TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

UBER TECHNOLOGIES INC. v HELLER 2020 SCC 16

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Facts

The popular food delivery service app Uber Eats connects customers with restaurants in their neighborhoods. Customers order meals which are then delivered by the Uber drivers that pick up and deliver food in their area. In Toronto, David Heller is one of these drivers.

Prior to beginning his work with Uber Eats, Heller signed a standardized service agreement contract ("service agreement") with Uber that laid out the terms of his job. The agreement was "signed" through the Uber app where Heller accepted all of the terms without negotiation by "clicking to agree." These included a mandatory arbitration clause ("the arbitration clause") that said that if he had a legal issue with Uber, he would have to resolve it through mediation or arbitration, alternative, discussion-based methods of dispute resolution, at the International Chamber of Commerce (ICC) in Amsterdam, Netherlands.

However, to be able to initiate any process of mediation or arbitration in the Netherlands, he would have to pay $14,500 USD, in addition to extra fees for travel and accommodation. For Heller these fees would have amounted to almost the entire amount of his annual income working full-time for Uber.

Procedural History

In 2017, Heller started a class proceeding in the Ontario court system against Uber. The basis of his claim was that Uber's service agreement does not classify Uber drivers as employees, but rather as independent contractors who are not entitled to benefits from Ontario's *Employment Standards Act (ESA)*. Heller argued that in this way, Uber's service agreement illegally "contracts out" of the *ESA*.

In response to Heller's class action, Uber brought a motion to stay the class proceeding, which is a request to the Court to stop the proceeding from continuing. Uber instead asked that the dispute be resolved with arbitration in the

Netherlands, as had been agreed to in the service agreement. Heller argued it should be the Ontario courts to hear the dispute as the arbitration clause itself was invalid. The motion judge sided with Uber.

Heller appealed to the Court of Appeal for Ontario (ONCA). ONCA reversed the initial trial decision, and found that a court in Ontario could deal with this matter. The Court found that the arbitration agreement was invalid because it both illegally contracted out of the *ESA* and was unconscionable, meaning there was evidence of an extremely or "grossly unfair" bargain where one party had taken advantage of the inequality in bargaining power over the other.

Uber then appealed this decision to the Supreme Court of Canada (SCC).

Issues

1. Which jurisdiction has the authority to decide whether the arbitration clause in Uber's service agreement is valid?
2. If it is the Ontario court that has jurisdiction over this dispute, is the mandatory arbitration clause in Uber's standard service agreement contract unconscionable and therefore invalid?

Decision

Justices Abella and Rowe, writing for the majority of the Court, decided that it is the Ontario court that has authority to decide this matter. Further, the arbitration and choice of law clauses in Uber's service agreement were found to be unconscionable and therefore invalid.

Ratio

The majority reasons set out a new test for unconscionability which requires there to be evidence of 1) an improvident bargain and 2) an inequality of bargaining power. Employers must now pay careful attention to the terms included in their standardized agreements to ensure terms are accessible, especially where arbitration, mediation, and choice of law clauses are included. In today's gig economy, where temporary positions for short-term commitments to work are commonly governed by standardized contracts, this case has a far-reaching impact. Standard form contracts are created solely by one party and are commonly not open to negotiation. They can include terms that are not fully clear to the individual signing the contract. These types of contracts are now more vulnerable to legal action.

Reasons

The Court first answered the overarching question of who had the jurisdiction, or legal authority, to decide the case: the arbitrator in the Netherlands or an Ontario court. To do this, the Court first had to determine what legislation governed the Uber's service agreement: The *International Commercial Arbitration Act (ICAA)* or the *Arbitration Act, 1991*. Based on the facts and

pleadings in the case, the Court determined the dispute between Heller and Uber engaged issues related to employment relationships and was not commercial in nature. Thus, the *Arbitration Act, 1991* was found to apply.

The *Arbitration Act, 1991* instructs courts to stay proceedings if a matter can be decided with arbitration. But there can be exceptions to this rule. The Court found that since the cost of arbitration in the Netherlands is so high, Uber's arbitration agreement was inaccessible. The issue of accessibility has not been previously raised by the jurisprudence on this topic, and so the Court can depart from the general rule that the arbitrator should be first to resolve a dispute and instead allow the courts to determine the agreements validity.

After the Court decided it had the authority to answer whether or not the terms in Uber's service agreement were valid or not, it embarked to do so on the basis of the unconscionability doctrine in Canadian contract law. The majority found that unconscionability is an important aspect of contract law which protects vulnerable parties throughout process of creating a contract.

The Court asserted that there are two central aspects to look at when deciding if a clause in a contract is unconscionable:

> First, there must be evidence of an inequality in the bargaining power between parties, when one party cannot protect their own interests in the process of agreeing to a contract.
>
> Second, there must have been an improvident bargain, an agreement that disproportionately favours the stronger party in the agreement.

Next, the Court discussed this aspect of contract law in the context of standard form contracts, for example, those where you "Click to Agree" to all of the terms. The Court found that standard form contracts have the potential to create inequality between the parties where there is no opportunity for one party to bargain or negotiate terms, as is the issue in this case.

Turning back to the facts at hand, the Court was satisfied there was both 1) an inequality of bargaining power and 2) evidence of an improvident bargain between Uber and Heller.

The Court found there was an inequality of bargaining power mainly because the arbitration and choice of law clauses were part of a standard form contract to which Heller had no input. When signing up to be an Uber Eats driver, Heller had only two options: accept or reject. Further, the Court noted inequality because the standard form contract did not mention the large costs associated with the chosen

course of dispute resolution. Neither Heller, nor any other reasonable person in his position, could have known about these costs before agreeing to a condition like this.

In answering the second part of the test, on whether there was evidence of an improvident bargain, the Court contrasted the high costs associated with arbitration in the Netherlands with Heller's yearly salary working full time as an Uber driver ($20,800–$31,200 per year before taxes and expenses). The Court, again, emphasized that no reasonable person who understood all of these details in the contract would have agreed to this term.

To conclude, the majority stated that arbitration is meant to be a cost-effective method of resolving disputes and any agreement that effectively does the opposite cannot be valid.

Justice Brown wrote a concurring judgement, meaning he agreed with the ultimate conclusion of the majority's decision but for different reasons. Justice Brown said the majority's approach using unconscionability as the path to say the arbitration clause is not valid was unnecessary because there is already a legal principle that would provide the same answer. That principle is found in the public policy that people should have meaningful access to the legal system and judicial decisions. Given the high costs of the arbitration, Justice Brown found that arbitration clause should be invalid because in this case it was inaccessible and limited Heller's ability to access the legal system.

In a dissenting opinion, Justice Côté disagreed with her colleagues' findings that the *Arbitration Act, 1991* was the applicable legislation and with the majority's treatment of the unconscionability doctrine. In contrast to the majority, Justice Côté found that the *ICAA* was applicable and that Heller's initial claim should be heard by the arbitrator. Justice Côté ultimately would have ordered a conditional stay in proceedings, meaning that, unless Uber provided Heller with the funds to continue with the arbitration, the proceedings would come to a stop.

The key takeaways from the case:

a. Companies may have to adapt to their respective jurisdictional worker protection laws like the *ESA* instead of contracting out of them with mandatory arbitration provisions.

b. If Uber drivers are eventually found to be "employees" instead of "contractors," Uber will have to update its employment contracts to reflect each province and territory's employment laws.

c. ICC mediation or arbitration provisions may lose favour because of the disproportionate costs faced by contracting individuals of limited means.

DISCUSSION

1. What did Heller say was unfair about the agreement he signed with Uber?

2. What are some other examples of businesses or types of service that this decision may impact?

3. Why, in your opinion, is there a difference between benefits that are available to "employees" versus "independent contractors"?

4. In what way might the service agreement between Uber Eats and its drivers give one side a significant advantage over the other?

5. Have you ever agreed to terms of service without reading them thoroughly? Was the Court correct in finding that no reasonable person would have agreed to Uber's service agreement if they understood it completely?