File Number: 38534

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

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)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. As this Court just observed in *Telus Communications Inc. v Wellman*, "'the law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence.'"[1] *Wellman* canvassed[2] s 7 of the Ontario *Arbitration Act*[3] and reiterated key principles from *Seidel v TELUS Communications Inc.*[4] Against this backdrop, the assertion of the Applicants (collectively referred to as "Uber") that this Court must weigh in on the enforceability of arbitration agreements should not be countenanced.

2. Here, the Ontario Court of Appeal exercised its discretion under s 7(2) of the *Arbitration Act*, which establishes five exceptions to the mandatory stay of court proceedings concerning matters subject to valid arbitration agreements. The decision both recognizes the enforceability of arbitration agreements under the *Arbitration Act* and applies the Act.

3. Nevertheless, without citing s 7(2), Uber argues that the Court of Appeal has created uncertainty as to the enforceability of arbitration agreements. Uber argues that in a single decision the Court of Appeal has gone rogue by applying the Ontario *Employment Standards Act, 2000* (the "*ESA*") and determining Uber's arbitration agreement is invalid as to *ESA* claims.[5]

4. In reality, Uber's complaint is that the Court of Appeal, as mandated in *Wellman* and *Seidel*, exercised its discretion under s 7(2), considered whether the *ESA* evidenced legislative intent to

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1 2019 SCC 19 ["***Wellman***"], (quoting, at para. 54, *Haas v Gunakekaram*, 2016 ONCA 744, para 10).
2 *Wellman*, paras 47-65.
3 *Arbitration Act*, 1991, SO 1991, c 17.
4 *Seidel v TELUS Communications Inc*, 2011 SCC 15, ["***Seidel***"].
5 *Employment Standards Act*, 2000, SO 2000, c 41.

exempt employment standards claims from private arbitration, and determined as a matter of law that it does. This is the correct approach and is not a basis for granting leave.

5. Uber further urges this Court to grant leave on the basis that the Court of Appeal's decision creates confusion about the unconscionability test. Uber then argues that the issue is whether the Respondent, Mr. Heller, could establish that Uber's arbitration agreement constituted a "knowing taking advantage" of him and the other putative class members.[6] That is precisely the question the Court of Appeal answered: "it can be safely concluded that Uber chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber".[7] The Court of Appeal applied the test Uber is urging on this Court.

6. Uber's final contention, that the Court of Appeal confused arbitration agreements and forum selection clauses, and as a result erred by applying the "strong cause test", is likewise inconsistent with the decision's plain language. The Court of Appeal expressly placed the onus on Mr. Heller to establish that the arbitration agreement was unconscionable, and therefore invalid. The Court of Appeal stated that if Mr. Heller failed to meet that burden, the *Arbitration Act* precluded the court from considering whether the clause is unenforceable for other reasons, such as strong cause.[8] The Court of Appeal concluded that the "Arbitration Clause here fails at the first step of this analysis"—unconscionability.[9]

7. The Court of Appeal's decision raises no issues that merit review by this Court. Accordingly, this application for leave to appeal should be dismissed.

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6 Uber's Memorandum of Argument ["**Uber Mem.**"], para 69.
7 *Heller v Uber Technologies Inc*, 2019 ONCA 1, ["***Heller ONCA***"], para 68.
8 *Heller ONCA*, paras 64-67.
9 *Heller ONCA*, para 67.

B. FACTS

1. Background

8. Uber operates in more than 77 countries. Through its cell phone applications ("Apps"), Uber connects its roster of drivers and delivery personnel with those needing their services. Uber sets and collects the fares and fees users must pay and charges a fee per transaction. Downloading the technology is free, but if the drivers and delivery personnel do not pick up riders and make deliveries, Uber does not make money.

9. The Respondent, Mr. Heller, is an Ontario resident who began delivering food for one of Uber's Apps, UberEATS, in 2016. He is 36 years old and has a high school education. As an UberEATS delivery person, Mr. Heller earns about $400-600 a week using his own vehicle and working 40-50 hours (about $21,000-31,000 annually).[10]

10. Uber App users (driver, delivery persons and customers) download Uber Apps to their mobile phones. Uber uses GPS to connect customers seeking transportation using an App for riders with drivers using an App for drivers. The Uber App allows riders to request rides at their location, track the driver on the way and then rate the driver when the ride is complete.[11]

11. The UberEATS App allows users to order and have food delivered by nearby delivery personnel. The App displays various menus, collects the orders and transmits them to the restaurants. The restaurants signal delivery personnel when an order is available. Delivery personnel willing to deliver the order accept through the App, which provides his or her

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10 *Heller ONCA*, para 2.
11 *Heller ONCA*, para 5.

information to the restaurant and the customer. The delivery person confirms delivery in the App, which collects payment from the customer and remits it to the restaurant.[12]

12. Uber determines the maximum fares and fees drivers and delivery personnel receive for their work according to a base fare amount plus distance (which is based on GPS data from the App), plus applicable time amounts. Uber collects the payments from the customers, provides customers with a receipt and remits payments periodically to drivers.[13]

2. The Arbitration Agreement

13. Uber requires drivers and delivery personnel to create an account online to access the Apps. The first time they log into the App on their phone, they must agree to a service agreement, which appears on the phone's screen. They accept by clicking "I agree", and confirming acceptance by clicking "YES, I AGREE" after reading the following: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS". Uber's January 4, 2016 driver service agreement with Mr. Heller is 14 pages. A more recent November 29, 2016 UberEATS service agreement with Mr. Heller is 15 pages.[14]

14. Mr. Heller's service agreements with Uber contain the following arbitration and choice of law agreement:

> Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request

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12 *Heller ONCA*, para 6.
13 *Heller ONCA*, para 9.
14 *Heller ONCA*, para 8.

> for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .

15. Under ICC Rules, drivers must pay a $2,000 USD non-refundable filing fee to initiate the mediation process. For disputes valued under $200,000 USD, drivers must pay an additional administrative fee, which may be as much as $5,000 USD. These fees do not cover the mediator's fee, legal fees or travel to the Netherlands. If the parties are unable to resolve their dispute within 60 days, they must proceed to arbitration. Any party wishing to join the arbitration, including the driver who initiated it, must pay a $5,000 USD filing fee.[15]

16. The ICC Arbitration Rules also require the parties to pay an advance on costs "in an amount likely to cover the fees and expenses of the arbitrator and the ICC administrative expenses for the claims which have been referred to it by the parties". These payments must be in cash, unless a party's share is greater than $500,000 USD, in which case the party may post a bank guarantee. The initial $5,000 USD filing fee is credited against this advance, but is non-refundable.[16]

17. The up-front cost for a driver like Mr. Heller to participate in the Netherlands-based mediation-arbitration process in the Uber arbitration agreement is $14,500 USD. As an UberEATS delivery person, Mr. Heller earns about $20,800-31,200 a year, before taxes and expenses.[17]

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15 *Heller ONCA*, paras 12-13.
16 *Heller ONCA*, para 14.
17 *Heller ONCA*, para 15.

3. The Class Action

18. On January 19, 2017, Mr. Heller filed a Statement of Claim seeking to bring a class action on behalf of "any person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor" as a driver or delivery person through Uber's Apps and subject to their service agreements.[18]

19. Mr. Heller alleges that he and other similarly situated drivers and delivery personnel in Ontario providing services through the Uber Apps are employees of Uber and therefore protected by the *ESA*. In particular, Mr. Heller seeks a declaration that he and the class members are employees of Uber entitled to minimum wage, overtime pay, vacation pay and other minimum entitlements guaranteed under the *ESA* and seeks damages for Uber's breach thereof. Further, Mr. Heller seeks a declaration that Uber's arbitration agreement is void and unenforceable.[19]

4. Motion to Stay the Class Action

20. On October 13, 2017, Uber brought a motion in the Ontario Superior Court of Justice to stay the proposed class action in favour of the arbitration agreement. On January 30, 2018, Perell J issued a decision granting a stay.[20] Perell J held, in relevant part, that it is a "matter of statutory interpretation whether resort to arbitration is precluded by the [*ESA*]", but determined that the *ESA* did not preclude resort to arbitration. He further concluded that the issue of whether employment claims in Ontario are arbitrable is subject to the competence-competence principle and should thus be determined by an arbitrator in the Netherlands under the law of the Netherlands.[21]

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18 *Heller ONCA*, para 3.
19 Statement of Claim, paras 1, 8, Response to the Application for Leave to Appeal ["**RALA**"], Tab 2.
20 *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 ["***Heller ONSC***"].
21 *Heller ONSC*, paras 57, 65-66.

21. Perell J further held that the arbitration agreement was not unconscionable, and therefore he could not exercise his direction to deny the stay under s 7(2) of the *Arbitration Act* or s 8(1) of the *International Commercial Arbitration Act, 2017*.[22] Citing Uber's internal dispute resolution mechanism and size of the *class's* damages claim (not Mr. Heller's), Perell J concluded the agreement was not "improvident" simply because it required arbitration in the Netherlands.[23]

5. The Court of Appeal Decision

22. Mr. Heller appealed. The Court of Appeal, in a unanimous decision, concluded that the motion judge erred in granting the stay because the arbitration agreement is invalid: (i) as applied to claims under the *ESA*, as it constitutes an illegal contracting out of the *ESA*; and (ii) because it is unconscionable.[24]

23. First, the Court of Appeal determined that it need not decide whether Uber drivers are employees to determine on a preliminary motion whether the agreement is invalid.[25] Following *Seidel*,[26] the court presumed Mr. Heller's claim was "capable of proof" for the purpose of the motion and asked: "if the appellant (and those like him) is an employee of Uber, does the Arbitration Clause constitute a prohibited contracting out of the *ESA*?".[27]

24. The Court of Appeal answered, "yes". To reach this conclusion, the Court of Appeal reviewed the *ESA*, particularly s 5, which prohibits the waiver of any employment standard under the Act and renders any contracting out void.[28] The Court of Appeal then considered the *ESA*'s

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22 *Heller ONSC*, paras 67, 71-79.
23 *Heller ONSC*, paras 70-71.
24 *Heller ONCA*, paras 41-42, 73.
25 *Heller ONCA*, paras 23-28.
26 *Seidel*, para 8.
27 *Heller ONCA*, para 28.
28 *Heller ONCA*, paras 29-32.

plain language and purpose, determined that the arbitration agreement impermissibly restricts the right to file a complaint with the Ministry of Labour alleging contravention of the *ESA* and the corollary right and employer obligation to participate in the investigative process.[29]

25. In reaching this conclusion, the Court of Appeal also noted that the *ESA* contemplates three procedures for vindicating *ESA* rights: (i) a complaint to the Ministry of Labour, followed by investigation; (ii) a "civil proceeding", which requires certain notice to the Ministry; or (iii) under a collective agreement, in a proceeding before an arbitrator.[30] Private and confidential arbitration is none of these. Accordingly, the Court of Appeal held that the arbitration agreement, as applied to Mr. Heller's *ESA* claims, was invalid and under s 7(2) of the *Arbitration Act* denied the stay.

26. Second, the Court of Appeal held that the arbitration agreement is unconscionable.[31] The Court of Appeal applied the test from *Titus v William F. Cooke Enterprises Inc.*,[32] which Uber argued was the correct test. As to the first element, the Court of Appeal concluded that the arbitration agreement was substantially improvident because: (i) it requires a person with a small claim, such as Mr. Heller, to incur significant up-front costs out of proportion with the size of the claim involved; (ii) Uber is better positioned to incur the costs; (iii) it requires individual arbitrations in Uber's home jurisdiction, which is unconnected to where the drivers live and work; and (iv) it applies the laws of the Netherlands, without advising drivers what that law is.[33]

27. As to the remaining elements, the Court of Appeal determined there was no evidence Mr. Heller had received any legal advice or could have negotiated the terms of the agreement, and that

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29 *Heller ONCA*, paras 32-37.
30 *Heller ONCA*, paras 32-36; *ESA*, s 8(2) (requiring notice to the Ministry of Labour).
31 *Heller ONCA*, para 52.
32 *Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573 ["***Titus***"], paras 60, 68.
33 *Heller ONCA*, para 68.

Uber had acknowledged the inequality of bargaining power. Pointing out that Uber also admitted to selecting the arbitration process to benefit itself, the Court of Appeal concluded that collectively these elements raise a reasonable inference that Uber chose the arbitration agreement to "take advantage of its drivers" and that it did so "knowingly and intentionally".[34]

PART II: QUESTIONS IN ISSUE

28. The issue on this application is whether this case raises questions of national or public importance that merit consideration by this Court. Mr. Heller respectfully submits it does not.

PART III: STATEMENT OF ARGUMENT

A. The Court of Appeal's Decision Respects Competence-Competence

29. The competence-competence principle is well settled in Canada and in Ontario.[35] The *Arbitration Act* expressly adopts it in s 17. The *Arbitration Act* also carves out the courts' jurisdiction to determine whether to stay a civil proceeding in favour of an arbitration agreement. Section 7(1) requires a mandatory stay with five exceptions under s 7(2), including an invalid arbitration agreement.[36]

30. This Court canvassed s 7 of the *Arbitration Act* in *Wellman*, noting that s 7(2) grants courts the discretion to deny a stay where "it would be either unfair or impractical to refer the matter to

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34 *Heller ONCA*, paras 68-69.

35 *See, e.g.*, *Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745 ["***OMA***"], paras 19-37; *Ontario v Imperial Tobacco Canada Ltd*, 2011 ONCA 525 ["***Imperial Tobacco***"], paras 33-42; *Dancap Productions Inc, v Key Brand Entertainment, Inc*, 2009 ONCA 135 ["***Dancap***"], paras 33-40; *Dalimpex Ltd v Janicki*, 2003 CanLII 34234 (ON CA) ["***Dalimpex***"].

36 SO 1991, c 17, ss 7(1), 7(2).

arbitration".[37] The Court also addressed the interaction of a similar provision and the competence-competence principle in *Seidel*. *Seidel* considered whether an action pursuant to the British Columbia *Business Practices and Consumer Protection Act* ("*BPCPA*"),[38] was subject to a stay under what is now the British Columbia *Arbitration Act*, ("*BCAA*").[39] Like the Ontario Act, the *BCAA* grants courts the discretion to deny a stay in favour of an arbitration agreement where that agreement is "void, inoperative or incapable of being performed".[40]

31. *Seidel* reiterated what several other decisions already had said: court challenges to an arbitration agreement on the basis that it is "void, inoperative or incapable of being performed" should be referred to the arbitrator under the competence-competence principle, "unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition 'only superficial consideration of the documentary evidence in the record'".[41] If it is arguable that the dispute falls within the scope of the arbitration agreement, it is proper to leave the question to the arbitrator.[42]

32. The Court of Appeal exercised its jurisdiction under s 7(2) of the *Arbitration Act* in a manner that conformed to this directive in considering two questions: (i) whether the arbitration agreement, as applied to employment standards claims, was invalid as a matter of law; and (ii)

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37 *Wellman*, paras 47-76 (quoting at para 65 *MDG v Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656, para 36).

38 *Business Practices and Consumer Protection Act*, SBC 2004 c 2.

39 *Arbitration Act*, RSBC 1996, c 55.

40 *Seidel*, paras 7, 15, 27-30.

41 *Seidel*, paras 29; *see also Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40, paras 37-38; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, paras 84-85; *Rogers Wireless Inc v Muroff*, 2007 SCC 35.

42 *Seidel*, paras 114-116.

whether the arbitration agreement was unconscionable and therefore invalid.[43] Neither of these questions concerned the scope of agreement, as the Court of Appeal pointed out.[44]

1. The Court of Appeal's Analysis of the *ESA* Parallels *Seidel*

33. Uber argues that the Court of Appeal's analysis warrants this Court's intervention because it failed to follow *Seidel* and engaged in a fact-intensive analysis that should have been left to an arbitrator. The decision is to the contrary. The Court of Appeal did not address whether Mr. Heller had an employment relationship with Uber. Rather, citing *Seidel*, the Court of Appeal noted that, on a preliminary motion like Uber's motion to stay, the court could presume that the allegations are true or at least "capable of being proven".[45]

34. This is the same approach this Court applied in *Seidel*:

> Firstly, of course, Ms. Seidel's complaints against TELUS are taken to be capable of proof only for the purposes of this application. We are not assuming the allegations will be proven, let alone deciding that TELUS did in fact engage in the conduct complained of.[46]

35. In *Seidel*, the Court then considered whether, "as a matter of statutory interpretation," the *BPCPA* evidenced a legislative intent to limit the enforcement of arbitration agreements against claims under that Act.[47] The Court's analysis considered the relevant legislative provisions particularly, that: (i) the act prohibited the "waiver or release by a person of the person's rights, benefits or protections under th[e] Act" and rendered any attempt to do so "void"; and (ii) s 172 of the *BPCPA* provided for enforcement by bringing an "action in Supreme Court".[48]

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43 *Heller ONCA*, para 22.
44 *Heller ONCA*, para 39.
45 *Heller ONCA*, para 27.
46 *Seidel*, para 8; *Heller ONCA*, para 27.
47 *Seidel*, paras 22-31.
48 *Seidel*, paras 31-32.

36. The Court directed that s 172 "must be approached textually, contextually and purposively".[49] Accordingly, the Court determined that the following factors evidenced legislative intent to preclude arbitration of the relevant claims under the *BPCPA*: (i) that the right to bring an action in court was a "right or benefit" conferred by the statute;[50] (ii) that *if* a s 172 claim is made, the text mandates that the claim be brought in court;[51] (iii) the act's aim to protect consumers; (iv) the importance of public proceedings to the act's effectiveness;[52] and (v) that arbitration did not provide the same process or remedies available under the statute or in court.[53]

37. Uber and Mr. Heller argued on appeal that *Seidel* governs this case, and the Court of Appeal's analysis both cites and tracks *Seidel*.[54] First, the Court of Appeal considered the *ESA*'s text, particularly that s 5 precludes contracting out of the rights and benefits afforded under the act and voids any attempt to do so.[55]

38. Then, the Court of Appeal considered the following factors as evidence of the legislature's intent to preclude arbitration of claims under the *ESA*: (i) that s 96 provides for a complaints process (which requires putative employers to participate in an investigative process) that is a right or benefit conferred by the act;[56] (ii) the only limitations on that right under the *ESA* are if the complainant chooses to initiate a "civil proceeding" or is subject to arbitration under a collective agreement, pursuant to s 101;[57] (iii) that the *ESA*'s public purpose, which is to require employers

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49 *Seidel*, paras 33-40.
50 *Seidel*, paras 33-34.
51 *Seidel*, para 34.
52 *Seidel*, paras 36-38.
53 *Seidel*, paras 39-40.
54 *Heller ONCA*, paras 17, 27-31.
55 *Heller ONCA*, paras 28-31.
56 *Heller ONCA*, paras 33-37.
57 *Heller ONCA*, paras 33-34.

to comply with certain minimum standards and protect as many employees as possible, would be undermined by mandatory arbitration;[58] and (iv) that private and confidential arbitration does not provide for the same process or remedies as a complaint or civil proceeding under the *ESA*.[59]

39. In short, the Court of Appeal considered the *ESA*'s plain language, its purpose and the rights guaranteed thereunder. That analysis did not deviate from *Seidel*.

2. The Unconscionability Analysis Respects Competence-Competence

40. Second, the Court of Appeal considered whether the arbitration agreement was unconscionable and therefore invalid. Contrary to Uber's contention, the court's analysis derived from a "superficial consideration of the documentary evidence in the record", in accordance with *Seidel* and the Court of Appeal's own jurisprudence.[60] This Court acknowledged the correctness of this approach in *Wellman*, noting that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with through the doctrine of unconscionability, which was the approach taken in *Heller v Uber*".[61]

41. If a superficial consideration of documentary evidence in the record leads only to an arguable claim that an arbitration agreement is invalid, Ontario courts will not interfere with an arbitrator's jurisdiction. Similarly, if determining the agreement's validity involves a "thorough review of the parties' complex contractual discussions, understanding, expectations and arrangements" the Ontario Court of Appeal has held that is *not* a "superficial review".[62] The Court of Appeal's approach in this case in no way changes or deviates from these principles.

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58 *Heller ONCA*, paras 36-37, 43-46.
59 *Heller ONCA*, paras 34-36, 43-46.
60 *Seidel*, para 8; *see also OMA*; *Imperial Tobacco*, paras 33-42; *Dancap*; *Dalimpex*.
61 *Wellman*, para 85.
62 *Imperial Tobacco*, paras 55-58; *Dancap*, paras 40-43.

42. The Court of Appeal did not engage in extensive weighing of credibility or consideration of the parties' relative expectations. Instead, its analysis relied on the plain language of the agreement, the following facts (as set out in the paper motion record or admitted by Uber) and the reasonable inferences drawn therefrom:

(a) Uber does not provide a dispute resolution mechanism in Ontario, but has an internal complaints process, which it controls, that routes complaints to the Philippines and Chicago, among other places;[63]

(b) "all disputes require arbitration in the Netherlands, unless the driver resolves his/her complaint voluntarily with Uber";[64]

(c) "the cost of initiating the arbitration process alone is US $14,500. This does not include the costs of travel, accommodation and, most importantly, counsel to participate in the arbitration";[65]

(d) a person like Mr. Heller earning $400 - $600 a week (working full time) from Uber would have to bear such expenses, regardless of the size of his claim;[66]

(e) Uber is better situated than people like Mr. Heller to bear the cost of this process, yet the applicable rules require the claimant to pay most of the up-front costs;[67]

(f) Mr. Heller had no legal advice before accepting the arbitration agreement; and

(g) Uber acknowledged the parties' inequality of bargaining power.[68]

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63 *Heller ONCA*, para 55.
64 *Heller ONCA*, para 56.
65 *Heller ONCA*, para 59; *Heller ONSC*, para 25.
66 *Heller ONCA*, paras 59, 68; *Heller ONSC*, para 29.
67 *Heller ONCA*, paras 59, 68;
68 *Heller ONCA*, para 68.

43. The Court of Appeal also considered Uber's admission that it chose the arbitration provision to favour itself.[69] In paragraph 23 of its Memorandum, Uber likewise acknowledges that it prefers the Netherlands and law of the Netherlands because that is where its operations are.

44. As to Uber's suggestion that it offered to arbitrate in Ontario, Uber fails to mention that offer was made during the motion hearing, which it acknowledged to the Court of Appeal.[70] Leaving aside the legitimacy of Uber's late-blooming offer, it suggests that Uber recognizes the unfairness inherent in requiring drivers to travel to the Netherlands to pursue their claims and falls well short of remedying the flaws that render the arbitration agreement invalid.

45. The Court of Appeal's determination, based on these facts, that Uber chose the arbitration agreement to favour itself and take advantage of its drivers was neither an inappropriate in-depth factual analysis, nor unreasonable.[71]

46. To bolster its application, Uber cites *Belnor Engineering Inc. v Strobic Air Corp.*, in which an Ontario court considered the unconscionability of an arbitration agreement, referred to the Court of Appeal's decision in this case, and enforced the agreement. [72] *Belnor* undermines Uber's position: it demonstrates that arbitration agreements are enforceable in Ontario and that the Court of Appeal decision rests on the facts of this case.

47. Uber's primary issue with the Court of Appeal's unconscionability analysis is the conclusion it draws from the facts, not their consideration. That, however, is not a proper basis for granting leave to appeal.

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69 *Heller ONCA*, para 68.
70 *Heller ONSC*, para 39.
71 *Heller ONCA*, para 68.
72 *Belnor Engineering Inc v Strobic Air Corp*, 2019 ONSC 664, paras 31-35.

B. The Court of Appeal's Interpretation of the *ESA* was not an Outlier

48. As explained above, the Court of Appeal's consideration of the *ESA* and whether the legislature intended to preclude the arbitration of employment disputes arising in a non-unionized workplace with respect to *ESA*'s minimum standards is entirely consistent with *Seidel* and *Wellman*. Moreover, contrary to Uber's assertions, there is no body of law considering private and confidential arbitration of *ESA* claims. The *ESA* sets minimum standards to protect employees in Ontario, and expressly provides for three mechanisms to vindicate these rights: a complaints process, claims in a "civil proceeding" and arbitration under a collective agreement.[73] Courts regularly determine that agreements contravening the *ESA* are void for doing so. In this respect, the Court of Appeal's decision is consistent with the weight of the authorities.

49. No other court that Mr. Heller is aware of has squarely considered whether mandatory arbitration of *ESA* claims outside a collective agreement violates the *ESA*. However, in *Huras v Primerica Financial Services Ltd.*, the Ontario Superior Court denied a motion to stay an action after it determined that an arbitration agreement did not apply to claims for unpaid wages during a training program because the parties entered the agreement after the training program ended. That court also opined that the arbitration agreement likely violated the *ESA* by purporting to preclude an employee from filing an *ESA* complaint, but declined to decide the issue on mootness grounds.[74] The Court of Appeal upheld the decision on other grounds, noting that the findings were unnecessary to the result on the motion below and therefore declined to review them.[75]

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73 *ESA*, SO 2000, c 41, ss 8, 83, 96, 97, 98, 99, 100, 101.

74 *Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC), paras 26-35.

75 *Huras v Primerica Financial Services Ltd*, 2001 CanLII 17321 (ONCA), para 20.

50. Although Uber correctly contends that arbitration agreements are used, and even enforced, in employment agreements, the suggestion that individual employees regularly arbitrate claims for their minimum entitlements under the *ESA* is simply unfounded. None of the cases that Uber cites consider this issue or apply employment standards legislation.[76] Moreover, employees who are seeking entitlements like minimum wage and overtime are unlikely to have a meaningful opportunity or desire to negotiate a mandatory arbitration agreement with their employer. In short, Uber vastly overstates the reach of the decision below as it pertains only to minimum standards under the *ESA*, not all employment terms that might be subject to an arbitration agreement.

51. Uber's contention that the Court's analysis is inconsistent with the *ESA*'s purpose is likewise misplaced. As the Court of Appeal and this Court have held, the *ESA*'s purpose is to protect employees. Therefore, courts interpret the *ESA* in a way that will encourage employers to comply and "extend[] its protections to as many employees as possible."[77] The Court of Appeal's holding that employees could not waive their statutory right to the s 96 complaint mechanism and related procedures recognizes that process as a benefit to employees, a common-sense notion consistent with the *ESA*'s purpose.

52. Contrary to Uber's submissions at para. 66, the *ESA* amendments that allowed individual employees to pursue civil litigation instead of only the complaint process were meant to allow "non-union employees" to decide whether "to file an employment standards claim with the ministry or *take the matter to court*" (emphasis added) and union members to pursue their *ESA* claims through the collective agreement arbitration process.[78] The legislature's concern was that

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76 *See* Uber Mem. n. 62.

77 *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986.

78 *See* Ontario, Legislative Assembly, 36th Parl, 1st Sess, (3 June 1996), at 1630.

all employees were pursuing *ESA* claims through a single process – employment standards complaints. By allowing unionized employees to pursue these claims in arbitration and non-unionized employees to choose between a court process or the complaints process, the legislature hoped to conserve resources. The Court of Appeal did not rely on legislative history, but it would have found support there.

53. Similarly, the Court of Appeal's determination that a "civil proceeding" is not an arbitration is a straight-forward interpretation of the *ESA*'s plain language, consistent with the legislature's intent. In *Wellman*, this Court cited the Ontario *Rules of Civil Procedure's* definition of "proceeding" ("an action or application") to distinguish the term "proceeding" from an arbitration. The Court of Appeal likewise cited that definition to support its interpretation.[79]

54. Moreover, the *ESA Policy and Interpretation Manual*, which is a guide for Employment Standards Officers, supports the Court of Appeal's conclusion. It provides that the reason an employee who brings an *ESA* claim in a civil proceeding must give notice to the Director of Employment Standards is to ensure that the Director and Ministry are alerted so that they may seek standing in the proceeding if important issues are being raised, as well as to consider whether the employee is barred from also making a complaint to the Ministry because of the pending civil action.[80] The Ministry would have no basis to seek standing in a private and confidential arbitration, nor would that process allow the employee to notify the Ministry in the first place, as the Court of Appeal recognized.[81]

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79 *Wellman*, paras 16, 58; *Heller ONCA*, para 33.

80 Ontario Ministry of Labour, *Employment Standards Act 2000*, Policy and Interpretation Manual, "Notice of Civil Proceedings s 8(2)", p 114, RALA Tab 3.

81 *Heller ONCA*, paras 34-36.

C. The Law of Unconscionability is Settled

55. Uber contends that the Court should grant leave because it has not addressed the test for unconscionability since its decision in *Norberg v Wynrib*.[82] However, the Court of Appeal's decision is not at odds with that decision, and the mere passage of time does not warrant this Court's intervention.

56. The Court in *Norberg* observed that an unconscionable transaction arises where there is "inequality in the position of the parties" and "proof of an improvident bargain". The Court reviewed examples of the kinds of evidence that would satisfy this test, which included: a lack of independent advice, inequality of bargaining power or vulnerability of one party to the other, and undue influence of one over the other, suggesting exploitation of some sort.[83]

57. Applying the test from *Titus*, which Uber argued was the applicable law, the Court of Appeal required Mr. Heller to establish four elements, which closely follow the Court's analysis in *Norberg*: (i) a grossly unfair and improvident transaction; (ii) a lack of independent legal advice; (iii) an overwhelming imbalance in bargaining power; and (iv) the other party's knowingly taking advantage of this vulnerability.[84] These factors derive from *Norberg*, they do not deviate from it.

58. Uber further submits that the Court of Appeal incorrectly confused arbitration agreements and forum selection clauses, and as a result erred by applying the "strong cause test". In reality, the Court of Appeal determined it could not apply that test.[85]

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82 *Norberg v Wynrib*, [1992] 2 SCR 226 (WL).
83 *Ibid.*, at paras 31-34, 40-49.
84 *Titus*, paras 60, 68.
85 *See WCL Capital Group Inc v Google LLC*, 2019 ONSC 947, paras 58-61 (noting that the Court of Appeal made it clear that the second-step of the *Douez* test did not apply).

59. Instead, it placed the burden on Mr. Heller, as required by the *Arbitration Act*, to prove that the arbitration agreement was invalid and held that if he failed to do so, the Court of Appeal could not consider the issue further.[86] Then, the Court of Appeal referenced the concerns expressed in *Douez* about the use of forum selection clauses to defeat consumer claims to support its conclusion that Uber's onerous arbitration agreement (which includes a forum section clause requiring arbitration in the Netherlands) is grossly unfair.[87] Mere references to the *Douez* decision and its analysis by way of comparison do not require this Court's intervention.

60. In summary, the Court of Appeal's decision was correct and requires no reconsideration by this Court. It does not raise any matters of national or public importance because the decision: (i) considers and conforms with this Court's recent jurisprudence addressing arbitration in Canada, particularly a court's discretion under applicable provincial legislation to deny a stay; and (ii) does not disturb the well-settled law of unconscionability.

PART IV: SUBMISSION ON COSTS

61. The Respondent respectfully seeks costs of responding to this application.

PART V: ORDER SOUGHT

62. Mr. Heller respectfully requests that leave to appeal be denied, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF APRIL, 2019.

Michael D. Wright / Danielle E. Stampley

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86 *Heller ONCA*, paras. 64-68.

87 *Heller ONCA*, para 70; *see also* *Douez v Facebook, Inc*, 2017 SCC 33, paras 63, 115.

PART VI: TABLE OF AUTHORITIES

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28.	Ontario, Legislative Assembly, 36th Parl., 1st Sess., (3 June 1996)	52