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Court of Appeal rates arbitration clause one star in proposed employment class action against Uber

A frequently litigated issue in Canadian class actions is the extent to which parties can agree in advance to opt out of class actions in favour of private arbitration. In the context of consumer protection claims, provincial legislatures have generally eliminated the ability of defendants to defeat class actions through arbitrations by declaring clauses requiring the parties to submit such disputes to private arbitrations to be void. However, it has remained an open question as to whether and when courts would enforce arbitration clauses in other contexts, where the effect of such enforcement would be to defeat a proposed class proceeding.

In the employment context, it appeared that at least some courts were prepared to enforce arbitration clauses in contractor agreements, thereby defeating the ability by individuals who claimed that they had been systemically misclassified as independent contractors rather than employees to bring class actions to claim rights under employment standards legislation. As I blogged about last year, Justice Perell's decision in *Heller v Uber Technologies Inc* signalled that courts could and would enforce arbitration clauses in independent contractor agreements.

However, in its first decision of 2019, the Ontario Court of Appeal reversed Justice Perell's decision and allowed the proposed class action against Uber to proceed.

The background to the decision is set out in my previous blog post. In brief, David Heller, an Ontario resident and Uber driver, brought a proposed class action against a series of Uber companies, alleging that he and other proposed class members were improperly classified as "independent contractors" instead of "employees" and that they were thus deprived of the statutory benefits provided by Ontario's *Employment Standards Act*. In order to become an Uber driver, Mr. Heller had entered into two contracts with two different Uber companies. Each of these contracts contained a clause requiring that disputes be submitted to arbitration. Uber brought a pre-certification motion to stay the proceedings, arguing that Mr. Heller's agreements

required him to submit any disputes arising under his agreements to arbitration in the Netherlands.

In a decision released in January of 2018, Justice Perell accepted Uber's position and stayed the proposed class proceeding in favour of arbitration in the Netherlands. Giving expression to the policy goals of the *International Commercial Arbitration Act, 2017*, Justice Perell held that the agreements between Uber and its drivers were "international commercial agreements" to which the Act applied. Consequently, he held the arbitration clauses were presumptively valid and that any challenges to the arbitrator's jurisdiction should be made before the arbitrator. He also held that the arbitration clauses were not unconscionable.

Mr. Heller appealed to the Ontario Court of Appeal. In a unanimous decision, the Court of Appeal set aside the stay and permitted Mr. Heller's proposed class action to continue.

The Court of Appeal first held that Justice Perell's decision was subject to review on a correctness standard. The Court applied this standard of review for two reasons: first, because the central issues regarding the interpretation of various arbitration statutes were questions of law; and second, because the Court was interpreting arbitration clauses in a standard form contract.

The Court of Appeal then held that the arbitration clauses in the agreements between Uber and their drivers were invalid, because they represented an unlawful contracting out of protections granted to employees under the *Employment Standards Act*. Specifically, the Court held that the arbitration clauses would eliminate the right of an Uber driver to make a complaint to the Ministry of Labour, as permitted under the *Employment Standards Act*. Because the arbitration clause would have eliminated a right that the drivers had under the *ESA*, it was unlawful and unenforceable. Importantly, the Court of Appeal held that the arbitration provision was unenforceable, even though the plaintiff was seeking to bring a proposed class action, rather than make a complaint to the Ministry of Labour.

The Court of Appeal also independently held that the arbitration clauses were invalid on the basis that they were unconscionable. In so doing, the Court relied heavily on the majority of the Supreme Court of Canada in *Douez v Facebook, Inc*, where the Supreme Court of Canada declined to apply a forum selection clause in favour of California that would have defeated a proposed privacy class action in British Columbia. The Court of Appeal in *Heller* held that the arbitration clause was unconscionable because:

- The arbitration clause represented a substantially improvident or unfair bargain, including because it effectively required claimants to pay large up-front costs to take advantage of the arbitration process;
- There was no evidence the claimant had received any legal advice;
- There was a significant inequality of bargaining power between the claimant and Uber; and
- Uber included the arbitration clause in the agreement in order to favour itself.

Consequently, the Court of Appeal concluded that the arbitration clauses were invalid and unenforceable. As a result, it set aside the stay of Mr. Heller's proposed class action.

As I noted previously, the *Heller* case highlights the tension between two competing adjudicative mechanisms, each of which legislatures have encouraged: private arbitration and class actions. Justice Perell's decision gave primacy to parties' ability to agree to arbitration and thereby opt out of class actions, affirming the policy goals underlying arbitration legislation. By contrast, the Ontario Court of Appeal's decision took the opposite approach, affirming the importance of ensuring that arbitration clauses do not defeat the ability of individuals to bring class actions to vindicate the rights of a group.

The Court of Appeal's decision may strike many as intuitively fair, given the difficulties that individual class members would have in pursuing their claims in private arbitrations. Yet if that is judged to be desirable, it seems strange that the legislature would not have explicitly precluded the availability of arbitrations for employment disputes, as it has in the consumer protection context.

Indeed, the natural consequence of the Court of Appeal's decision would appear to be that any arbitration clause in an employment agreement is unenforceable, since any such arbitration clause would preclude an individual from making a complaint to the Ministry of Labour. To hold that all arbitration clauses in employment contracts are unenforceable would not be a sensible result: there are many circumstances where both employers and employees would have legitimate interests in resolving their employment-related disputes in private.

Given the difficult competing policy issues at play, this remains an area that cries out for legislative clarification.