for the use of Uber's services;

(b) a representation that the agreement creates a legal and direct business relationship;

(c) an express agreement and acknowledgement that the parties are not in an employment relationship;

(d) an express acknowledgement by Uber that the Partner retains the right to provide his or her services through the Apps of Uber's competitors at any time; and

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[8] MJ Reasons, para. 11, ALA, Tab 2A.
[9] MJ Reasons, para. 7, ALA, Tab 2A.
[10] MJ Reasons, para. 16, ALA, Tab 2A.
[11] van der Woude Affidavit, paras. 10, 25, 40, 43, ALA, Tab 4.
[12] MJ Reasons, para. 21, ALA, Tab 2A.

(e) an express acknowledgement by Uber that the Partner is not under Uber's control regarding when, where, and for how long the Partner chooses to use the Driver App (there is no requirement to use the App for any number of hours or at any particular location).[13]

17. To agree to the terms of a Services Agreement, a Partner must scroll through the entire Agreement, which can be reviewed for as long as a Partner wishes.[14] A Partner must click "YES, I AGREE" twice to enter into the Services Agreement. Partners are then able to access the Uber App, and their agreement is immediately sent to their "Driver Portal" which they can access at any time through the App.[15]

Dispute resolution through the App

18. Uber offers dispute resolution to its Partners through the Driver App. Customer services representatives ("CSRs") respond to queries and complaints from Partners through the App. Though the vast majority of Partners' complaints are resolved in this way, if the CSRs are not able resolve the Partner's complaint, Uber may involve its legal team (located in the Netherlands). A Partner may also visit a local support centre in Ontario referred to as a Greenlight Hub.[16]

19. The evidence in the record reflects the efficacy of the dispute resolution system established by Uber. Mr. Heller has raised over 300 complaints through the system, most of which have been resolved within 48 hours.[17] Overall, the "vast majority of all of [Uber's issues] with its customers are dealt with in a successful way via the app."[18]

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[13] *See for example*, 2016 Rasier Agreement, Exhibit "B", van der Woude Affidavit, ss. 2.3, 2.4, 4.4, 13.1, ALA, Tab 4A.
[14] van der Woude Affidavit, paras. 55, 56, ALA, Tab 4.
[15] Transcript from the Cross-Examination of Rob van der Woude, held November 3, 2017 ("van der Woude Cross-Examination"), q. 134, ALA, Tab 5; MJ Reasons, para. 19, ALA, Tab 2A.
[16] MJ Reasons, paras. 22-24, ALA, Tab 2A; Answers to Undertakings from the Cross-Examination of Rob van der Woude, held November 3, 2017, qq. 164, 214, ALA, Tab 6.
[17] Transcript from the Cross-Examination of David Heller, held November 3, 2017 ("Heller Cross-Examination"), qq. 136-139, 181-182, ALA, Tab 7.
[18] van der Woude Cross-Examination, q. 147, ALA, Tab 5.

20. Uber is not equipped to provide local, individualized, in-person dispute resolution to its millions of Partners worldwide. Instead, providing dispute resolution through the App allows Uber to leverage its technology to ensure that complaints are dealt with in a timely, efficient, and amicable fashion.[19]

Arbitration

21. Arbitration is the final step in Uber's dispute resolution process.

22. Uber sells its lead generation services in more than 600 cities across 77 countries in six continents.[20] Uber enters into an enormous number of Services Agreements with Partners around the globe on a daily basis. To ensure consistency and predictability in the outcome of any disputes with Partners, the Services Agreements include arbitration as the final form of dispute resolution. Arbitration also affords Uber an efficient way to manage millions of worldwide contracts.[21]

23. The legal place or seat of an arbitration determines which country's procedural laws will apply to the arbitration. Uber selected Amsterdam as the seat for arbitration because: (i) Uber's services are provided out of the Netherlands; (ii) its team, including its legal team, is located there; and (iii) to centralize dispute resolution for Partners who operate world-wide.[22] Nevertheless, the applicable ICC Rules permit the parties to hold the hearings elsewhere.[23] In this case, Uber offered to arbitrate with Mr. Heller in Ontario.[24]

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[19] van der Woude Cross-Examination, q. 147, ALA, Tab 5.
[20] MJ Reasons, para. 15, ALA, Tab 2A.
[21] van der Woude Affidavit, para. 49, ALA, Tab 4.
[22] van der Woude Affidavit, paras. 35, 36, 49, ALA, Tab 4; van der Woude Cross-Examination, qq. 209-10, ALA, Tab 5.
[23] Gary B. Born, *International Commercial Arbitration*, 2nd ed., (New York: Kluwer Law International, 2014), pp. 1596-1597, ALA, Tab 11; International Chamber of Commerce, "Rules of Arbitration" (entered into force 1 March 2017), s. 18(2); United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Arbitration 1985" (entered into force 21 June 1985), s. 20.
[24] MJ Reasons, fn. 39, ALA, Tab 2A; International Chamber of Commerce, "Rules of Arbitration" (entered into force 1 March 2017), s. 18(2).

24. There is no evidence in the record that any Partner has wished to arbitrate a claim with Uber and been deterred from doing so by the expenses relating to ICC filing and administrative fees (or because of any other costs associated with arbitration).[25]

The Respondent and the proposed class action

25. David Heller is the plaintiff in the underlying proposed class action against the defendants. Mr. Heller provides food delivery services through the Driver App. To do so, he has entered into two Services Agreements with Uber.[26]

26. Mr. Heller's claim alleges that Partners in Ontario are employees of Uber and therefore entitled to the minimum benefits and protections under the Ontario *Employment Standards Act, 2000* ("*ESA*"). Uber brought a motion to stay the proposed class action on the basis of the Arbitration Clause.

The motion judge's decision to stay the action in favour of arbitration

27. Applying this Court's decision in *Seidel v. TELUS Communications Inc.* and the Ontario Court of Appeal's decision in *Wellman v. TELUS Communications Company*, the motion judge granted Uber's motion for a stay in favour of arbitration. He held that courts must enforce arbitration agreements freely entered into, even in contracts of adhesion. Any restriction on the parties' freedom to arbitrate must be found in legislation.[27]

28. The motion judge also concluded that the plain language of the *ESA* does not restrict arbitration. The arbitrability of employment agreements was a "complex issue of mixed fact and law" (not a legal question of statutory interpretation) for the arbitrator to decide at first instance under the competence-competence principle. This was particularly true because the Services Agreement expressly rejected the existence of an employment relationship.[28]

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[25] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.), para. 42.
[26] Heller Cross-Examination, qq. 108-120, ALA, Tab 7; van der Woude Affidavit, paras 64-65, ALA, Tab 4.
[27] MJ Reasons, paras. 51, 59, ALA, Tab 2A.
[28] MJ Reasons, para. 65, ALA, Tab 2A.

29. Finally, the motion judge rejected the unconscionability exception because there was no evidence that Uber had preyed upon or taken advantage of Mr. Heller.[29]

The Court of Appeal reverses the motion judge

30. The Court of Appeal allowed Mr. Heller's appeal and set aside the stay. In doing so, the Court adopted a novel standard for considering the enforceability of arbitration agreements. The Court expressly rejected the application of the competence-competence principle and determined that it was entitled to assume the facts pleaded by Mr. Heller for the purposes of analyzing the validity of the Arbitration Clause.

31. Based on a presumption that Partners are Uber's employees, the Court held that the *ESA* precluded arbitration because the Arbitration Clause did not allow Partners to complain to the Minister under s. 96. The s. 96 complaint procedure was an "employment standard" that could not be contracted out of, or waived, by virtue of s. 5. Notwithstanding that Mr. Heller was not making a complaint under s. 96 (and contrary to this Court's decision in *Seidel*[30]), the Court of Appeal found that the Arbitration Clause was an unlawful contracting out of the *ESA*. To reach this conclusion, the Court engaged in a weighing of public policy factors, including its views on the benefits of class actions and the complaint procedure under s. 96 of the *ESA* as compared to arbitration and its view that resolving disputes regarding whether an employee has been misclassified as an independent contractor ought to be determined by a court in Ontario.[31]

32. The Court also concluded that the Arbitration Clause was unconscionable in an analysis that drew on this Court's analysis in *Douez v. Facebook*. The Court did so, because it found that there was no principled difference between arbitration clauses and forum selection clauses.[32]

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[29] MJ Reasons, para. 70, ALA, Tab 2A.
[30] The plaintiff's claim in *Seidel* was permitted to proceed in court only to the extent that the claim sheltered under the provision of the legislation that invalidated the arbitration agreement: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 9, 31, 35-40.
[31] CA Reasons, paras. 45, 49, 50, ALA, Tab 2C.
[32] CA Reasons, para. 63, ALA, Tab 2C.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

33. The question in issue on this application is whether the proposed appeal raises an issue of national or public importance that warrants the granting of leave to appeal. It does.

34. The Court of Appeal, relying on an outdated approach to arbitration, changed the law concerning the enforceability of arbitration agreements in Canada. The questions before this Court relate to the deference that courts in Canada must show to legislatures in respect of their policy determinations regarding whether and to what extent to allow for arbitration, as well as, the deference courts owe to arbitrators in analyzing the validity of an arbitration agreement.

35. In particular, this case raises the following issues that warrant this Court's consideration:

(1) What is the proper role for a court – and how and to what extent does the competence-competence principle apply – in determining the validity of an arbitration agreement?

(2) What is the proper allocation of responsibility as between the courts and the legislatures in determining whether to allow for or restrict arbitration, and to what extent must courts defer to that legislative determination?

(3) What is the governing test for the unconscionability doctrine in determining the enforceability of an arbitration agreement?

PART III – STATEMENT OF ARGUMENT

National and Public Importance

Legislatures have the sole power to weigh policy considerations

36. Arbitration has become an increasingly popular alternative for dispute resolution in Canada.[33] This Court has recognized and welcomed the "virtues of commercial arbitration,"[34] reflecting legislative decisions across Canada to support arbitration and foster the resolution of disputes outside of court proceedings.[35]

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[33] David Morritt & Eric Morgan, "Canada" in Richard Clark, ed., *The Dispute Resolution Review*, 5th ed. (London: Gideon Robertson, 2013) p. 125, ALA, Tab 9.
[34] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 23, 89, 99, 100.
[35] *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, paras. 66-67.

37. The benefits of arbitration are well known. Flexibility, cost, and the expertise of an arbitral panel are often cited as rationales for parties preferring arbitration over other forms of dispute resolution.[36] In choosing arbitration, parties obtain "a quick and final justice" and "can get on with [their] life." The court process, on the other hand, can offer "exquisitely slow and expensive justice" that a party may spend the rest of their life enduring and paying for.[37]

38. Certainty around the enforceability of arbitration agreements is key to the viability of arbitration as a method of dispute resolution. Legislatures across Canada have enacted domestic and international legislation enshrining arbitration. Courts have not interfered with the freedom of parties to submit their disputes to arbitration absent legislative intervention.[38] Such an approach fosters certainty for parties who select arbitration.

39. The weighing of competing public policy factors is properly reserved to the legislatures and not the courts. On several occasions, this Court has recognized that given the "far-reaching and unpredictable implications for Canadian society" arising from matters of public policy "the legislature is the more appropriate forum for the consideration of such problems and the implementation of legislative solutions to them."[39]

40. The Court of Appeal's weighing of policy factors in this case[40] creates uncertainty as to when courts will defer to clear legislative direction to prohibit arbitration. The Court's approach invites a significant risk that different courts would weigh competing policy factors in different ways with the result that arbitration agreements would be upheld inconsistently by different courts.

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[36] David St. John Sutton et al., eds., *Russell on Arbitration*, 24th ed. (London: Thomson Reuters, 2015), pp. 9-10, ALA, Tab 10; *South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd.*, 2018 BCCA 468, paras. 17, 18.
[37] *Mungo v. Saverino*, [1995] O.J. No. 3021, para. 71 (WL).
[38] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 2, 40.
[39] *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, para. 18; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, L'Heureux Dubé J., concurring, para. 7; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, para. 41 (WL); *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, para. 101; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 2, 40, 42, 171-175.
[40] CA Reasons, paras. 45, 49, 50, ALA, Tab 2C.

The competence-competence principle has been adopted in Canada for good reason

41. The competence-competence principle provides that "if there is an arguable or *prima facie* case that the arbitrator has jurisdiction, the court should defer the issue of jurisdiction to the arbitrator."[41] It is only if the jurisdictional question is based solely on a question of law or a mixed question of law and fact that necessitates only a minimal analysis of the documentary record that a court will determine the jurisdictional question.[42]

42. Legislatures across Canada have all adopted the competence-competence principle into statute.[43]

43. The benefits of applying the competence-competence principle are far-reaching. It fosters the goals of arbitration to offer timely, efficient, and cost-effective dispute resolution. By restricting the challenge to an arbitrator's jurisdiction, there is less room for delay before a matter is referred to arbitration. Challenges to the arbitrator's jurisdiction that involve scrutiny of facts are not duplicated and are only considered once by the arbitrator.[44] As a result, there is less

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[41] *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, para. 68, citing *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; *Dalimpex Ltd. v. Janicki* (2003), 64 OR (3d) 737 (C.A.), para. 20; *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, para. 34.

[42] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, paras. 84-86; *Seidel v. TELUS Communications Inc*., 2011 SCC 15, para. 4, 28-30.

[43] *Arbitration Act*, R.S.A 2000, c. A-43, s. 17; *The Arbitration Act*, S.S. 1992, c. A-24.1, s. 18(1); *The Arbitration Act*, C.C.S.M. c. A120, s. 17(1); *Arbitration Act*, R.S.N.B. 2014, c. 100, s. 17(1); *Commercial Arbitration Act*, S.N.S. 1999, c. 5, s. 19(1); *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 17; *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, s. 16(1); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 16(1); *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), s. 16(1); *International Commercial Arbitration Act*, S.M. 1986-87, c. 32, C.C.S.M., c. C151, s. 16(1); *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, s. 16(1); *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2, s. 16(1); *International Commercial Arbitration Act*, R.S.N.B. 2011, c. 176, s. 16(1); *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, s. 16(1); *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5, 16(1); *International Commercial Arbitration Act*, R.S.N.L. 1990, c. I-15, 16(1); *International Commercial Arbitration Act*, R.S.Y. 2002, c. 123, s. 16(1); *International Commercial Arbitration Act*, R.S.N.W.T. (Nu) 1988, c. I-6, s.16(1).

[44] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 69.

expense for the parties, because there is no requirement to file extensive factual evidence to support or rebut any challenges to the arbitrators' jurisdiction.

Question 1: Whether the competence-competence principle applies to questions of the validity of an arbitration agreement?

44. Decisions of this Court and Canadian legislatures reflect a "strong preference that an arbitrator be allowed to determine the scope of the arbitrator's jurisdiction."[45] This deferential approach has been applied by this Court to questions of both the validity and scope of arbitration agreements.[46] The Court of Appeal's decision in this case creates a distinction between those issues holding that the competence-competence principle only applies to questions of the scope of the arbitration agreement and not questions of validity.

45. The Court of Appeal concluded that competence-competence did not apply to questions of the validity of arbitration agreements. The Court reached this conclusion on the erroneous view that validity challenges did not impugn the arbitrator's jurisdiction.

46. There are good reasons to support that the Court of Appeal erred in principle in its decision on competence-competence. Given the importance of consistently applying the competence-competence principle, the Court of Appeal's approach raises a legal policy concern warranting guidance by this Court.[47]

47. In addition to the Court of Appeal's departure from this Court's jurisprudence, the decision is contrary to Ontario legislation. Ontario's *Arbitration Act, 1991* provides that an "arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement."[48] Similarly, the *International Commercial Arbitration Act, 2017*, provides that the "arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the

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[45] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 84.
[46] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 11; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 4, 28-30, 66.
[47] *Salomon v. Matte-Thompson*, 2019 SCC 14, para. 40.
[48] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 17, (emphasis added).

existence or validity of the arbitration agreement."[49] Domestic and international arbitration legislation in other provinces contain similar provisions.[50]

Dangers of the Court of Appeal's approach to competence-competence

48. The dangers of failing to apply the competence-competence principle to questions of validity are evident from the Court of Appeal's decision. The validity challenges in this case were two-fold. First, Mr. Heller argued that the arbitration agreement was an unlawful contracting out of the *ESA*. That challenge was premised on the existence of an employment relationship between the parties – the ultimate question in the underlying dispute. Second, Mr. Heller took the position that the arbitration agreement was unconscionable.

49. Neither of Mr. Heller's challenges to the validity of the Arbitration Clause involved pure questions of law. Under the competence-competence principle, a reviewing court ought to have only considered Mr. Heller's challenges insofar as a superficial review of the record would have permitted. However, since the Court of Appeal abandoned the application of competence-competence, it engaged with each of Mr. Heller's challenges at a fact-intensive level.

50. The question of whether an employment relationship exists is a complex question of fact.[51] The Court of Appeal presumed the existence of the relationship based on Mr. Heller's pleading. By abandoning competence-competence and concluding that the plaintiff is presumed to be able to prove that which he pleads in considering the exceptions to the mandatory legislative stay in favour of arbitration, the Court significantly lowered the standard to resist a stay.[52] Under the Court of Appeal's approach, a plaintiff will now be permitted to plead around the validity of an arbitration agreement to avoid a stay and their bargain to arbitrate.

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[49] *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, s. 16(1), (emphasis added).
[50] See footnote 42 above for examples.
[51] *Omarali v. Just Energy*, 2016 ONSC 4094, para. 21, leave to appeal ref'd, 2016 ONSC 7096 (Div. Ct.).
[52] Contrary to the Court of Appeal's decision, this Court's decision in *Seidel* does not support this standard. This Court did not endorse assuming pleaded facts that were relevant to determining the enforceability of the arbitration agreement at issue.

51. On unconscionability, the Court went so far as to conclude that the motion judge made palpable and overriding errors of fact in his unconscionability analysis. This conclusion was based on several factual determinations which were not based on the record but based on the plaintiff's pleading or on unproven assumptions. These include: Mr. Heller's income, the size of Mr. Heller's claim, that the employment law of the Netherlands would not apply Ontario law in the event an employment relationship was established, and that the employment law of the Netherlands would be less favourable than Ontario law.[53]

52. The Court of Appeal also rejected Uber's unchallenged evidence on its motivations for selecting arbitration.[54] The Court drew an inference unsupported by any evidence in the record that Uber chose arbitration "to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber."[55]

53. The Court's decision is already being followed by lower courts in Ontario.[56] Without guidance from this Court, there is a real risk that the Court of Appeal's flawed approach to the competence-competence approach to considering the validity of an arbitration agreement will prevail.

Question 2: What is the role of the court in interpreting the legislatures' determination on whether to restrict arbitration?

Legislatures weigh policy considerations to determine any restrictions on arbitration

54. This Court has made clear that the decision to restrict parties' freedom to choose arbitration has been left to the legislatures.[57] Determining the validity of an arbitration agreement therefore requires the court to determine whether the legislature has expressed an intention to exclude arbitration over the subject-matter of the parties' dispute. The analysis is one of statutory interpretation involving the plain words of the legislation and express legislative choices. This is

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[53] CA Reasons, paras. 58-59, 68, ALA, Tab 2C.
[54] CA Reasons, para. 68, ALA, Tab 2C.
[55] CA Reasons, para. 68, ALA, Tab 2C.
[56] *Belnor Engineering Inc. v. Strobic Air Corporation et al.*, 2019 ONSC 664.
[57] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 2.

well-established legal precedent that the Court of Appeal ignored in this case.[58] The Court went beyond the legislature's expressed intentions and engaged in its own review of policy factors.[59]

55. The resolution of the question of whether the Court of Appeal went beyond the permissible bounds in considering whether the *ESA* precluded arbitration will have far-reaching implications both within and beyond the employment context.

56. The provisions of the *ESA* are identical, or substantially similar to, provisions of other provincial employment standards legislation across Canada.[60] Employers and employees "frequently prefer the private arbitration of employment disputes to protracted litigation"[61] and courts have routinely supported and enforced the use of arbitration clauses in employment agreements across Canada.[62] The Court of Appeal's decision threatens this use.

57. Apart from the employment context, the Court of Appeal's approach in this case creates significant uncertainty for all parties involved in selecting and relying on arbitration agreements,

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[58] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 2; *Young v. National Money Mart Company*, 2013 ABCA 264, paras. 16-19; *Wellman v. TELUS Communications Company*, 2017 ONCA 433, para. 50; *Hopkins v. Ventura Custom Homes Ltd*., 2013 MBCA 67, paras. 58-63, 98, 99.

[59] CA Reasons, paras. 45, 49, 50, ALA, Tab 2C.

[60] *See Employment Standards Code*, R.S.A. 2000, c. E-9, ss. 3-4, 82-83; *Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 4, 74; *Employment Standards Code*, C.C.S.M., c. E110, ss. 4, 92; *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 61; *Labour Standards Act*, R.S.N.L 1990, c. L-2, ss. 3-4, 62; *Employment Standards Act*, S.N.W.T. 2007, c. 13, ss. 4, 61; *Labour Standards Code*, R.S.N.S. 1989, c. 246, ss. 6, 21; *Labour Standards Act (Nunavut)*, R.S.N.W.T. (Nu) 1988, c. L-1, s. 3; *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2, ss. 2.1, 6.2; *Act Respecting Labour Standards*, C.Q.L.R., c. N-1.1, ss. 86.1, 87, 93-94; *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, ss. 2-6, 2-7, 2-76, 2-89; *Employment Standards Act*, R.S.Y. 2002, c. 72, ss. 3, 73; *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 97, 168.

[61] Randy A. Pepper, "Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration" (1998) 36 Osgoode Hall L.J. 807, p. 844 (HeinOnline).

[62] *See Bonazza v. Forensic Investigations Canada Inc.*, [2009] O.J. No. 2626; *Kocur v. FirstService Corporation*, 2017 ONSC 6114; *Ross v. Christian & Timbers Inc.*, [2002] O.J. No. 1609 (WL); *National Ballet of Canada v. Glasco*, (2000), 49 O.R. (3d) 230; *Robert v. Markandu*, 2012 ONSC 6891; *Canadian Crude Separators Ltd. v. Jacobson*, 1998 ABQB 590; *Rashid v. Wipro Ltd.*, 2015 BCSC 2199; *Pietrasz v. Eminata Group*, 2014 BCSC 479; *Macleod v. Westwinn Group Corp.*, 2007 BCSC 1788; *Sharecare Homes Inc v. Cormier*, 2010 NSSC 252; *Pratt v. First Nations University of Canada*, 2011 SKQB 280.

particularly those in industries where a complaint mechanism exists in the governing statute permitting civil proceedings or complaints to an administrative body.[63]

58. The difficulty with the Court of Appeal's approach is the uncertainty it injects into the legal landscape for the enforceability of arbitration agreements. Individuals and organizations that agree to arbitrate no longer have certainty that their agreements are enforceable by simply considering the clear wording of their governing statutes. They are now at the mercy of a court weighing policy objectives to adjudicate the permissibility of the arbitration agreement. The possibility for inconsistent results abounds.

No legislative intention to prohibit arbitration under the ESA

59. In addition to the uncertainty created by the Court of Appeal's decision, the decision appears to run contrary to the Ontario legislature's intention not to restrict arbitration in the employment context.

60. ***No express prohibition on arbitration***. Legislatures that have restricted arbitration, including the Ontario legislature, have been express when they have done so. For example, the Ontario *Consumer Protection Act* provides that: "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act."[64] No such prohibition is found in the *ESA*.

61. Moreover, the previous Ontario government conducted an expansive review and overhaul of the *ESA* through the *Fair Workplaces, Better Jobs Act, 2017*, S.O. 2017, c.22, yet no

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[63] *See for example, Discriminatory Business Practices Act*, R.S.O. 1990, D/12. s. 7(4).
[64] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, s. 7(2); *Alberta Consumer Protection Act*, R.S.A. 2000, c-26.3, s. 16(2); *Energy Consumer Protection Act, 2009*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2); *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5, s. 7(3); *Payday Loans Act*, R.S.P.E.I. 1988, c. P-2.1, s. 37(2).

recommendations or amendments were made to restrict arbitration.[65] The amendments to the *ESA* began with the "Changing Workplaces Review" where the government engaged special advisors to conduct a comprehensive review of employment legislation and workplaces in Ontario. The special advisors made specific recommendations regarding what legislative changes should occur in order to address "the changing nature of the workforce, the workplace […] and changes in the prevalence and characteristics of standard employment relationships."[66]

62. The Review specifically considered the "gig economy" and referred to Uber directly.[67] Despite the expansive Review and significant legislative reform that ensued, no legislative changes were made to preclude employees and employers governed by the *ESA* from using arbitration to resolve their employment disputes.

63. ***The complaint mechanism in the ESA is not an employment standard.*** The Court of Appeal found that the Arbitration Clause was void as it contracted out of Mr. Heller's right to complain to the Minister under s. 96, which the Court held was an "employment standard." This legal determination is flawed.

64. An employment standard is defined under the *ESA* as a "requirement or prohibition under this Act that applies to an employer for the benefit of an employee."[68] The case law interpreting employment standard defines the term as requiring an obligation on an employer and distinguishes it from the complaint process.[69] The plain wording of the complaint mechanism in the *ESA* places obligations on the Minister and not the employer.

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[65] The Report contains 173 recommendations. Ontario, Ministry of Labour, "The Changing Workplaces Review" (January 2018), online: <https://www.labour.gov.on.ca/english/about/workplace/>.

[66] Ontario, Ministry of Labour, *The Changing Workplaces Review: An Agenda for Workplace Rights (Summary Report)* by S.C. Michael Mitchell & John C. Murray, p. 3.

[67] Ontario, Ministry of Labour, *The Changing Workplaces Review: An Agenda for Workplace Rights*, S.C. Michael Mitchell & John C. Murray, p. 54.

[68] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 1(1).

[69] *Nailor Industries Inc. v. S.M.W.I.A., Local 30*, 100 C.L.A.S. 144, para. 211(WL); *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, para. 20.

65. ***Civil proceeding in the ESA includes arbitration.*** Section 98 of the *ESA* states that an employee who commences a "civil proceeding" is restricted from accessing the complaint procedure under section 96. The Court of Appeal ruled that the term "civil proceeding" does not encompass arbitration. This aspect of the decision means that arbitration clauses in employment contracts are now invalid unless they expressly carve out a right to complain to the Minister.

66. There is good reason to support that the Court of Appeal erred in concluding that "civil proceeding" does not include arbitration. When the *ESA* was amended to make the complaint mechanism optional and to permit an employee to pursue a "civil action," the legislature was clear that its goal was to lessen the number of employees using the statutory process, which was overwhelmed by complaints. Many of these complaints were being simultaneously "addressed through other means" in any event. [70] The legislature explained at the time that the civil proceeding exception was created "in keeping with [the] government's desire to encourage greater self-reliance in the workplace" as "employers and employees [would be] required to settle more disputes on their own rather than appealing to the ministry in each and every case."[71] Arbitration is consistent with these policy objectives.

67. Further support for this intention is found in the legislature's decision to alter the language in the exception from "civil action" to "civil proceeding." The 1990 *ESA* excluded parties engaged in a "civil action" from using the legislative complaint process.[72] This language was broadened in 2000 to exclude parties engaged in any "civil proceeding" from using the complaint mechanism. This change suggests legislative intent to encompass the rising use of alternative forms of dispute resolution.

Question 3: What should be the test for determining whether an arbitration agreement is unconscionable?

68. The application and scope of the doctrine of unconscionability in the context of arbitration agreements are issues of first impression for this Court. This Court has not addressed the test for unconscionability in over 25 years. *Norberg v. Wynrib*, the last decision of this Court to consider this issue, arose in a very different context involving the fiduciary relationship

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[70] Ontario, Legislative Assembly, 36th Parl., 1st Sess., (3 June 1996).
[71] Ontario, Legislative Assembly, 36th Parl., 1st Sess., (13 May 1996).
[72] *Employment Standards Act*, R.S.O. 1990, c. E.14, s. 64.3(1) [repealed on September 4, 2001].

between a doctor and patient.[73] Since then only Justice Abella has analyzed the test for unconscionability in concurring reasons in this Court's 2017 decision in *Douez v. Facebook*.[74]

69. In the absence of definitive guidance from this Court, the Court of Appeal in this case recognized that inconsistent approaches have emerged across Canada.[75] The confusion regarding the unconscionability doctrine led the Court of Appeal to err in law by finding that the unconscionability doctrine could be satisfied through inferences rather than direct evidence. The Court of Appeal's inference that Uber selected arbitration to favour itself – without any evidence that such choice presents a procedural or substantive disadvantage to Mr. Heller – cannot at law establish a "knowing taking advantage."[76]

70. The Court of Appeal also erred in its unconscionability analysis by relying on the "strong cause test" for setting aside a forum selection clause.[77] There are fundamental differences between forum selection clauses and arbitration clauses that make the "strong cause test" inapt for considering the unconscionability of arbitration clauses. Unlike forum selection clauses, legislative directives exist to enforce arbitration clauses. Competence-competence does not apply to forum selection clauses, meaning that courts can engage in ordinary fact-finding in considering unconscionability of those clauses. The same is not true for arbitration clauses.

71. Forum selection clauses also take the adjudication of a dispute out of the local forum to a foreign one. By contrast, this Court has described arbitration as "neutral". An arbitrator has "no allegiance or connection to any single country," nor does arbitration as an institution have a connection to a particular forum or geographic base.[78] The Court of Appeal's novel approach to unconscionability in this case suggests that the issue is ripe for this Court's consideration.

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[73] *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, para. 41 (WL).
[74] *Douez v. Facebook*, 2017 SCC 33, Abella J., concurring, para. 115. Excluding unconscionable marital contracts, which has formed a unique approach for that specific context.
[75] CA Reasons, para. 61, ALA, Tab 2C.
[76] CA Reasons, para. 68, ALA, Tab 2C.
[77] *Douez v. Facebook*, 2017 SCC 33, para. 17.
[78] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 51; M. Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice" (2003-2004), 42 *Colum. J. Transnat'l L.* 753, p. 755 (HeinOnline).

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

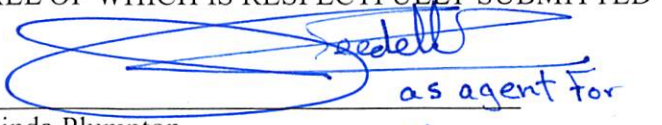
72. In light of the issues of national and public importance at stake in this application, the Applicants do not seek the costs of this application.

PART V – ORDER SOUGHT

73. The Applicants seek an order granting leave to appeal to this Honourable Court the decision of the Court of Appeal.

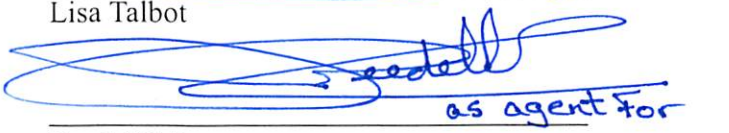
March 4, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Linda Plumpton

Lisa Talbot



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