Summary of Lower Court Decisions of the *Heller v Uber* Stay Litigation

Heller v. Uber Technologies Inc. **2018 ONSC 718** Before Justice Perell, released January 30, 2018	
Case overview	This was a pre-certification motion in a proposed class action brought by a group of Uber drivers with David Heller as the representative plaintiff. Uber succeeded in having the class action stayed in favour of proceeding to arbitration in the Netherlands, as per the arbitration agreement in Uber's employment contract.
Plaintiffs' argument	The plaintiffs argued that this proposed class action is about an alleged employment relationship, and that it cannot be stayed because this issue is outside the jurisdiction of the arbitrator to decide. Rather, the court can decide whether the matter is arbitrable as a matter of interpreting the *Employment Standards Act* ("*ESA*"), an issue of law. This case falls under the exceptions to referring a dispute to arbitration that are set out in s. 7(2) of the *Arbitration Act*, because Uber's arbitration agreement is illegal as a contracting out of the *ESA*, and on the grounds of unconscionability.
Defendant's argument	The defendants argued that it is for the arbitrator to decide under the competence-competence principle, whether the Drivers are employees is a complex issue of mixed fact and law.
Judge's ratio	The general rule is that a challenge to the arbitrator's jurisdiction should be first resolved by the arbitrator. There can be an exception where the challenge is based solely on a question of law. If, however, the challenges raised are questions of mixed fact and law, the court should refer the challenge to the arbitrator unless the questions of fact require only superficial consideration of the documentary evidence in the record. Heller's status as an employee is a complex issue of mixed fact and law that remains to be determined, and therefore must be determined by the arbitrator.

	The plain meaning of the *ESA* does not exclude arbitration. If the statute is clear and unambiguous, the court must interpret the words literally even if the consequences are absurd public policy or unjust. SCC precedents in *Seidel* and *Wellman* state that, absent legislative language to the contrary, courts must enforce arbitration agreements. The judge disagreed with Justice Cumming's earlier decision that an arbitration agreement was an illegal contracting out of the *ESA*, noting that his decision was written before the "tsunami of case law" favouring arbitration agreements. "Unconscionability is ultimately a fact-based determination of the particular circumstances of the case and of the particular terms of the contract. I do not see a situation of unconscionability in the circumstances of the immediate case." There was an inequality of bargaining power, but it cannot be said that Uber took advantage. As demonstrated by the record, most grievances or disputes between the drivers and Uber can be dealt with by the dispute resolution mechanisms from Ontario.

***Heller v. Uber Technologies Inc.,* 2019 ONCA 1** Before Feldman, Pardu and Nordheimer JJ.A., released January 2, 2019	
Case overview	The appeal was allowed, finding the motion judge wrong both on the interpretation of the *ESA* and on the issue of unconscionability.
Appellants' argument (Heller et al.)	The appellants argued that the Arbitration Clause is invalid because it amounts to a contracting out of the *ESA* that is, itself, prohibited by the *ESA*.
Respondent's argument (Uber)	The respondent argued that S. 96 of the *ESA* is not an "employment standard" because, in allowing employees to make a complaint to the Ministry of Labour, it does not establish a "requirement or prohibition…that applies to an employer". Whether the exceptions in s. 7(2) of the *Arbitration Act,* apply is an issue for the arbitrator to determine, because it is an issue going

	to the jurisdiction of the arbitrator. Uber invokes the "competence-competence" principle in support of its position.
Decision of Nordheimer J.A. for a unanimous court	Nordheimer J.A had reservations about Perell J.'s conclusion that it was a commercial agreement but agrees that nothing much hangs on it. This dispute is not about jurisdiction of the arbitrator, but the validity of the arbitration clause. Any dispute over an arbitrator's jurisdiction should first be determined by the arbitrator but that addresses situations where the scope of the arbitration is at issue. It is a court that makes the decision of whether an exception to s. 7(2) of the *Arbitration Act* applies, not an arbitrator. The analysis must start with the assumption that Heller can prove that he is an employee. If he is an employee, the arbitration clause is an illegal contracting out of the *ESA*. One of the benefits provided by the *ESA* is the right of an employee to make a complaint to the Ministry of Labour that his/her employer has contravened the *ESA*, pursuant to s. 96(1), which the arbitration clause would prevent. This right to appeal is "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee," and is therefore an employment standard. This view is reinforced by public policy considerations, such as the advantage of a class proceeding, e.g. "the issue of whether persons, in the position of the appellant, are properly considered independent contractors or employees is an important issue for all persons in Ontario." On the issue of unconscionability, the motion judge's conclusion is based on palpable and overriding errors of fact. There is no independent adjudication in Ontario. Unless the driver resolves his/her complaint voluntarily with Uber, it is necessary to go to the Netherlands. There are significant financial and geographic barriers to initiate the arbitration process. This imposes an unaffordable burden on a driver, that is grossly unfair and chosen by Uber to benefit itself, based on its unequal bargaining power.

Appeal to the Supreme Court	
Uber's argument: The Court of Appeal made three fundamental errors.	**Error 1 – Competence-competence**. The competence-competence principle requires courts to defer questions of jurisdiction to the arbitrator where there is an arguable or prima facie case that the arbitrator has jurisdiction on the matter. The Court of Appeal wrongly concluded that competence-competence applies only to challenges to the scope of an arbitration agreement, and not to its validity. The questions the respondent raises regarding the validity of the arbitration agreements are neither questions of law nor questions of mixed fact and law requiring only a superficial consideration of the record. Competence-competence requires that they be deferred to the arbitrator. **Error 2 – Interpretation of the *ESA***. The Court of Appeal wrongly concluded that the *ESA* precludes arbitration. The Ontario legislature has not prohibited arbitration of *ESA* claims. The province's arbitration legislation and numerous decisions of this Court confirm the "very strong legislative direction" to courts to enforce arbitration agreements absent an express legislative override of arbitration. The *ESA* contains no such prohibition. Nor can one be inferred from the circumstances in which the Act was enacted and recently amended, or the scope and context of the Act. The Court of Appeal's interpretation of the *ESA* is inconsistent with the principles of statutory interpretation and usurps the role of the legislature. **Error 3 – Unconscionability**. The Court of Appeal erred in determining that the arbitration agreements are unconscionable. The Court of Appeal failed to consider the entire agreement, lowered the threshold for unconscionability, and applied the wrong test. There is no evidence to support a conclusion that the arbitration agreements are unconscionable.
Heller's argument: The Court of Appeal got all three of them right.	**First**, the Court of Appeal's holdings did not violate the competence-competence principle. *Seidel* and *Wellman* have set out where a court's discretion ends, and competence-competence begins. Where, in this case, an Ontario court can determine an arbitration clause's validity by examining an Ontario statutory scheme to recognize a legislative intent to prohibit arbitration of

	claims as a matter of law, that determination does not violate competence-competence. Likewise, where unconscionability can be determined from a superficial review of a documentary record, that determination does not violate competence-competence. **Second**, the Court of Appeal correctly determined that mandatory arbitration is inconsistent with the *ESA*'s statutory enforcement mechanisms, which cannot be waived. As a result, the Arbitration Agreement is invalid and unenforceable as to *ESA* claims. **Third**, the Court of Appeal applied the correct unconscionability analysis and determined that the facts available based on a superficial review of the record establish that the arbitration agreement unconscionably prevents Uber drivers from enforcing their rights. Therefore, the court reasonably found that the arbitration agreement imposes costs that are out of proportion with Mr. Heller's economic means and the size of his potential claims and, moreover, requires adjudication in the Netherlands and under the laws of the Netherlands. Mr. Heller has no connection to the Netherlands nor does he have any knowledge of their laws.