

# FIVE-STAR RATING? UBER CLASS ACTION LAWSUIT GETS CERTIFIED

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Ontario's Superior Court of Justice has certified a class action lawsuit against Uber Technologies Inc. and other Uber entities (collectively "Uber"), paving the way for a potential common issues trial, which will decide whether Uber drivers and delivery persons have been misclassified as independent contractors.<sup>[1]</sup>

## Background

In 2017, the plaintiffs filed a claim against Uber seeking \$200-million in compensation and \$200-million in punitive damages on behalf of thousands of drivers and delivery persons who have entered into Service Agreements with Uber to use software applications developed and operated by the company ("Uber Apps") since 2012.

The plaintiffs allege that Uber has misclassified drivers and delivery persons as independent contractors, as opposed to employees. They also allege that Uber has breached its contracts with drivers and delivery persons, and contravened various statutory requirements under the *Employment Standards Act, 2000* (the "ESA"), the *Canada Pension Plan* and the *Employment Insurance Act*. They also claim that Uber is liable for unjust enrichment and negligence.

In its defence, Uber argues that the criteria necessary to establish an employment relationship do not exist. Drivers and delivery persons provide services as independent contractors using the Uber Apps, and benefit from the flexibility that using the Uber Apps affords. Uber's role is simply to develop, improve, license, and market the Uber Apps that drivers and delivery persons use to provide services to third party riders and eaters, and to facilitate payments for those services.

At issue before the court was whether or not the plaintiffs' claim should be certified as a class action.

## Class Action Certified, In Part

Under Ontario's *Class Proceedings Act, 1992* (the "CPA"), the court shall certify a claim as a class action where: (i) the pleadings disclose a cause of action; (ii) there is an identifiable class of two or more persons that would be represented by a representative plaintiff; (iii) the claims of the class members raise common issues of fact or

law; (iv) a class action would be the preferable procedure; and (v) there is a plaintiff who would fairly and adequately represent the interests of the class.

In this case, the court found that the plaintiffs had satisfied all five criteria under the CPA, and granted their certification motion. Ultimately, the court was not persuaded by Uber's argument that however the relationship with each of the 300,000-plus drivers and delivery persons might be classified, the classification would have to be determined on an individual case-by-case basis. Rather, all of the drivers and delivery persons had in common the fact that they entered into the Service Agreements and used the Uber Apps, i.e., the Uber business model. It would be appropriate for the common issues trial judge to determine whether or not this business model amounts to an independent contractor or employment relationship.

However, the plaintiffs' certification motion was not entirely successful. In particular, the court agreed with Uber that there was no basis for unjust enrichment because the claims for ESA entitlements, other unpaid statutory entitlements and out-of-pocket expenses were all breach of contract claims. Regarding the plaintiffs' negligence claim, the court opined that it would be redundant and cumbersome and would not satisfy the preferable procedure criterion.

The court also held that the question of punitive damages – which may be awarded when a defendant's conduct is so reprehensible and outrageous that it merits punishment – was not certifiable. In the court's view, there was simply no factual basis for concluding that Uber's conduct was reprehensible, outrageous or that it merited punishment.

Finally, and perhaps most importantly, the court found that the question of aggregate damages was not certifiable. The CPA allows a court to determine damages on an aggregate, class-wide basis where such damages can "reasonably be determined without proof by individual class members." In this case, however, the court held that determining each driver's or delivery person's damages requires an individual assessment of their particular circumstances (although the court did observe that these assessments would be aided by the Uber Apps' activity tracking and record keeping features). This could mean that if the plaintiffs eventually succeed at the common issues trial, individual drivers and delivery persons will still need to participate in mini-trials in order to determine what they are owed.

### **Takeaways for Employers**

The certification of a class action is a procedural ruling rather than a substantive finding on the merits of the claim, meaning that the class action could still be unsuccessful. As the court in this case noted, the test for certification is applied in a "purposive and generous manner" in order to give effect to the goals of class actions; namely: to provide access to justice for litigants, to encourage behaviour modification and to promote the efficient use of judicial resources.

Nevertheless, the court's decision is significant because it is the latest – and highest profile – independent contractor misclassification case to receive class action certification in Ontario. Companies that engage a large number of independent contractors as part of their regular workforce should take keen interest in this case as it moves closer to a common issues trial, as further success for the plaintiffs will have the likely effect of encouraging more lawsuits of its kind.

[1][ps2id id='1' target='']Heller v. Uber Technologies Inc., 2021 ONSC 5518.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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