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The Expansion of Unconscionability – The Supreme Court's Uber Reach

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Case Commented On: *Uber Technologies Inc v Heller*, 2020 SCC 16 (CanLII)

Contracts of adhesion, or standard form agreements (SFAs) are oftentimes unfair. They are drafted by the stronger parties. Their provisions are dense and difficult to understand. The party signing does not have a say in their contents – they are take-it-or-leave-it agreements. They are usually lengthy and cannot feasibly be read in the short time it takes the parties to transact. Some of the more onerous terms are deeply embedded (hidden?) in the document. The contracts more often than not limit the liability of the drafting party at the expense of the other party. They ensure occupiers are not liable for negligence, including their own. And the list goes on.

We are not powerless against these contracts – common law and equitable doctrines protect weaker parties from harsh or onerous provisions. Is this enough? Probably not. Certainly the Supreme Court of Canada thought more should be done to protect weaker parties against SFAs in the case of *Uber Technologies Inc v Heller*, 2020 SCC 16 (CanLII). But instead of leaving this job to the legislature, as it should have, it expanded the reach of the doctrine of unconscionability without providing any substantial guidance or principles, thereby furnishing lower courts with an enormously powerful weapon to use against SFAs.

Facts

Mr. Heller, an Ontario resident, contracted with Uber to be a driver. An individual wishing to become a driver for Uber must sign a fourteen-page SFA. Once the individual accepts the agreement by clicking "I agree" twice, the Uber App is set up for the driver (at para 7).

The agreement included a mandatory arbitration and choice of law clause. The choice of law clause required the agreement to be "governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws." The arbitration clause required all disputes to first be submitted to mandatory mediation, then, if that failed, to arbitration. The arbitration had to take place in Amsterdam, to be governed by the International Chamber of Commerce's (ICC)'s Rules (at para 9).

The upfront cost to begin an arbitration at the ICC is $14,500 USD, which does not include legal fees, lost wages and other costs of participation. As an Uber driver, Mr. Heller earned approximately $20,800-$31,200 CAD per year, before taxes. Commencing arbitration with Uber would have cost him almost his entire gross annual income. The agreement did not provide information about the costs to mediate and arbitrate (at para 10).

The Issue

Mr. Heller started class action proceedings against Uber for violations of the Ontario *Employment Standards Act, 2000*, SO 2000, c 41 (*ESA*). He sought relief for four claims: a claim for breach of the *ESA*, a claim for breach of contract based on either implied terms or the duty of good faith, a claim for negligence, and a claim for unjust enrichment.

In order for these claims to be successful, Mr. Heller had to be an "employee" within the meaning of the *ESA* (at para 12). Uber, relying on the arbitration clause in the agreement, sought to stay the proceedings in favour of arbitration in the Netherlands.

In response, Mr. Heller argued that the arbitration clause was invalid on two grounds: it was unconscionable, and it contracted out of the mandatory *ESA* provisions (para 13). To resolve the dispute, the Supreme Court had to determine which arbitration legislation applied: the *Arbitration Act, 1991*, SO 1991, c 17 *(AA*), or the *International Commercial Arbitration Act, 2017*, SO 2017, c. 2, Sch. 5 (*ICAA*). The two statutes are exclusive – if one governs, the other does not (para 20).

These Proceedings

Both the majority and concurring Supreme Court decisions determined that the *AA* applied to the dispute between Heller and Uber. The *AA* mandates a stay of proceedings when a court action deals with a matter governed by an arbitration agreement, but the action is allowed to proceed if the "arbitration agreement is invalid." (s.7). The majority decision (written by Justices Rosalie Abella and Malcolm Rowe) found the agreement invalid for unconscionability, as the arbitration agreement made it impossible for one party to arbitrate (para 4). Justice Russell Brown, in a concurring judgment, also found it invalid for effectively barring one party from arbitrating. He determined, however, that this invoked public policy grounds, not the doctrine of unconscionability (para 101). In dissent, Justice Suzanne Côté determined that this dispute should have been submitted to arbitration for resolution.

This post will address the doctrine of unconscionability, as discussed by both the majority and Justice Brown's concurring judgment. Discussions on employment and arbitration law are beyond the scope of this post.

Majority Judgment

The majority found the arbitration agreement to be void, both for unconscionability and because it contracted out of the *ESA*. It said the following about unconscionability.

The equitable doctrine of unconscionability is used to protect the vulnerable in the contracting process by setting aside "'unfair agreements [that] resulted from an inequality of bargaining power'" (at para 54, quoting (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at 424). Freedom of contract rests on the assumption that the contracting parties are equal and that "'the contract is *negotiated*, *freely agreed*, and therefore *fair*'" (at para 56, relying on Mindy Chen-Wishart, *Contract Law* (6th ed. 2018), at 12 (emphasis in original)). Where this assumption is

true, contracts must be enforced. But where contracting parties do not have the capacity to protect themselves, the doctrine of unconscionability provides relief (at para 59).

The two steps required to establish unconscionability, an inequality of bargaining power and an improvident transaction, are separate, though proof of the first may provide evidence of the second (at para 79). Inequality of bargaining power exists when one party is unable to protect its interests in the contracting process. The type of inequality, which does not need to be "overwhelming" (at para 82), could be differences in wealth, knowledge or experience, but it could also encompass personal or circumstantial weaknesses (at para 67).

The second tenet of unconscionability, an improvident transaction, is found if "a bargain… unduly advantages the stronger party or unduly disadvantages the more vulnerable" (at para 74). This improvidence does not need to be "grossly" unfair (at para 89) and is determined when the contract is formed, not if the circumstances become challenging while the agreement is being performed (at para 74). Improvidence must be assessed contextually (at para 75).

The arbitration clause in this case was found unconscionable and therefore invalid (at para 99), having met the two-pronged test for unconscionability: an inequality of bargaining power between Uber and Mr. Heller, and a lack of information in the agreement about the cost of arbitration, which were disproportionate to an arbitration award that could have been foreseen when the parties entered into the contract (at para 94). The court concluded that the arbitration clause "makes the substantive rights given by the contract unenforceable by a driver against Uber" and that "[n]o reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it" (at para 95).

Given that conclusion, the majority did not need to decide whether the clause was also invalid for effectively contracting out of the *ESA* (at para 99).

Concurring Judgment

Justice Brown, in a concurring judgment, agreed with the majority's decision, and with the factors on which the majority relied, but would have found the arbitration clause invalid on public policy grounds, not unconscionability.

He relied on the existing public policy ground of protection of the integrity of the justice system and access to justice (at para 111), because the upfront costs for Mr. Heller were grossly disproportionate in light of the sort of dispute likely to arise under the agreement (at para 132), because Uber was in a much stronger bargaining position, and because Mr. Heller had no opportunity to negotiate, this being a contract of adhesion (at para 134).

In addition to his discussion of public policy, Justice Brown also discussed unconscionability. He argued that the doctrine of unconscionability was ill-suited for this dispute. Despite stage one of the test being phrased merely as an "inequality of bargaining power", it is in fact "a *significant* degree" (emphasis in original) of procedural unfairness that is required, as "almost every contract involves some difference in bargaining power" (at para 160). The test traditionally requires a degree of vulnerability specific to the claimant (at para 161), which was not the case here.

Analysis

As mentioned above, the equitable doctrine of unconscionability targets unfair agreements that arise from an imbalance of bargaining power. It requires an inequality of bargaining power (the procedural aspect), and an improvident bargain (the substantive one), though, as Justice Brown points out, the focus is more on the procedural aspect. Unconscionability primarily "redress[es] *procedural* deficiencies associated with contract formation – arising, for example, from abuse of an inequality in bargaining power, or exploitation of the weaker party's vulnerability" (at para 157, emphasis in original), and in that way, substantive improvidence "serves as a hallmark of a procedurally flawed transaction" (at para 159).

Prior to the *Uber* decision, the test originating in *Cain v Clarica Life Insurance Company*, 2005 ABCA 437 (CanLII) was commonly used for unconscionability. The *Cain* test has the same basic requirements as *Uber*, but with a higher threshold. It requires, *inter alia*, a "grossly" unfair or improvident transaction, an "overwhelming" imbalance of bargaining power, and the other party "knowingly" taking advantage of the vulnerability, which could be caused by the "victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability" (*Cain* at para 32). The majority in *Uber* rejected this test, maintaining that it "raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused" (at para 82).

Instead of the *Cain* test, the majority said that inequality of bargaining power would be demonstrated where, "the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of contractual terms, or both" (at para 68). It listed two examples. The first, the "necessity" cases, make up the clearest cases of unconscionability because "[e]ach requires a degree of vulnerability particular to the claimant" (at para 161). The second does not require vulnerability; rather, inequality would be present if "only one party could understand and appreciate the full import of the contractual terms", which may occur because of a vulnerability, but may also occur because of "disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms" (at para 71).

Was there an imbalance of bargaining power between Mr. Heller and Uber? Without a doubt. As the majority said, there was a "significant gulf in sophistication" between the parties (at para 93). Does this type of imbalance – the presence of dense or difficult to understand terms – exist any time a corporation transacts with the public, in particular through a SFA? Absolutely. Is this the type of imbalance that should be caught by the doctrine of unconscionability? Absolutely not – the threshold is too low. But it does fall entirely within step one of the broad test endorsed by the majority.

Turning to step two, in order to determine whether the agreement was improvident, the majority inquired into whether the agreement "unduly advantaged the stronger party or unduly disadvantaged the more vulnerable" (at para 74). The majority found improvidence because the cost of mediation was disproportionate to Mr. Heller's income as an Uber driver, making "the substantive rights given by the contract unenforceable by a driver against Uber" (at paras 94-95).

I, however, am not convinced this was a clear case of improvidence. The agreement was both costly and beneficial to Mr. Heller. On one hand, dispute resolution was done either through the internal procedure, which was governed by Uber, or arbitration, which, as the majority noted, involved disproportionate costs for Mr. Heller (at para 94). This gave Uber a significant amount of power over this process. On the other hand, Uber had to resolve a great deal of complaints internally – Mr. Heller himself raised over 300 complaints through Uber's (free) internal procedure, and most of them were resolved within 48 hours (at para 186), meaning Mr. Heller had also benefited from the agreement. For that reason, improvidence was not obvious to me.

In my opinion, the agreement was not unconscionable, but it was, as Justice Brown found, contrary to the public policy requiring access to justice and protection of the integrity of the justice system. The agreement does not actually bar dispute resolution, but it effectively does so, as "only Mr. Heller would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit" (at para 136).

Even though using unconscionability when the majority should have used public policy is problematic, there is, in my opinion, a bigger (two-fold) problem with the majority's decision. First, it endorsed a test for unconscionability that is too broad to be meaningful and that undermines other legal doctrines. Second, a doctrine this broad empowers courts to invalidate most SFAs, thereby usurping the role of the legislature in making public policy decisions to protect the public against SFAs.

Most SFAs could check both boxes of the doctrine of unconscionability, as articulated by the majority – a broad doctrine with a low threshold, meant to address the broad concept of unfairness. But unconscionability, like other equitable doctrines, is not meant to apply in its broadest sense. Although incapable of exact definition, equitable doctrines are effective only if a clear test is required, or when the court applies a broader test in a way that makes its meaning clear. A body of law based in fairness, deriving from decisions tailored to individual circumstances, necessarily requires us to "[e]schew… attention to rigid linguistic formula… when dealing with equitable concepts and principles" (*Downer v Pitcher*, 2017 NLCA 13 (CanLII) at para 13). At the same time, if the law does not refine equitable doctrines, limiting their reach or narrowing their scope, it reverts back to the time when equity varied with the length of the Chancellor's foot, in other words, a time of *ad hoc* judicial moralism and palm tree justice. Lack of clarity also generates an unprincipled, unstructured body of case law, devoid of legal analysis and rife with inconsistencies.

Unconscionability is supposed to operate as a "gap filler" when other doctrines do not apply; it is not meant to replace other doctrines. A broad definition, however, allows exactly that. The majority listed two examples of cases that would fall under the unequal bargaining power part of the unconscionability test; one of which is where the reasonable expectations of the weaker party are ignored (at para 77). When a contract does not conform to the reasonable expectations of parties, courts need to consider, first, whether the harsh or onerous term was incorporated into the agreement, and whether it applies to the scenario, before turning to unconscionability.

I do not mean to trivialize the majority's concerns about SFAs. The question is not whether these agreements are problematic – in many cases, they are. The question, rather, is whether other

doctrines or legislation are better suited to address the many fairness issues arising from these agreements. These can range from broad questions of consent, to more narrow questions, such as whether parties should be able to exclude liability for their own negligence – see my earlier post on incorporating exemption clauses into contracts. This takes me to my next problem with the majority's decision: by broadening the doctrine of unconscionability, the Court is not only allowing it to undermine other applicable legal doctrines, it is expanding the power of courts to strike down SFAs.

Filling in the "gaps between the existing 'islands of interventions'" (at para 60) is what courts should do with the doctrine of unconscionability, but lowering its threshold broadens its applicability, allowing these decisions to come down to what a particular judge deems to be "fair." If SFAs are so inherently unfair that additional protections need to be imposed, that is the legislature's job, not the court's.

When the legislature introduces changes through statute or regulation, it designs an entire statutory scheme that regulates certain activities. When courts introduce these changes, it might be for virtuous reasons – here, to protect weaker parties against big corporations – but they cannot do so through a scheme, leaving immense uncertainty in interpreting and applying the law. Legislating requirements and limitations on the contents of SFAs allows companies to reassess their risk and adapt as necessary, whereas expanding the reach of a doctrine based in fairness leaves companies without any guidance on how to govern their affairs. Additionally, this is complex public policy, pitting freedom of contract against relief from improvident contracts, or access to justice. These decisions involve public policy trade-offs. Here, we need to protect certain kinds of corporate economic activity on one hand while also protecting the rights of individuals on the other. Where the line should be drawn is neither clear, nor obvious, leaving these types of questions better suited to the democratic process, not the judicial one.

By saying, "[w]e do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power" (at para 88), the majority seemed to understand that its test was quite broad. But the judgment does not tell us what more is required to achieve the level of inequality of bargaining power great enough to invoke the doctrine of unconscionability, leaving me to wonder whether an SFA, by itself, *does* establish the requisite inequality of bargaining power.
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