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HELLER V. UBER – WHAT EMPLOYERS NEED TO KNOW

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On June 26, 2020, the Supreme Court of Canada released its much-anticipated decision in *Heller v. Uber Technologies Inc*.

The Supreme Court upheld the Ontario Court of Appeal's January 2019 finding that an arbitration clause contained in Uber's standard Ontario driver contracts was unconscionable. As we discussed in a summary of the Court of Appeal's decision, the plaintiff sought a declaration that Ontario Uber drivers are subject to the Employment Standards Act, 2000 ("**ESA**") and that arbitration provisions contained in Uber's service agreements are void and unenforceable. The plaintiff also sought $400 million in damages on behalf of the class.

Uber's agreements contain identical arbitration clauses, which require drivers to submit to the arbitral jurisdiction of the International Chamber of Commerce in Amsterdam, Netherlands to resolve any dispute with Uber. ICC rules require parties initiating proceedings to pay approximately $14,500 in administrative fees. By way of contrast, the plaintiff earns $400 to $600 per week based on 40 to 50 hours of work.

Uber's initial motion to stay the proposed class action in favour of arbitration succeeded. The Ontario Court of Appeal overturned the motion judge's decision, finding that the arbitration clause was both unconscionable and an unlawful attempt to contract out of the ESA.

What Employers Should Know

Robert Wisner and Paola Ramirez of McMillan LLP have written a detailed overview of the Supreme Court's decision and its ramifications for the law of arbitration and doctrine of unconscionability.

Employers should consider two key implications of the decision in Heller:

1) Unconscionability

A Supreme Court majority agreed with the Court of Appeal that Uber's arbitration clause is unconscionable. The majority wrote that unconscionability requires examining a two-part test: First, whether there is an inequality of bargaining power between the parties and, second, whether that inequality led to the weaker party accepting an "improvident bargain." The majority found that there was an inequality in bargaining power

because Uber used a standard form "contract of adhesion" that could not be modified and because the plaintiff would not appreciate the implications of the arbitration clause. The majority then found that the plaintiff had accepted an improvident bargain because the cost of arbitration – at least $14,500 in fees simply to initiate an arbitration claim – would make enforcing the contract all but impossible.

The Supreme Court's application of the doctrine of unconscionability may make enforcing arbitration clauses more challenging. Employees who prefer to claim against an employer in court are likely to allege that the clause in question is unconscionable by applying the Supreme Court's test to their circumstances. While ensuring that an employee has a chance to obtain independent legal advice before signing an employment agreement may help, the Supreme Court noted that a clause can be unconscionable even if the stronger party is not willingly taking advantage of its position. Employers seeking to include an arbitration clause in an employment agreement should consider whether doing so risks binding an employee to a so-called "improvident bargain."

2) Contracting out of the Employment Standards Act, 2000

The Supreme Court determined that because the impugned arbitration clause was unconscionable, there was no need to decide whether or not it was also invalid because it has the effect of contracting out of the mandatory protections of the ESA.

The Ontario Court of Appeal had previously found that the arbitration clause was invalid and unenforceable because it was an unlawful attempt to contract out of the ESA's protections. Specifically, the Court of Appeal held that, if the arbitration clause applied, it would deprive Uber employees of their ability to file a complaint about an ESA breach with the Ontario Ministry of Labour under section 96(1) of the ESA.

Although the Supreme Court declined to comment on whether or not the clause had the effect of contracting out of the ESA, employers should continue to bear the Court of Appeal's decision in mind when crafting or relying on arbitration clauses. Employers should be leery of blanket clauses that risk denying an employee the right to pursue remedies afforded by the ESA, such as complaints about unpaid wages or overtime.

For more information regarding the implications of *Heller*, including for your existing employment contracts, please contact a member of McMillan's Employment & Labour Relations Team.

by Kyle Lambert and Jeffrey B. Simpson

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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