The 2020 Harrison Shield Moot
Official Problem

Based on the Supreme Court of Canada decision: *Uber Technologies Inc. v. Heller*, 2020 SCC 16

1. In 2018, David Heller commenced a proposed class proceeding in Ontario for CAN$400,000,000, alleging that Uber drivers such as himself have been misclassified by Uber because they are employees who are entitled to the benefits and protections of Ontario's *Employment Standards Act*. Uber brought a motion to have Mr. Heller's proceeding stayed in favour of arbitration pursuant to the Arbitration Clause in the standard form services agreement Mr. Heller had agreed to.

2. To become a driver for Uber, Mr. Heller had to accept the terms of Uber's standard form services agreement by way of scrolling through the entire contract and clicking two buttons to indicate his acceptance. The Driver App does not limit the time an Uber driver may take to review the service agreement before accepting; however, no option for negotiation of the contract's terms was provided for or apparent.

3. Under the terms of the agreement, Mr. Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. Mr. Heller earns between $400-$600 a week. The fees represent most of his annual income.

4. The services agreement itself provides no information about the cost of the mediation and arbitration process. However, Uber offers a free internal dispute resolution mechanism which connects Uber drivers to customer support representatives. Ontario-based drivers may also visit a local support centre referred to as a Greenlight Hub to resolve disputes. Mr. Heller has raised over 300 complaints through Uber's internal procedure, most of which were resolved within 48 hours.

5. Heller argued that the Arbitration Clause in his contract with Uber should not be enforced because it was unconscionable, given the disproportionate fees required to access arbitration and its location in the Netherlands. He was unsuccessful at first instance. The Ontario Court of Appeal allowed Heller's appeal, finding that the Arbitration Clause was unconscionable because of the inequality of bargaining power between Heller and Uber and the improvident cost of Heller's promise to submit all disputes to arbitration.

6. Uber then appealed to the Supreme Court of Canada. The Supreme Court dismissed the appeal in a 7-2 majority.

7. The majority began its reasons by defining unconscionability as an equitable doctrine used to set aside unfair agreements that resulted from an inequality of bargaining power. Its purpose, they held, is the protection of those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made.

8. Prior to the Supreme Court hearing this case, the test for unconscionability tended to vary according to jurisdiction. The majority found that the test consists of two elements: determining whether there is an inequality of bargaining power and whether there is a resulting improvident bargain.

9. According to the majority, an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. There are no "rigid limitations" on the types of inequality that fit this description. Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes. These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract. A common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry". This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement.

10. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and must be assessed contextually. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties. Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate.

11. Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant. But unconscionability can be triggered without wrongdoing.

12. The majority found that there was an inequality of bargaining power between Uber and Heller. The arbitration agreement was part of a standard form contract and Mr. Heller was powerless to negotiate any of its terms. There was a significant gulf in sophistication between Mr. Heller and Uber. The arbitration agreement contained no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller read through the contract in its entirety before signing it, he would have had no reason to suspect that behind the mandatory mediation and arbitration terms there lay a US$14,500

hurdle to relief. Exacerbating this situation, the rules of this process were not attached to the contract, and so Mr. Heller would have had to search them out himself.

13. The majority found the Arbitration Clause to be improvident as mediation and arbitration processes required US$14,500 in up-front administrative fees, an amount close to Mr. Heller's annual income that does not include the potential costs of travel, accommodation, legal representation or lost wages. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

14. As a result, the majority found the Arbitration Clause to be unconscionable and therefore invalid.

15. The dissent considered that the test for unconscionability required a slightly different set of steps. It held that the unconscionability doctrine applied where there was (1) a significant inequality of bargaining power stemming from a weakness or vulnerability, (2) a resulting improvident bargain, and where (3) the stronger party knew of the weaker party's vulnerability.

16. According to the dissent, the key question in relation to the significant inequality of bargaining power is whether the weaker party had a degree of vulnerability that had the potential to materially affect their ability, through autonomous, rational decision making, to protect their own interests, thereby undermining the premise of freedom of contract. It found that the majority's claim that vulnerability in the contracting process may arise from provisions in standard form contracts which are dense or difficult to read or understand set the threshold for unconscionability so low as to be both practically meaningless and open to abuse. The dissent classified the majority's decision as a sweeping restriction on arbitration clauses in standard form contracts and a move best left to the legislature, especially since the sharing economy — a vital and growing sector of Canada's economy which depends on standard form contracts that are agreed to electronically — could be stifled if a reduced threshold for inequality of bargaining power is adopted.

17. Applying its test to the facts, the dissent held that with respect to unequal bargaining power, Mr. Heller's evidence established that he was capable of understanding the significance of the Arbitration Clause, but that he simply declined to read it before agreeing to the terms. He was free to review the Service Agreement for as long he wished before communicating his acceptance and he showed considerable sophistication by lodging over 300 complaints through Uber's internal dispute resolution procedure. There is nothing in the record to suggest that he was rushed into accepting the terms of the Service Agreement, and no evidence regarding why he decided to become an Uber driver.

18. Individuals should be expected to be aware that any form of dispute settlement, including litigation in the courts, comes with a price. A person cannot read an arbitration clause and reasonably assume that the process will be free of charge.

19. With respect to any improvident bargain, there is no obligation to actually conduct the arbitration at the place of arbitration. In accordance with the governing laws at issue, the arbitral tribunal may meet, and hear witnesses or submissions from the parties, at any place it considers appropriate, regardless of the place of arbitration selected by the parties. There is no reason to presume that an arbitral tribunal would act arbitrarily and callously by compelling a party to travel overseas unnecessarily and at great hardship.

20. As to the mandatory arbitration fee being disproportionately high, the dissent considered that an arbitration agreement involving a mutuality of exchange (i.e. the fee must be paid by whichever party initiates arbitration) will not be improvident. Specifically, the arbitration fees make pursuing a claim for a small amount just as uneconomic for Uber as for Mr. Heller. By contrast, a one-sided arbitration clause, which requires one party to submit disputes to arbitration while the other party retains the right to litigate, might not involve a mutuality of exchange. But that was not the case here. Both Mr. Heller and Uber would have to pay the same large fee to arbitrate over what would typically be a small amount. The dissent considered that the "mutuality" of this arrangement was not unfair.

21. Finally, the dissent held that the evidence did not support a finding that Uber had constructive knowledge of Heller's alleged peculiar vulnerability. It would have been impossible for Uber to be aware of Heller's specific income and education level when he decided to become an Uber driver, or that he intended to use the Driver App as his primary source of income.

The dissent found the contract to be valid and would have allowed Uber's appeal.

The Privy Council of Beaverbrook has granted leave to appeal the Supreme Court of Canada's decision on the following grounds of appeal:

1. The Supreme Court of Canada majority erred in defining the test for unconscionability.
2. The Supreme Court of Canada majority erred in determining that the Arbitration Clause at issue was unconscionable.

Along with the Supreme Court's decision on the unconscionability issue, you are permitted to use the following cases:

- *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809
- *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437
- *Davidson v. Three Spruces Realty Ltd.* (1977), 79 D.L.R. (3d) 481 (B.C.S.C.)
- *Douez v Facebook*, 2017 SCC 33
- *Downer v. Pitcher*, 2017 NLCA 13

- *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.)
- *Hess v. Thomas Estate*, 2019 SKCA 26
- *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377
- *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426
- *Input Capital Corp. v. Gustafson*, 2019 SKCA 78
- *Lloyds Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326
- *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.)
- *Norberg v. Wynrib,* [1992] 2 S.C.R. 226
- *Stockloser v Johnson*, 1954 1 QB 476, [1954] 1 All ER 630
- *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4
- *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573