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April 18, 2019

DELIVERED

Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Mr. Bilodeau:

Re: Uber Technologies Inc. et al v. David Heller
Applicant's Reply in SCC Court File No. 38534

In accordance with Rule 28 of the *Rules of the Supreme Court of Canada*, Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V., (collectively "Uber")[1], provide the following brief reply to the Respondent David Heller.

Since Uber filed its application for leave to appeal, this Court decided *Telus Communications Inc. v. Wellman*, in which it affirmed its support of party autonomy and its view that "parties to a valid arbitration agreement should abide by their agreement."[2] *Wellman* supports Uber's application for leave to appeal. It recognizes that the interpretation of arbitration agreements is an issue of national and public importance that merits consideration by this Court.

This Court's decision in *Wellman* underscores that the Court of Appeal for Ontario has erred in principle in the case at issue. Specifically, *Wellman* demonstrates that the Court of Appeal should not have engaged in its own weighing of public policy factors when it is the role of the legislature and not the courts to set policy.[3] *Wellman* also emphasizes that the Court of Appeal should not have injected greater uncertainty and unpredictability into the enforcement of arbitration agreements.[4]

The Respondent submits that because *Wellman* "canvassed s 7 of the Ontario *Arbitration Act* and reiterated key principles from *Seidel v. TELUS Communications Inc.*," this Court does not need to "weigh in on the enforceability of arbitration agreements."[5] Uber disagrees. *Wellman* does not dispense with the need for this Court to grant leave to Uber's appeal. Uber's application raises important issues that were neither raised nor resolved by *Wellman*.

First, *Wellman* does not engage the specific provision at issue in Uber's application for leave to appeal — namely, section 7(2) and the unconscionability exception to the mandatory stay provided for in section 7(1) of the *Arbitration Act, 1991*.[6] At issue in *Wellman* was the partial

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

[2] 2019 SCC 19, ["*Wellman*"], para. 63

[3] *Wellman*, para. 79

[4] *Wellman*, para. 83

[5] Memorandum of Argument of the Respondent, para. 1

[6] S.O. 1991, c. 17, s. 7(1)

stay provision in section 7(5) of the Act.[7] This Court addressed whether section 7(5) grants the court discretion to refuse to stay the non-consumer claims in a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement.[8] In *Wellman*, this Court endorsed the use of the section 7(2) unconscionability analysis to address any arguments about the potential unfairness of arbitration clauses in standard form contracts.[9] Yet since the respondent in *Wellman* had not argued that the standard form arbitration agreement at issue was unconscionable, such an analysis was beyond the scope of the case. This Court's directive to parties to rely on unconscionability reinforces the need for this Court to clarify the inconsistent approaches which have emerged across Canada in this area, and to address the errors of law made by the Court of Appeal.

Second, *Wellman* does not address whether the *Employment Standards Act, 2000*[10] *("ESA")* precludes arbitration. *Wellman* arose in the context of the *Consumer Protection Act, 2002*,[11] in which the legislature has expressly overridden consumers' freedom to choose arbitration.[12] Uber's application requires this Court to consider the Court of Appeal's statutory interpretation of the *ESA*. As outlined in paragraphs 55-58 of Uber's memorandum of argument, the Court of Appeal's decision has far-reaching implications for the use of arbitration within and beyond the employment context.

Third, *Wellman* does not address how and to what extent the competence-competence principle applies in determining the validity of an arbitration agreement. In light of the importance this Court has placed on allowing arbitrators to determine the scope of their own jurisdiction, this Court should offer guidance about whether the Court of Appeal erred in holding that competence-competence does not apply to determining the validity of arbitration agreements.

All of these issues raised squarely in Uber's application for leave to appeal remain to be determined following this Court's decision in *Wellman*. They are issues of national and public importance which warrant this Court's consideration and support granting Uber's application for leave to appeal.

Respectfully submitted,

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[7] S.O. 1991, c. 17

[8] *Wellman*, para. 29

[9] *Wellman*, para. 85

[10] S.O. 2000, c. 41

[11] S.O. 2002, c. 30, Sched. A, s. 7(2)

[12] *Wellman*, para. 8