CITATION: Heller v. Uber Technologies Inc., 2021 ONSC 5518
COURT FILE NO.: CV-17-567946-00CP
DATE: 20210812

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DAVID HELLER	)	
Plaintiff	)	*Michael D. Wright, Lior Samfiru, Danielle E. Stampley* and *Samara Belitzky* for the Plaintiff
- and -	)	
	)	
UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., RASIER OPERATIONS B.V. and UBER PORTIER B.V.	)	
Defendants	)	*Linda M. Plumpton, Lisa Talbot, Sarah Whitmore* and *Alexander Bogach* for the Defendants
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: July 13-15, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] David Heller, the Plaintiff, and Felicia

[1] S.O. 1992, c. 6.

Garcia, a putative Class Member who is to be joined as co-Plaintiff, move for certification of their action as a class action. The Plaintiffs' action is against Uber Technologies Inc., Uber Canada Inc., Uber B.V., Rasier Operations B.V., and Uber Portier B.V. (collectively referred to as "Uber"). The Plaintiffs seek to be Representative Plaintiffs on behalf of a class of persons who have entered into Service Agreements with Uber to use software applications ("Uber Apps") developed and operated by Uber to provide rider transportation and food delivery services. The Plaintiffs submit that Uber has breached its employment contracts with the putative Class Members and contravened Ontario's *Employment Standards Act, 2000*.[2] They also plead that Uber is liable for unjust enrichment and negligence.

[2] The Plaintiffs describe their proposed class action, which has had a visit to the Supreme Court of Canada about the court's jurisdiction to decide the dispute,[3] as a conventional misclassification of employment class action. There is, however, nothing routine about it, and it is misdescribed as a misclassification of employment status class action. The proposed class action is better described as a compound classification of employment status class action. The Plaintiffs' proposed class action raises unique problems of how class actions should adopt to what has been called the "sharing economy" which is animated by information, computer, and Internet technology.

[3] In a conventional misclassification of employment status class action, there will be no controversy about whether there is an employer, and the typical issue will be whether the Class Members are working as employees or working for the employer as independent contractors. In either case, the class members will be "working for" the defendant in some capacity. However, in this compound classification of employment status class action, Uber denies that it is the putative Class Members' employer. This quandary about not only the legal status of the putative Class Members but also of the defendant Uber adds complexities about the commonality of the common issues of fact and law that are the bread-and-butter prerequisite of a certifiable class action.

[4] Amongst the proposed class action's unique features is the unusual circumstance that the proposed class action pits some putative Class Members against others. Both sides called putative Class Members to support their cases. Nine putative Class Members testified. The evidence on the certification motion reveals that the putative Class Members - the persons that the Plaintiffs wish to represent - are divided into two opposing camps and that there also is a third camp of putative Class Members whose members do not yet know which camp to join or who may be indifferent to joining either camp.

[5] In the immediate case, the first camp of putative Class Members are persons who would want to be classified as employees "working for Uber." This camp of putative Class Members would be much assisted in their aspirations for access to justice, if the Plaintiffs were appointed their Representative Plaintiffs, because the fundamental allegation in the proposed class action is the allegation that Uber is the employer of the putative Class Members. If Uber is indeed the first camp's employer, these putative Class Members would be entitled to the benefits of Ontario's *Employment Standards Act, 2000* and of federal employment protection legislation such as the *Canada Pension Plan*,[4] and the *Employment Insurance Act*.[5]

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[2] S.O. 2000, c. 41.
[3] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, aff'g 2019 ONCA 1, which rev'd 2018 ONSC 718.
[4] R.S.C. 1985, c. C-8.
[5] S.C. 1996, c. 23.

[6] In the immediate case, however, the second camp of putative Class Members are persons who do not want to be "working for Uber". These persons see themselves as "working for themselves." These putative Class Members do not want to work for Uber as employees or even as independent contractors, although the latter status would be preferable to the former. It is already apparent that this second camp of persons who are using Uber's technology should opt-out of the proposed class action because they would not wish to disturb the current contractual relationship they have with Uber. They certainly do not wish to be bound by a decision at a common issues trial that they are "working for Uber". For this second camp of persons, a class proceeding is not access to justice for breach of contract but rather it is interference with their freedom to contract.

[7] In the immediate case, the discussion will reveal that there are complexities associated with the commonality of the proposed common issues, which is desired by the first camp of putative Class Members, or the idiosyncrasy of the proposed common issues, which is the position of the second camp of putative Class Members and of the Defendant Uber.

[8] In this extraordinary case, the common issues focus on the questions of whether the relationship between Uber and the putative Class Members is that of: (a) service provider and customer; (b) employer and employee; or (c) employer and independent contractor. There is a serious controversy about the commonality or conversely with the idiosyncrasy of the relationship between the parties and this controversy is amplified because the contracts upon which the relationships are based have constantly been changing.

[9] In this extraordinary case, the evidentiary record reveals that with numerous Service Agreement amendments, Uber has been striving mightily, but not necessarily successfully: (a) to not be classified as an employer; and also (b) to not have a court decide the Plaintiffs' proposed class action and rather have the grievances of the putative Class Members referred to arbitrators.

[10] This struggle about the court's jurisdiction led to the parties' visit to the Supreme Court of Canada, and it continues into this certification motion, and, thus, in addition to seeking certification, the Plaintiffs request that the court rule invalid an Arbitration and Class Action Waiver Clause that Uber introduced into its Service Agreements on August 26, 2020. Uber, however, submits that it took heed of the lessons learned from the Supreme Court's judgment and the Arbitration and Class Action Waiver Clause is a valid and enforceable arbitration contract and that the putative Class Members who did not opt out of the clause should not be included as Class Members.

[11] In the immediate case, Uber's position is that it does not dispute that Mr. Heller and Ms. Garcia are qualified to be Representative Plaintiffs, but it disputes all of the other certification criterion, and Uber requests that the certification motion be dismissed.

[12] In the immediate extraordinary case, as I shall explain below, my conclusions about the contested certification criteria and about the matter of the Arbitration and Class Action Waiver Clause are as follows.

a. The Plaintiffs satisfy the cause of action criterion for their causes of action of: (a) breach of contract; and (b) breach of the *Employment Standards Act, 2000.* They do not satisfy the cause of action criteria or the preferable procedure criteria for their claims of: (a) unjust enrichment; and (b) negligence.

b. The Plaintiffs satisfy the identifiable class criterion, but the class definition needs a modest revision to identify the putative Class Members simply as Uber App users rather

than begging the question of whether they are "working for" Uber.

c. There are certifiable common issues for the breach of contract and the breach of the *Employment Standards Act, 2000* causes of action. The question of aggregate damages, however, is not certifiable as a common issue. The question of punitive damages is also not certifiable as a common issue.

d. The Plaintiffs satisfy the preferable procedure criterion.

e. It is conceded that Mr. Heller and Ms. Garcia satisfy the representative plaintiff criterion.

f. The Plaintiffs' action should be certified as a class action.

g. At this juncture of the proceeding, nothing needs to be done with respect to the Arbitration and Class Action Waiver Clause except insofar as its significance, if any, needs to be addressed in the notice of certification.

h. Extreme care must be taken with respect to the notice of certification to bring to the attention of the putative Class Members: (a) the legal significance of the Arbitration and Class Action Waiver Clause; and (b) the legal consequences of their having exercised or conversely their not having exercised the right to opt-out of the Arbitration and Class Action Waiver Clause.

B. Battleground: Overview of the Parties' Positions and Arguments

[13] In this proposed class action, the major theatre of war is the parties' battle over the commonality or the idiosyncrasy of the behaviour of the parties in their performance of the standard form contracts and the associated documents that are a constant feature of the Uber software (the "Uber Apps").

[14] The line of the Plaintiffs' argument may be summarized as follows:

a. Uber provides consumers with two product lines of internet software applications that are accompanied by a standard form contract, the Service Agreements. The consumers, who are called "Riders", can use one product line of Uber App to obtain rides much like a taxi service, and the consumers, who are called "Eaters," can use the other product line of Uber App to obtain deliveries from restaurants. Uber provides the persons who provide the rides, who are called "Drivers" and the persons who make the deliveries, who are called "Delivery People," corresponding software applications, and these Uber Apps are accompanied by standard form Service Agreements between Uber and the Drivers and the Delivery People.

b. The Drivers and the Delivery People are the putative Class Members.

c. The Plaintiffs, one of whom is a Delivery Person and the other a Delivery Person and a Driver, submit that the putative Class Members are employees working for Uber. The Plaintiffs make this argument based on: (a) the commonality of the functionality of the Uber App; (b) the commonality of the terms of the standard form Service Agreements, which are not negotiable; and (c) the commonality of associated rules of contract performance imposed on Drivers and Delivery People and some external rules and regulations imposed by municipalities on users of the Uber Apps.

d. The Plaintiffs submit that Uber has misclassified its employees as independent

contractors. The Plaintiffs submit that their proposed class action is similar to the other employment status misclassification cases that have been certified[6] and that it too should be certified.

[15] The line of Uber's argument to resist certification may be summarized as follows.

a. The Drivers and the Delivery People are not employees working for Uber but are independent contractors, which is a status expressly attributed to them in the Service Agreements, and it follows that there cannot be a common issue about employment status misclassification.

b. Moreover, and in any event, the matter of employee or independent contractor status cannot in whole or in part be determined at a common issues trial because notwithstanding common Uber Apps, common standard form Service Agreements, and common rules and regulations, employment status is inevitably an idiosyncratic phenomenon that cannot be determined in common.

c. There is no basis in fact for any common issues based on the alleged commonalities.

d. In addition, Uber submits that, in any event: (a) there are no certifiable causes of action for unjust enrichment and negligence; (b) the proposed class definition is defective; (c) putative Class Members who did not opt-out of the Arbitration and Class Action Waiver Clause should not be included as Class Members; (d) the common issues want for commonality; (e) in particular, aggregate damages is not a common issue; and (f) a class proceeding is not the preferable procedure and the putative Class Members should wait for legislative reform of employment law in the context of the law's regulation of the sharing economy.

[16] As the detailed description of the factual background and of the legal background set out below will reveal, the focus of the Plaintiffs in advancing their case for certification was on demonstrating that in accordance with the established law about employment status, there was commonality in the various indicia of an employment relationship in the immediate case. Uber's focus was to show that the various indicia revealed idiosyncrasy not commonality.

C. Methodology

[17] In this case, to resolve the competing positions and arguments of the Plaintiffs and Uber and to decide whether the Plaintiffs' action satisfies the test for certification, it is necessary to cover a large amount of factual and legal territory. And it is necessary before setting out the details of the facts, to place those facts in the context of employment law about employee status and in the context of the existing jurisprudence about employment status misclassification class actions. I have, therefore, organized the Reasons for Decision as set out in the table of contents above.

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[6] *Montaque v. Handa Travel Student Trip Ltd.*, 2020 ONSC 6459; *Rallis v. Approval Team Inc*., 2020 ONSC 4197; *Berg v. Canadian Hockey League*, 2017 ONSC 2608, var'd 2019 ONSC 2106; *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122 and 2018 ONSC 271; *Omarali v. Just Energy*, 2016 ONSC 4094; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144.

D. The Employment Law Context

[18] In Ontario, there are three types of workplace relationships;[7] namely: (a) employer-employee (master-servant); (b) contractor-independent contractor, and (c) contractor-dependent contractor, which is an intermediate classification where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied.[8]

[19] What the parties may choose to call their relationship is relevant, but it is not determinative, and the court will determine the nature of the relationship based on the conduct of the parties.[9]

[20] In *McKee v. Reid's Heritage Homes Ltd.*,[10] the Court of Appeal described the methodology or analytical approach to the determination of the type of worker relationship. The first step is to determine whether or not the worker is an employee or a contractor in accordance with the established methodology and criteria for differentiating an employee from an independent contractor. The analysis of the classification of the relationship ends if the worker is determined to be an employee. However, if the worker is determined to be a contractor, the second step of the analysis is to determine whether he or she is a dependent or an independent contractor.

[21] The leading cases for the first step of differentiating employees from contractors, be they independent or dependent contractors (which is the focus of the second step of the analysis) are: *Montreal v. Montreal Locomotive Works Ltd.*,[11] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*.,[12] *Belton v. Liberty Insurance Co. of Canada*,[13] and *Braiden v. La-Z-Boy Canada Ltd*.[14]

[22] The employee versus contractor cases establish that there is no litmus test or formula for determining the classification of the worker, and, rather, there is a non-comprehensive list of relevant criteria or factors which should be analyzed on a case-by-case basis to determine the true legal nature of the relationship. In determining whether the worker is an employee or contractor, the court must consider: (a) the intentions of the parties; (b) how the parties themselves regarded the relationships; (c) the behaviour of the parties toward each other; and (d) the manner of conducting their business with one another.[15]

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[7] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, 2016 ONCA 79, affg. 2015 ONSC 1055; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, 2014 ONSC 4989; *Wyman v. Kadlec*, 2014 ONSC 4710; *Huber v. Way*, 2014 ONSC 4426; *Filiatrault v. Tri-County Welding Supplies Ltd*., 2013 ONSC 3091; *Duynstee v. Sobeys Inc*., 2013 ONSC 2050; *Conde v. National Sign Manufacturers Ltd*., 2013 ONSC 229 (Div. Ct.); *Sarnelli (c.o.b. East End Lock and Key) v. Effort Trust Co.*, 2011 ONSC 1080; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Slepenkova v. Ivanov*, [2007] O.J. No. 4708 (S.C.J), affd. 2009 ONCA 526; *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464; *Moseley-Williams v. Hansler Industries Ltd*., [2008] O.J. No. 4457 (S.C.J.); *Ross v. 413554 Ontario Ltd. (c.o.b. Chouinard Bros. Roofing)*, [2008] O.J. No. 3381 (S.C.J.).

[8] *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.).

[9] *Cormier v 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587 at para 50; *Omarali v. Just Energy*, 2016 ONSC 4094 at para. 20; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, 2014 ONSC 4989 at paras. 72, 77.

[10] 2009 ONCA 916.

[11] [1947] 1 D.L.R. 161 (P.C.).

[12] [2001] 2 S.C.R. 983.

[13] (2004), 72 O.R. (3d) 81 (C.A.).

[14] 2008 ONCA 464.

[15] *Charbonneau v. A.O. Shingler & Co.*, [2000] O.J. No. 4282 at para. 12 (S.C.J.); *Wyman v. Kadlec*, 2014 ONSC 4710 at para. 28.

[23] In *Montreal v. Montreal Locomotive Works Ltd.*, Lord Wright indicated a fourfold test would be appropriate to differentiate an employee from an independent contractor; namely: (a) control of the work; (b) ownership of tools; (c) chance of profit; and (d) risk of loss. He stated that posing the question "Whose business is it?" would also serve, in some cases, to answer the question of the nature of the parties' relationship.

[24] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., at para. 47, the Supreme Court of Canada said that the central question for determining whether a worker is a contractor is whether he or she is providing services in business on his or her own account. The Court stated:

> 47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, [1968] 3 All E.R. 732, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[25] In *Braiden v. La-Z-Boy Canada Ltd*. at para. 34, Justice Gillese suggested that the question of whose business was being operated was at the heart of the matter; *i.e.*, was the worker carrying on business for himself or herself or was he or she paid to make a contribution to somebody else's business enterprise? In determining that question, the following non-comprehensive factors were relevant but not necessarily determinative: (a) the extent to which the activities of the worker were controlled by the other contracting party; (b) whether the worker provided his or her own tools or equipment; (c) whether the worker hired his or her own helpers; (d) the extent to which the worker assumed financial risk; (e) the extent to which the worker had invested capital in the enterprise; (f) the extent to which the worker had management responsibilities; and (g) whether the worker had an opportunity for profit in the performance of his or her tasks.

[26] In *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*[16] at paras. 74-75, Justice D.G. Price provided a helpful description of the control factor, as follows:

> 74. The control test is the most traditional and frequently used method of determining whether an individual is an employee. If the employer has substantial control over the worker's operations, an employment relationship will be found, even if the worker has substantial freedom to operate, such as a professional employee normally has.
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> 75. Control over the employee need not be complete in order to establish an employment relationship. Indicia of control include: the ability to decide when, where, and by what method the employee will perform his/her work; the ability to determine which customers can be served or sold goods, and which cannot; the requirement that the employee submit activity reports; the employee's ability or inability to attend meetings; assistance and guidance that the employer gives to the employee in connection to the work being performed; the employer's ability to set dress and conduct codes for the employee, and the discipline the employer exercises over the employee for breaches of company policy. The employer's ability to select and dismiss the employee, and the general power to control the employee, are also important factors in determining the existence of an employment relationship.

[27] As noted above, if the first step of the analysis determines that the worker is a contractor,

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[16] 2014 ONSC 4989.

then it is necessary to go further and determine whether the worker is a dependent or independent contractor. In *McKee v. Reid's Heritage Homes Ltd.*, *supra*, Justice MacPherson identified a variety of factors to differentiate dependent and independent contractors including: (a) the extent to which the worker was economically dependent on the particular working relationship; (b) the permanency of the working relationship; and (c) the exclusivity or high level of exclusivity of the worker's relationship with the enterprise. It follows from the factors identified by Justice MacPherson that the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship.[17]

[28] Thus, the extent to which, over the history of the relationship, the worker worked exclusively or near-exclusively or was required to devote his or her time and attention to the other contracting party's business is an important factor in determining whether the worker is a dependent or independent contractor: the greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker will be classified as a dependent contractor.[18]

[29] In *McKee v. Reid's Heritage Homes Ltd.*, *supra*, Justice MacPherson said that recognizing the intermediate category between employee and independent contractor accorded with the statutorily provided category of dependent contractor found in the *Labour Relations Act*, S.O. 1995. At para. 29 of his judgment in *McKee v. Reid's Heritage Homes Ltd.*, he stated:

> 29. Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
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> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

[30] It should be noted that if the analysis of the worker relationship reaches the second stage, there will inevitably be indicia that the worker was a contractor; for example, that he or she was paid in exchange for invoices and not issued salary cheques, but the analysis, nevertheless, continues to examine the true substance of the relationship. Thus, the case law reveals that the fact that the worker operated as a sole proprietor or through a business is relevant but not determinative of the worker's status.[19]

E. Employment Law Class Action Context

[31] As mentioned above, it is my view that the Plaintiffs misdescribe the case at bar as a

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[17] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, 2016 ONCA 79, affg. 2015 ONSC 1055.

[18] *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd*., 2016 ONCA 79, affg. 2015 ONSC 1055.

[19] *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 at para. 54; *Braiden v. La-Z-Boy Canada Ltd*., 2008 ONCA 464 at para. 30; *Kordish v. Innotech Multimedia Corp*. [1998], 46 C.C.E.L. (2d) 318, (Ont. Gen. Div.), aff'd [2000] O.J. No. 2557 (C.A.).

conventional misclassification of employment class action. My view is that the proposed class action is better described as a compound classification of employment status class action. The difference in labelling can be demonstrated by contrasting the following two illustrations of proposed class actions.

[32] In the first illustration, ABC Ltd. purchases buses from School Buses Ltd. ABC Ltd. operates a business in which it hires drivers to drive students to school. "X" is a school bus driver. X brings a proposed class action against ABC Ltd., and the issue is whether the drivers, who are the putative class members are hired as employees working for ABC Ltd. or hired as dependent or independent contractors working for ABC Ltd. This is a conventional misclassification of employment status class action.

[33] In the second illustration, School Buses Ltd. sells buses to drivers pursuant to a service contract in which School Bus Ltd. shares in the revenues the drivers earn from transporting students to school. X brings a proposed class action against School Buses Ltd., and there is the compound issue of whether in a sharing economy, there is any employment relationship between School Buses Ltd. and the drivers, who are the putative class members, and, if so, whether the drivers are hired as employees working for School Buses Ltd. or hired as dependent or independent contractors working for School Buses Ltd. This is a compound classification of employment status class action.

[34] The case at bar is like the second illustration because Uber pleads the following in paragraphs 5 and 6 of its Statement of Defence:

> 5. As the services agreements between Uber and the proposed class members explicitly state and accurately reflect, the parties did not intend to, and did not, create an employment relationship. The criteria necessary to establish an employment relationship do not exist here, nor do those criteria have application in the context of this commercial relationship. The plaintiff and the proposed class members made the choice to provide services to riders or merchants using the Uber Apps, and to benefit from the flexibility that using the Apps affords. Uber's role is to develop, improve, license, and market the technology that the plaintiff and the proposed class members use to provide services to a number of third parties, and to facilitate payments for those services.
>
> 6. Uber denies that the provisions of the *Employment Standards Act*, the *Canada Pension Plan*, and the *Employment Insurance Act*, or any of them, apply. Uber also denies each of the other asserted claims, all of which depend upon the individualized finding that each of the proposed class members is an employee of Uber. There is accordingly no basis for the plaintiff's claim. It should be dismissed.

[35] That the case at bar is not a conventional misclassification of employment class action does not mean that it is not certifiable. The prospect of certification in the immediate case still turns on the matter of commonality versus idiosyncrasy.

[36] The conventional misclassification of employment cases succeed in achieving certification when there is some basis in fact for a systemic, which is to say a class-wide commonality in the behaviour and characteristics of the relationship between the putative Class Members and the defendant such that a court may be able to classify that relationship as that of an employee working for an employer.[20] The conventional misclassification of employment cases fail in achieving

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[20] *Montaque v. Handa Travel Student Trip Ltd*., 2020 ONSC 6459 (consent certification); *Rallis v. Approval Team Inc.*, 2020 ONSC 4197 (consent certification); *Berg v. Canadian Hockey League*, 2017 ONSC 2608 var'd 2019 ONSC 2106 (Div. Ct.); *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122 and 2018 ONSC 271; *Omarali v. Just Energy*, 2016 ONSC 4094; *Baroch v. Canada Cartage Diversified GP Inc*., 2015 ONSC 40; *Rosen*

certification when the classification of the employee's relationship can only be determined on a case-by-case basis based on the individual circumstances of the putative class members.[21]

[37] The same legal tension between commonality and idiosyncrasy is present in a compound classification of employment status class action.

[38] Although the case at bar is unique, for present purposes, it is necessary to understand the conventional misclassification of employment class action caselaw because it focuses attention on what the Plaintiffs must do to show some basis in fact for the four certification criteria that require a factual underpinning and it focuses attention on what the Defendants can do to resist certification in a case where there is the compound issue of whether in a sharing economy, there is any employment relationship at all.

[39] All of which is another way of saying that in this proposed class action, the major theatre of war is the parties' battle over the commonality or the idiosyncrasy of the behaviour of the parties in their performance of the standard form contracts and the associated documents that are a constant feature of the Uber software (the "Uber Apps").

F. Procedural Background

[40] On January 19, 2017, Mr. Heller commenced his proposed class action.

[41] On January 22, 2018, Uber brought a motion to have the action stayed in favour of arbitration in the Netherlands. On January 30, 2018, I stayed the action.[22]

[42] On January 2, 2019, the Ontario Court of Appeal reversed my decision and held that the arbitration clause was unconscionable and illegal because it contracted out of the *Employment Standards Act, 2000*.[23]

[43] On May 23, 2019, the Supreme Court of Canada granted leave to appeal.[24]

[44] On June 19, 2019, Mr. Heller amended the Statement of Claim to add Uber Portier B.V. as a party defendant.

[45] On June 26, 2020, the Supreme Court of Canada dismissed the appeal and held that the arbitration agreement was unconscionable.[25]

[46] On September 28, 2020, Mr. Heller delivered an Amended Fresh as Amended Statement of Claim.

[47] On November 27, 2020, Uber delivered its Statement of Defence.

[48] On December 18, 2020, Mr. Heller served his Motion Record for Certification (1,141 pages).

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v. BMO Nesbitt Burns Inc., 2013 ONSC 2144; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[21] *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377 aff'd 2014 ONCA 677; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, rev'g 2010 ONSC 4520.

[22] *Heller v. Uber Technologies Inc*., 2018 ONSC 718.

[23] *Heller v. Uber Technologies Inc*., 2019 ONCA 1, which rev'd 2018 ONSC 718.

[24] *Uber Technologies Inc. v. Heller* [2019] S.C.C.A. No. 58.

[25] *Uber Technologies Inc. v. Heller*, 2020 SCC 16, aff'g 2019 ONCA 1, which rev'd 2018 ONSC 718.

[49] In March 2021, Uber delivered its Responding Motion Record (3,045 pages).

[50] In May 2021, Uber delivered its Supplementary Responding Motion Record (9 pages).

[51] On June 9, 2021, Mr. Heller delivered his Supplementary Motion Record (3,586 pages) and his Factum (164 pages).

[52] On June 10, 2021, Mr. Heller delivered his Second Supplementary Motion Record (2,749 pages).

[53] On June 30, 2021, Uber delivered its Responding Factum (114 pages).

[54] On July 7, 2021, Mr. Heller delivered his Reply Factum (50 pages).

[55] In their Statement of Claim, the Plaintiffs advance four causes of action; namely: (a) breach of the *Employment Standards Act*; (b) breach of contract; (c) negligence; and (c) unjust enrichment.

[56] The proposed Class Definition is:

> Any person who, since January 1, 2012, worked or continues to work in Ontario transporting passengers and/or providing delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[57] For reasons discussed below, I shall amend the class definition to be:

> Any person who, since January 1, 2012, in Ontario used an Uber app to transport passengers and/or to provide delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[58] The proposed Common Issues are as follows:

> *Statutory Claims and Breach of Contract*:
>
> 1. Are the Class Members "employees" of the Defendants (or of any Defendant) pursuant to the *Employment Standards Act, 2000* ("ESA")?
>
> 2. Are the Defendants (or some of the Defendants) a common employer of the Class Members for the purposes of the ESA?
>
> 3. If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants (or of any Defendant) pursuant to the *Canada Pension Plan* ("CPP")?
>
> 4. If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants (or of any Defendant) pursuant to *the Employment Insurance Act* ("EI")?

5. If the answer to (1) is "yes", are the Class Members outside the scope of the "taxi cab driver" exemption to Parts VIII and X of the ESA because they are not "taxi cab drivers"?

6. If the answer to (1) is "yes", do the minimum requirements of the ESA with regard to minimum wage, vacation pay, and notice of termination or pay in lieu thereof form express or implied terms of the Defendants' (or of any Defendant's) contracts with the Class Members?

7. If the answer to (5) is "yes", do the minimum requirements of the ESA with regard to overtime pay, public holiday pay, and premium pay form express or implied terms of the Defendants' (or of any Defendant's) contracts with the Class Members?

8. If the answer to question (1) is "yes", do the Defendants (or does any Defendant) owe contractual duties and/or a duty of good faith to:

(a) ensure that the Class Members are properly classified as employees;

(b) ensure that Class Members' hours of work are monitored and accurately recorded;

(c) ensure that the Class Members are paid the minimum wage;

(d) ensure that the Class Members are paid vacation pay;

(e) ensure that the Class Members whose services the Defendants terminated without just cause received notice of termination or pay in lieu thereof ("Termination Pay"); and

(f) ensure that the Class Members are reimbursed for out-of-pocket expenses paid for gas, insurance, maintenance, parking fines, and/or cell phone data in connection with the use of personal vehicles and/or mobile phones used to perform work for the Defendants ("Out-of-Pocket Expenses")?

9. If the answer to question (5) is "yes", do the Defendants (or does any Defendant) owe contractual duties and/or a duty of good faith to:

(a) ensure that the Class Members are paid overtime pay for hours worked in excess of 44 hours per week; and

(b) ensure that the Class Members are paid public holiday pay and premium pay?

10. Did the Defendants (or any Defendant) breach any of their contractual duties and/or duty of good faith? If so, how?

11. If the answer to (1) is "yes", did the Defendants (or any Defendant) fail to pay the Class Members minimum wage, vacation pay, and Termination Pay as required by the ESA?

12. If the answer to (5) is "yes", did the Defendants (or any Defendant) fail to pay the Class Members overtime pay, holiday pay, and premium pay as required by the ESA?

13. If the answers to (3) and/or (4) are "yes", did the Defendants (or any Defendant) fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Negligence

14. Alternatively, did the Defendants (or any Defendant) owe a duty of care to the Class Members to:

(a) ensure that the Class Members are properly classified as employees;

(b) advise the Class Members of their entitlement to the minimum wage, overtime pay, vacation pay, public holiday pay, premium pay, and Termination Pay;

(c) ensure that the Class Members' hours of work are monitored and accurately recorded; and

(d) ensure that the Class Members are paid minimum wage, overtime pay, vacation pay, public holiday pay, premium pay, and Termination Pay?

15. If the answer to any of the subparts of question (14) is "yes", did the Defendants (or any Defendant) breach their duty of care to the Class Members? If so, how?

Unjust Enrichment

16. Were the Defendants (or was any Defendant) unjustly enriched by:

(a) failing to pay the Class Members minimum wage, overtime pay, vacation pay, public holiday pay, premium pay and/or Termination Pay in accordance with the ESA;

(b) failing to reimburse the Class Members for their Out-of-Pocket Expenses; and/or

(c) failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Aggregate Damages

17. If the Defendants (or any Defendant) breached the ESA, their contracts with the Class Members, their duty of good faith or duty of care owed to the Class Members, or was unjustly enriched, should damages be assessed on an aggregate basis? If so, in what amount?

Punitive, Exemplary, and Aggravated Damages

18. Are the Class Members entitled to an award of punitive, exemplary, or aggravated damages based on the Defendants' (or any Defendant's) conduct?

[59] For reasons discussed below, I shall certify as common issues questions 1-13.

G. Evidentiary Record

[60] Mr. Heller supported his certification motion with the following evidence:

- Affidavit of **Linda Brown** dated December 17, 2020. Ms. Brown is a putative Class Member. She was cross-examined.

- Affidavit of **Felicia Garcia** dated December 16, 2020. She was cross-examined.

- Affidavit of **David Heller** dated December 17, 2020. He was cross-examined.

- Affidavit of **Youssef Kodsy** dated December 18, 2020. Mr. Kodsy is a lawyer at Wright Henry LLP, Plaintiff's counsel. He was cross-examined.

- Affidavit of **Dwight Steward** dated December 18, 2020. Dr. Steward is an economist and statistician with a B.A. (Economics, 1990) from the University of Austin Texas and a Ph.D. (Economics, 1995) from the University of Iowa. He is currently the principal of EmployStats, an economic consulting firm that he founded in 1997 based in Austin, Texas. He has been an expert witness in over 500 cases in the United States. He has held teaching positions in The Department of Economics and The Red McCombs School of Business at the University of Texas at Austin, and in The College of Business Administration at Sam Houston State University. He was cross-examined.

[61] Uber responded to the certification motion with the following evidence:

- Affidavit of **Lisa Broderick** dated March 1, 2021. Ms. Broderick is a user of the Uber App. She was cross-examined.
- Affidavit of **David Clark** dated March 2, 2021. Mr. Clark is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Tiffany Chevers** dated March 4, 2021. Ms. Chevers is a user of the Uber App. She was cross-examined.
- Affidavit of **Jess Edwards** dated March 1, 2021. Mr. Edwards is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Derek Eyamie** dated March 2, 2021. Mr. Eyamie is a user of the Uber App.
- Affidavit of **Peter Needham** dated March 1, 2021. Mr. Needham is a user of the Uber Driver App. He was cross-examined.
- Affidavit of **Daniel Valenti** dated March 5, 2021. Mr. Valenti is the Head of Marketplace & Planning at Uber Canada, Inc. He was cross-examined.

H. Facts

1. The Plaintiffs and the Putative Class Members

[62] The putative Class Members, who include Mr. Heller and Ms. Garcia, are persons who have entered into Service Agreements with Uber to use the Uber Apps. More precisely the putative Class Members are persons who entered into Service Agreements with Uber B.V., Rasier Operations B.V., or Portier B.V.

[63] **Ms. Brown** is a putative Class Member. She has been a Driver and occasionally a Delivery Person using Uber Apps since August 2015. It has been a main source of income. Previously, she worked at Sun Life Financial. She used the App approximately 87% of days in a given year between 2015 and 2019. In addition to providing services using the App, Ms. Brown also offers her services through Rideco, a transportation service company. With Rideco, Ms. Brown is required to work scheduled shifts. She provides her ridesharing services using the Uber App

around her set Rideco schedule.

[64] **Ms. Broderick** is a putative Class Member. For over twenty years, Ms. Broderick has worked full-time in the fleet management industry, which she continues to do. In 2016, to save money for vacation holidays, she began providing ridesharing services using the Uber App and enjoyed the collegiality of the experience. She testified that she would stop driving if a Service Agreement was changed in a way that she did not like. Before the pandemic, Ms. Broderick typically provided ridesharing services for approximately 15 hours per week. In 2018, her job duties involved travelling every other week, so she reduced her App usage significantly for about ten months, including a six-month period where she did not log on at all. Typically, she turns on the App while commuting home from work. She also provides ridesharing services on weekend mornings. Since the pandemic, Ms. Broderick has spent less time ridesharing. Since October 2020, Ms. Broderick has worked remotely from home, and has returned to occasionally providing services using the App.

[65] **Ms. Chevers** is a putative Class Member. She is a single mother who works full-time as a manager in the hospitality industry. She holds three bachelor degrees: a Bachelor of Arts in Spanish Language and Literature, a Bachelor of Social Science, and a Bachelor of Business Administration. She began using the Uber App in 2018, during a pregnancy in order to earn money to pay off her car debt and student loans. She has provided both ridesharing and delivery services but focuses primarily on ridesharing because she enjoys getting to know people. When she delivers, she uses a delivery bag she bought from Canadian Tire. Since the pandemic, Ms. Chevers has maintained a job but her hours have been reduced and she has had more time to use the App. With passengers less eager to talk and socialize with her during the pandemic, Ms. Chevers has shifted to delivering using the Uber Eats platform and delivers during the dinner rush to maximize her earnings.

[66] **Mr. Clark** is a putative Class Member. He has had a varied career in the restaurant industry, including managerial positions, and now operates a not-for-profit fishing program for children. In late 2019, he signed up to provide delivery services using the Uber App to raise money for his fishing program and for an exercise activity. In making food deliveries, he uses his bicycle. He purchased an Uber delivery bag. He only used the App around his existing work schedule with his other jobs. He used a variety of strategies to maximize his earnings. His earnings were between $25-$35/hour. If a delivery took him outside the downtown zone, where he lives, Mr. Clark's strategy was to turn off the App, bike towards a better zone, and then turn the App back on again to ensure he is sticking to areas with high demand and that he is familiar with. He was diligent in serving his "Eaters" to earn high ratings on the Uber Eats App.

[67] **Mr. Edwards** is a putative Class Member. He has BFA in Creative Writing and is an aspiring publisher. In 2016, after graduating from the University of Victoria, he moved his wife and two kids from Victoria to Toronto to pursue his publishing career. However, he was unable to locate a job in publishing and instead worked in food services at a Toronto university for a few years while his wife pursued studies in nursing at the same university. During this time, Mr. Edwards also provided delivery services using the App, typically on his way to visit a friend in North York, as a way to earn some extra spending money to buy fast food and purchase a new video game to play with his friends. He has never used the App for more than 4-8 hours a week, except when he went on a disability leave from the university. He will sometimes refrain from logging into the App for weeks or months at a time and has used it less than a handful of times since August 2020. He described his use of the App as a hobby. He testified that he would stop using the Uber App if there was anything in the license agreements that he did not like. He is very

selective in his use of the App; for example, he "wouldn't touch" any promotions that were being offered downtown, notwithstanding the increased earning potential because of the hassles associated with downtown traffic and parking.

[68] **Mr. Eyamie** is a putative Class Member. His regular job was with the Ottawa-Carleton District School Board as a head of student guidance. In March 2020, idled by the pandemic, he decided to use the Uber Eats App to fill his time and to earn additional income. He used his own vehicle. He monitored surges in demand and made deliveries around dinner rushes or around lunchtime on weekends. He never worked more than 8 hours in a day. In June or July 2020, he stopped using the Uber App.

[69] **Ms. Garcia** is a putative Class Member and is proposed as a Representative Plaintiff. She has been using the Uber ride app since October 1, 2015 and the Uber Eats App since 2017. She uses her own vehicle. From October 2015 to March 2021, Ms. Garcia provided ride services in 53 out of 66 months. She averaged 19 days of work in each month, though in 2017-2019, she frequently worked almost every day and often more than eight hours a day. She first became aware of the Uber App after searching on Google for ways to make extra money. She submitted documentation both through the App and in person at the Greenlight Hub, which is an in-person registration centre, but she received no training. During the time that Ms. Garcia has used the App, she has had other jobs and she provided ridesharing or delivery services around the schedules of her other jobs. She is sometimes accompanied by her daughter who assists her.

[70] **Mr. Heller** is a putative Class Member and is proposed as a Representative Plaintiff. He used the Uber Eats App in the greater Toronto area from February 24, 2016 until April 12, 2018. It was his livelihood. On average, he worked 15 days per month. He used the App for 427 of 782 days (54.5%). At times, he worked 40-50 hours a week and earned between $400 and $600 a week, which is under the minimum wage of an employee. He used his own vehicle and a thermal delivery bag that he purchased from Uber. In 2017, for a time, he was a "dual-apper," a person who provides delivery services using the Uber App and also a rival software known as DoorDash. The evidence from Uber's records was that Mr. Heller worked 71.7 % of his hours on Fridays, Saturdays, and Sundays and 28.4% of Mondays and Tuesdays. Mr. Heller made over 300 complaints to Uber during his time using the App addressing matters like waiting too long at a restaurant for food to be ready, not being able to find an Eater, payments and receiving promotions.

[71] **Mr. Needham** is a putative Class Member. He began using the Uber Apps in 2015 and it became his main source of income, although he has a business offering services as a Life Coach. He regards his use of the App as entrepreneurial, and he uses a wide array of strategies to maximize his earnings. During the pandemic, Mr. Needham has shifted his strategies throughout the various stages of lockdown. He now focuses on providing ridesharing services to frontline workers at Long-Term Care Homes in Whitby. Mr. Needham provides feedback and input directly to Uber on ways he thinks the App or experiences with restaurant partners can be improved to increase earnings. Some of those suggestions have been adopted by Uber. In 2019, Mr. Needham received a $14,300 "appreciation payment" from Uber for contributing to its success.

2. Class Size

[72] Between January 1, 2012 and March 1, 2021, 366,359 putative Class Members have provided at least one ride or delivery using the Uber App.

[73] During the Class Period, 30.8% of the putative Class Members provided rides, 37.9% provided Uber Eats services, and 31.3% of the putative Class Members provided both ride and delivery services.

3. Uber

[74] Uber Technologies Inc. is incorporated under the laws of Delaware, USA and is the parent corporation of Uber B.V., Rasier Operations B.V. ("Rasier") and Uber Portier B.V ("Portier") (collectively referred to as "Uber").

[75] Uber B.V., Rasier and Portier are incorporated under the laws of the Netherlands with offices in Amsterdam.

[76] Uber Canada Inc. is incorporated under the laws of Canada, and it provides marketing and administrative support to Uber B.V. in Canada.

[77] Uber is a technology company that develops computer software applications ("Uber Apps"), and then markets, licenses, and operates the Uber Apps as a digital marketplace for goods and services.

[78] Through Uber Technologies Inc., its business enterprise operates in 69 countries, and it generates billions of dollars of revenue annually. The enterprise had gross booking revenues of $65 billion in 2019.

4. Uber Apps, the Service Agreements, Incentives, and the Code of Conduct

[79] Among Uber's software applications are applications that have revolutionized the transportation and delivery industry. All of the applications have associated Service Agreements. The Service Agreements are for Uber Apps known as: Uber Eats, UberX, UberXL, Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

[80] The Service Agreements are all standard form contracts that differ in aspects but not in kind. For example: UberX is a ride service for drivers with standard four-door vehicles; UberXL is a ride service for drivers with larger vehicles; Uber Premier is a ride service for drivers with higher-end vehicles and highly rated drivers; Uber Green is a ride service for drivers with low emission vehicles; Uber WAV is a ride service for drivers with wheelchair-accessible vehicles; Uber Taxi is a public municipal ride service for municipally licensed taxi drivers; and Uber Pool is similar to UberX but it is for passengers who agree to travel together in a car pool.

[81] The precise nature or standard of service may vary and be changed from time to time, but Uber uses the same technological model for its rider software applications and for its food delivery software applications.

[82] For the rider applications, the person seeking transportation, the "Rider" downloads from an Internet site one version of the Uber Ridesharing App. The person who will provide the transportation, the "Driver" downloads a complementing and corresponding version of the software.

[83] For the "Uber Eats" application, there are three complementing and corresponding versions of the software. The person ordering food or other items, the "Eaters," downloads one version, and

the restaurant or person supplying the goods, the "Merchants" downloads an associated version, and the person providing the carriage, the "Delivery People" (some Delivery People walk or use bicycles rather than drive vehicles) respectively download complementing versions of Uber Eats.

[84] To provide services through the Uber App, putative Class Members (Drivers or Delivery People) enter into a Services Agreement. Uber updates the Services Agreements from time to time. There have been numerous amendments. Each time Uber revises a Services Agreement, Drivers and Delivery People providing services must accept the new agreement to continue providing services through the Uber App.

[85] The Service Agreements label the Drivers or Delivery People as "independent contractors." This legal categorization is disputed by the Plaintiffs.

[86] Uber Drivers and Uber Delivery People must complete an application and be approved by Uber to enter a Services Agreement with Uber for which there are different standards of service.

a. The Class Member must provide proof that his or her vehicle meets Uber's standards. Uber requires Drivers to have certain licenses, qualifications, and/or vehicles to provide certain levels of service. For examples, as noted above, the UberX Rides Service Agreement requires standard four-door vehicles, but the Uber Select Service Agreement requires higher-end vehicles.

b. A Driver for the rides service must provide a copy of a valid driver's licence, proof of eligibility to work in Canada, vehicle registration information, and vehicle insurance information.

c. To provide Uber Eats services by bike or foot, Uber requires Drivers to provide proof of work eligibility, and photo identification confirming that they are over 18 years of age.

d. To provide Uber Eats services by car, Delivery People must provide a photo of a valid driver's licence identifying they are at least 21 years old, proof of vehicle insurance, vehicle registration information, and proof that their vehicle is 20 years old or newer. Any prospective Delivery People seeking to deliver alcohol must also obtain a SmartServe Certification.

[87] All prospective Drivers and Delivery People, with the exception of commercial delivery Drivers, must complete background screening. This background screening involves a multi-step process that checks for issues including, but not limited to, driving violations, impaired driving history, and a criminal record.

[88] Once an Uber user is registered, Uber proactively reruns driving and criminal history checks every year to ensure that Drivers and Delivery People continue to meet its standards. If a routine motor vehicle record check or background check uncovers a violation of Uber's Community Guidelines, the Uber user will lose access to the Uber App.

[89] Putting aside the disputed issue of whether Uber is an employer, the Uber App for ridesharing replicates the operation of a taxi company. The fares (passengers, Riders) download the Uber App and use it to call for a ride. The Uber App initially acts as a dispatcher and assigns the Rider to a Driver, (a putative Class Member), who has also downloaded the Uber App. The putative Class Member has a short period of time to accept the assignment, failing which the Uber App assigns the fare to another Driver. If the Class Member accepts the assignment, the Uber App identifies the Rider's pickup location and provides a map to the location. The fare begins when the

Rider is picked up and enters the Class Member's vehicle. The Uber App provides the Class Member with a route map to the destination. The trip is monitored, and the Uber App sends the Driver notifications if the speed limit is exceeded. At the destination, the Uber App charges the Rider a fare and issues a receipt. If a Rider cancels the ride request, he or she will be charged a cancellation fee which is deemed to be a fare. The Rider may use the Uber App to rate the Driver on a scale of one to five stars. The Driver may use the App to rate the Rider on a scale of one to five stars.

[90] After collecting payment from the Rider, Uber deducts its fees, which range in general between about 25 and 30% of the fare and then remits the balance of the fare to the Driver. Uber pays Drivers on a weekly basis.

[91] From the perspective of the putative Class Members who are Delivery People, the Uber Eats App operates similarly to the Uber applications for the delivery of passengers to their destination. The Uber Eats App sends the putative Class Member requests for food delivery services from restaurants. The request indicates where the Driver is to pick up the food order and provides a route. As of June 2020, the request indicates the order's ultimate destination and a delivery fee based on a formula set by Uber. If the Delivery Person accepts the request, Uber notifies the restaurant, and then the Uber App displays a map to the restaurant for the Delivery Person. After the Delivery Person picks up the food at the restaurant, the Uber App provides a route map to the "Eater's" Location. When the food delivery is completed, the Uber App collects payment and issues the Eater a receipt. If the Eater or restaurant cancels an accepted Uber Eats request, Uber, in its discretion, may charge a cancellation fee, which is deemed to be the delivery fee. Uber deducts its fees, which can range between 5% and 35% of the fare and remits the balance to the Delivery People who provided the delivery service.

[92] Uber communicates with Drivers and Delivery People by email and through the Uber App.

[93] Uber has data about the assignment, commencement and completion of trips and route details. The Uber App tracks the location of the Driver and the Delivery People while he or she is using the Uber App.

[94] From February 2012 to September 10, 2014, Drivers contracted with Uber by signing simple one-page Services Agreements. These early Services Agreements provided that: (a) Uber would enforce Driver quality through ratings, client feedback, cancellations, and acceptance rates; (b) Uber would monitor Driver activity and require at least one trip every two weeks; and (c) the Driver's "partnership" with Uber was dependent on meeting quality and activity requirements.

[95] Before July 2013, putative Class Members who provided services under a commercial livery license (i.e., Uber Black and Uber Taxi Drivers) contracted with Uber Technologies Inc.

[96] From July 26, 2013 to December 2018, Drivers who provided services under a commercial livery license contracted with Uber B.V. From July 26, 2013 to January 4, 2016 these Drivers were subject to a B.V. "Partner Terms" agreement (the "2013 B.V. Agreement"). From January 4, 2016, these Drivers were subject to the Uber B.V. Services Agreement (the "2016 B.V. Agreement") There were sixteen addenda to the Uber B.V. Services Agreement. On and after December 2018, all Drivers providing rides contracted with Rasier.

[97] After September 10, 2014 (when Uber introduced UberX in Ontario) to date, Drivers who have provided services without a commercial livery license have contracted with Rasier pursuant to a "Transportation Provider Services Agreement."

[98] The 2014 Rasier Services Agreement was used until January 4, 2016, when the 2016 Rasier Services Agreement was introduced. During its tenure, there were three addenda updating the agreement.

[99] The Rasier Services Agreements: (a) require Drivers to use only their assigned Driver ID; (b) wait 10 minutes at a pick-up location before cancelling a trip; (c) give Uber the right to terminate or suspend the agreement and prohibit Drivers from using the Uber App in the event of a breach; (d) require Drivers to meet a minimum rating requirement and give Uber the right to "deactivate" a Driver's account if they fail to do so; and (e) set restrictions as to when Rides can be cancelled and when the cancelling Rider will have to pay the Driver a cancellation fee.

[100] There have been forty-seven addenda to the 2016 Rasier Services Agreement. The addenda update: (a) the fare formula; and (b) the fees Uber charges Riders and deducts from Riders. The addenda have added new services such as UberSelect, UberXL, and UberComfort. The addenda added policies for picking up Riders at Ontario airports.

[101] The Uber Eats App was introduced in 2015 first in Toronto. Before November 28, 2016, putative Class Members who wished to provide food delivery services entered into a Rasier Agreement. After November 28, 2016, putative Class Members entered into the 2016 Portier Agreement. There are forty-one different addenda to the 2016 Portier Agreement. The addenda update Uber's delivery fee formula and its fees. The addenda provide new services and have extended service beyond Toronto to new cities.

[102] In the 2012 and 2013 Services Agreements, Uber reserved the right to enforce Driver quality through ratings. The parties to the Services Agreements contractually agreed that Uber would review quality and activity with Drivers not meeting Uber's standards.

[103] Uber offers a variety of incentives to increase the use of the Uber Apps.

a. Surge pricing is an incentive through which Uber encourages Drivers and Delivery People to work at a certain location or at times of high demand in exchange for additional compensation.[26]

b. "Quests" are bonus pay incentives for Drivers and Delivery People who complete a high number of trips in a set time period determined by Uber.

c. The "Uber Pro"[27] and the "Uber Eats Pro"[28] programs offer perks to Drivers and Delivery People who drive more frequently, drive during Uber's preferred times, and maintain high ratings and low cancellation rates. Through Uber Pro, Drivers earn points for providing services at certain times or in certain places determined by Uber. As they accumulate points, they can increase their "status" in the program and earn benefits, including: (a) "Airport Priority Rematch", which gives Drivers a better chance for a quick pickup at an airport terminal after dropping off a Rider at the airport; (b) "Trip Duration and Direction", which allows Drivers to view the estimated duration and direction of all Ride requests before accepting; (c) discounted car and bicycle maintenance; (d) discounted tax

[26] Uber notifies Drivers through the Uber App that it has implemented a "surge". Examples of when Uber has implemented surge pricing during the Class Period include: (a) during sports events; (b) in inclement weather; (c) during a conference; (d) during meal times; (e) late night at closing time for bars and clubs; and (f) around 5:00 pm, when people leave work.

[27] Uber Pro was introduced in August 2019 in Toronto and Ottawa and expanded across Ontario in February 2020.

[28] Uber launched Uber Eats Pro in July 2020.

preparation; and (e) Moneygram discounts.

d. Other examples of financial incentives that Uber offers or has offered to Drivers and Delivery People are: (a) providing referral codes that give Drivers a financial incentive to recruit other Drivers; (b) providing additional compensation for completing a certain number of rides in a given week; and (c) promotions for completing trips overnight in rural areas.

[104] Uber's 2014 Rasier Services Agreement provides that Uber used the rating system for "quality assurance purposes" to determine the level of service provided by Drivers. Uber reserves the right to restrict Drivers with low ratings from accepting fare requests.

[105] Since January 4, 2016, all of Uber's Services Agreements have required Drivers and Delivery People to acknowledge and agree that after providing rides, food delivery or Uber Connects services, Uber will prompt Riders, Eaters, restaurants, or other customers to rate the Driver's services and, optionally, to provide comments or feedback about the Driver. Since January 4, 2016, Drivers and Delivery People have been required to maintain a minimum average rating to maintain access to the Uber App. In the event the Driver's or Delivery People's average rating falls below the minimum requirement, Uber will notify the Driver or Delivery People and may provide them, in Uber's discretion, a limited period of time to raise their average rating above the minimum required. If the Uber user fails to do so, Uber reserves the right to deactivate the user's access to the Uber App.

[106] In March 2015, Uber introduced a Code of Conduct, which in June 2016 was renamed "Community Guidelines." It has been updated from time to time. The Community Guidelines provide that in its sole discretion, Uber may terminate its relationship with the Driver or Delivery People and discontinue access to the Uber App if the App user violates the Community Guidelines.

[107] Under the Community Guidelines, Drivers and Delivery People: (a) must keep all documentation with Uber up to date; (b) must maintain the minimum average rating set by Uber; (c) must not contact Riders or Eaters after a trip or delivery, except to return a lost item; (d) must not share their account with anyone; (e) must not accept street hails; (f) must not solicit payment of fares outside the Uber App; and (g) must not discriminate against someone based on their destination.

[108] Uber enforces its Community Guidelines by asking Riders and Eaters to provide feedback or report any violations to Uber. Since May 2019, Uber has reviewed reports of potentially unsafe driving behaviour, including customer reports of collisions or traffic citations that may have happened during a trip or delivery, and other reports that may indicate "poor, unsafe, or distracted" driving.

[109] From April 2017 to date, for Drivers providing Rides, and since May 2019 for Delivery People providing Uber Eats services, the Community Guidelines provide that Uber reviews and investigates reports of violations submitted by Riders and Eaters. A Driver may be contacted during this process and Uber, in its sole discretion, may disable a Driver's use of the Uber App until the conclusion of the review.

[110] Since April 2017 and May 2019, for Rides and Uber Eats, the Community Guidelines have provided that if a Driver loses access to the Uber App for low ratings, they may have the opportunity to regain access if they meet certain requirements and provide proof that they have successfully taken a quality improvement course offered by third-party experts.

[111] Since the COVID-19 pandemic Uber has imposed additional requirements on Drivers with respect to health and safety. In 2020, Uber introduced a "No Mask. No Ride." Policy, requiring Drivers to wear a face cover or mask. Uber enforces this policy by requiring Drivers to take a photo of themselves before they can begin driving. Uber also requires Drivers to confirm, via a new Go Online Checklist, that they have taken certain preventive measures with respect to COVID-19. Uber has also distributed masks and sanitation materials to Drivers for free.

5. The Arbitration and Class Action Waiver Clause

[112] On August 26, 2020, Uber amended the Service Agreements to provide for arbitration and for the Riders and the Delivery People to waive a right to participate in a class action. However, the amendment provided the Riders and the Delivery People for a right to opt out of the Arbitration and Class Action Waiver Clause.

[113] The Arbitration and Class Action Waiver Clause provides that: (a) Drivers and Delivery People must resolve all disputes arising out of their relationship with Uber on an individual basis through arbitration, pursuant to the Arbitration Rules of the ADR Institute of Canada, Inc., except that they may bring *Employment Standards Act, 2000* complaints to the Ministry of Labour; (b) Drivers and Delivery People are prohibited from participating in or recovering from any collective proceeding; and (c) Drivers and Delivery People can "opt out" of the Arbitration and Class Action Waiver within 30 days by accepting the amendments in the Uber App and then sending an email requesting to opt out to one of three email addresses, depending on the counter party to their Services Agreement. An "opt out" with respect to one Uber entity is ineffective as to other Services Agreement counterparties.

[114] The Arbitration and Class Action Waiver Clause is set out below with the notifications provided to the Uber App users.

> You entered into an agreement ("**Agreement**") with Rasier Operations BV ("**Company**") for your use of certain software and other services. This Addendum is an addendum to that agreement and it sets forth additional terms and conditions that are applicable in the regions in which you provide transportation services. By clicking "Yes, I agree", you agree to be bound by the additional terms below. Capitalized terms used herein but not defined shall have the meanings set forth in the Agreement.
>
> The below replaces section 15 of the Agreement.
>
> **IMPORTANT: PLEASE READ THIS ARBITRATION PROVISION ("ARBITRATION PROVISION") CAREFULLY. IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH US ON AN INDIVIDUAL BASIS THROUGH ARBITRATION, EXCEPT IN CERTAIN CIRCUMSTANCES. YOU MAY CHOOSE TO OPT OUT OF THIS ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS BELOW. IF YOU DO NOT OPT OUT OF THIS ARBITRATION PROVISION AND THEREFORE AGREE TO ARBITRATION WITH US, YOU ARE AGREEING IN ADVANCE, EXCEPT AS OTHERWISE PROVIDED BELOW, THAT YOU WILL NOT PARTICIPATE IN AND, THEREFORE, WILL NOT SEEK OR BE ELIGIBLE TO RECOVER MONETARY OR OTHER RELIEF IN CONNECTION WITH ANY CLASS ACTION OR OTHER COLLECTIVE PROCEEDING. THIS ARBITRATION PROVISION, HOWEVER, WILL ALLOW YOU TO BRING INDIVIDUAL CLAIMS IN ARBITRATION ON YOUR OWN BEHALF.**

15.1. How This Arbitration Provision Applies

(a) All disputes arising out of or in connection with the Agreement, or in respect of any legal relationship associated with or derived from the Agreement, will be finally and conclusively resolved by arbitration, on an individual basis, under the Arbitration Rules ("ADRIC Rules") of the ADR Institute of Canada, Inc. ("ADRIC"), except as modified here.

(b) The ADRIC Rules are available by, for example, searching www.google.ca to locate "ADRIC Arbitration Rules" or by clicking here. You can also contact ADRIC at 1-877-475-4353 or www.adric.ca.

(c) The governing law, known as the Seat of Arbitration, will be that of the province or territory where you reside, or of Ontario if you reside outside Canada. The language of the arbitration will be English or, if the governing law is Québec's, French if you choose.

(d) The arbitration hearings and meetings may be held at any location(s) the arbitrator considers appropriate. Arbitration hearings may be conducted by telephone, email, the Internet, videoconferencing, or other communication methods, unless the arbitrator disagrees. Information about the cost of arbitration is below in section 15.5.

(e) You have the right to consult with counsel of your choice about this Arbitration Provision and to be represented by counsel at any stage of the arbitration process.

(f) If any portion of this Arbitration Provision is unenforceable, the remainder of this Arbitration Provision will be enforceable. This Arbitration Provision survives the termination of your relationship with us, and it continues to apply if your relationship with us is ended but later renewed.

(g) Except as provided below regarding the Class Action Waiver, this Arbitration Provision covers without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the formation, scope, enforceability, waiver, applicability, revocability or validity of this Arbitration Provision or any portion of this Arbitration Provision.

15.2. Limitations On How This Arbitration Provision Applies

(a) Nothing in this Arbitration Provision prevents you from filing a claim with a government agency, or prevents that agency from adjudicating and awarding remedies based on that claim.

(b) Where you allege claims of sexual assault or sexual harassment, you may choose to bring those specific claims in court instead of arbitration. We agree to honour your choice of forum with respect to your individual sexual harassment or sexual assault claim but in doing so we do not waive the enforceability of any other part of this Arbitration Provision (including but not limited to Section 15.3—Class Action Waiver, which will continue to apply in court and arbitration).

15.3. Class Action Waiver

This Arbitration Provision affects your ability to participate in class or collective actions. Both Uber and you agree to bring any dispute in arbitration on an individual basis only, and not on a class or collective basis on behalf of others. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or for you to participate as a member in any such class or collective proceeding ("Class Action Waiver"). Notwithstanding any other provision of this Arbitration Provision or the ADRIC Rules, disputes in court or arbitration regarding the validity, enforceability, conscionability, or breach of the Class Action Waiver, or whether the Class Action Waiver is void or voidable, may be resolved only by a court and not by an arbitrator. In any case in which (1) the dispute is filed as a class or collective action and (2) there is a final judicial determination that all or part of the Class Action Waiver is unenforceable, the class or collective action to that extent must be litigated in court, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

15.4. Starting the Arbitration

(a) Before starting arbitration with ADRIC, the party bringing the claim in arbitration must first deliver a written Notice of Request to Arbitrate ("Notice") within the limitation period that would apply if the claim were brought in a Court in your province or territory of residence, or of Ontario if you reside outside Canada. The Notice must include contact information for the parties, the legal and factual basis of the claim, and the remedy sought and amount claimed. Any demand for arbitration made to us must be served to Uber Canada Inc.'s registered address (c/o McCarthy Tétrault LLP, 66 Wellington Street West, Suite 5300, TD Bank Tower, Toronto ON M5K 1E6).

(b) Before the Notice is delivered to ADRIC, the party bringing the claim shall first attempt to informally negotiate with the other party, in good faith, a resolution of the dispute, claim or controversy between the parties for a period of not less than 30 days but no more than 45 days ("negotiation period") unless extended by mutual agreement of the parties. During the negotiation period, any otherwise applicable limitation period will be tolled (temporarily suspended). If the parties cannot reach an agreement to resolve the dispute within the negotiation period, the party bringing the claim may deliver the Notice to ADRIC.

(c) To commence arbitration, the party bringing the claim must: (1) deliver the Notice to ADRIC and (2) pay their portion of any initial arbitration filing fee (see Section 15.5, below).

15.5. Paying for the Arbitration

(a) Each party shall follow the ADRIC Rules applicable to the initial arbitration filing fees, called the Commencement Fee and Case Service Fee, except that your portion of any initial arbitration filing fees in total will not exceed the amount of the filing fee to start an action in the superior court of the province or territory where you reside, or of Ontario if you reside outside Canada. If you could have brought your claim in a provincial/territorial court in your province/territory of residence for a lower filing fee than the ADRIC Commencement Fee and Case Service Fee, that lower amount applies instead. After (and only after) you have paid your portion of the initial arbitration filing fees, we will make up the difference, if any, between the fee you have paid and the amount required by the ADRIC Rules.

(b) In all cases where required by law, we will pay the arbitrator's fees, as well as all fees and costs unique to arbitration. Otherwise, such fee(s) will be apportioned between the parties in accordance with applicable law, and any disputes in that regard will be resolved by the arbitrator.

(c) Generally, an arbitrator's fees are similar in amount to a lawyer's fee and can vary based on experience and location.

15.6. Your Right To Opt Out Of This Arbitration Provision

(a) Agreeing to this Arbitration Provision is not a mandatory condition of your contractual relationship with us. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision as set out here. To do so, within 30 days of the date that this Arbitration Provision is electronically accepted by you, you must send an email from the email address associated with your driver account to canadaoptout@uber.com , stating your intent to opt out of this Arbitration Provision, as well as your name, the phone number associated with your account, and the city in which you reside.

(b) Your email may opt out yourself only, and any email that tries to opt out anyone other than yourself will be void as to any others. Should you not opt out of this Arbitration Provision within the 30-day period, you and Uber shall be bound by the terms of this Arbitration Provision. You will not be subject to retaliation if you exercise your right to opt out of this Arbitration Provision.

(c) Your acceptance of this Agreement or your decision to opt out of this Arbitration Provision does not affect any obligation you have to arbitrate disputes pursuant to any other agreement you have

> with us or our affiliates. Likewise, your acceptance of or decision to opt out of any other arbitration agreement you have with us or any of our affiliates does not affect any obligation you have to arbitrate claims pursuant to this Arbitration Provision.
>
> 16. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of the province or territory where you reside, or of Ontario if you reside outside Canada, excluding their rules on conflicts of laws.

6. External Regulation of Uber and its Drivers

[115] Within Ontario, Uber and the Drivers are subject to regulation. These regulations, often municipal Bylaws, generally regulate Uber as a "Transportation Network Company", "Personal Transportation Company", or "Personal Transportation Provider", which refer to companies that offer transportation services through software like the Uber App.

[116] Among other things, these regulations require: (a) Uber and the Drivers to have special licenses or permits to work in a particular municipality; (b) Uber and the Drivers to meet certain insurance requirements; (c) Uber to keep records of the Drivers who are providing services; (d) Uber to keep records of fares charged and receipts; and (e) for the Drivers and their vehicles to meet certain safety standards.

[117] Because Uber must comply with these Bylaws and/or ensure compliance with these Bylaws to reliably operate its business, it incorporates some of these regulatory requirements into its Services Agreements and Community Guidelines.

7. Legislative and Ontario Policy Background

[118] Ontario enacted the first *Employment Standards Act* in 1968.[29] Since 1974, the definition of an "employee" has remained substantially similar to the current definition. For present purposes the pertinent provisions from the *Employment Standards Act* and of Ontario regulations, Ont. Reg. 285/01 and Ont. Reg. 288/01, are set out in Schedule "A" to these Reasons for Decision.

[119] In May 2017, the Ontario Ministry of Labour, Training and Skills Development commissioned a 420-page report entitled "*The Changing Workplaces Review*."[30] The report considers the definition of employee in the *Employment Standards Act, 2000* and concludes that "the old definitions are not well suited to the modern workplace." The report recommends adding "dependent contractors" to the definition of "employee" in the Act.

[120] In February 2018, the Ontario Ministry of Finance published "*Sharing Economy Framework*." The framework recognizes that it is the government's role to "develop policies and take actions that effectively realize the social and economic benefits afforded by innovative business models and mitigate the negative consequences of market disruption to the economy, individuals and the public interest." One of the "potential gaps" identified is "worker protection mechanisms in emerging sectors of the sharing economy."

[121] In December 2020, the Ontario legislature enacted Bill 236, the *Supporting Local*

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[29] *Employment Standards Act*, 1968, S.O. 1968, c. 35.
[30] C.M. Mitchell and J.C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights: Final Report* (May 2017)

Restaurants Act, 2020.[31] The statute sets limits on service fees that "food delivery services providers", like Uber Eats, can charge to certain restaurants. The Act prohibits services providers from reducing employee or contractor compensation and payment in order to comply with the Act.

[122] In June 2021, Ontario's Minister of Labour Training and Skills Development established the Ontario Workforce Recovery Advisory Committee. The Committee plans to "lead recommendations on the future of work" focused on three pillars, one of which is "[ensuring] Ontario's technology platform workers benefit from flexibility, control, and security."[32] The Committee is currently in the consultation stage.

I. The Significance, if any, of the Arbitration and Class Action Waiver Clause

[123] In the immediate case, although the Plaintiffs were not entirely clear about the precise relief that they seek, it appears that in addition to certification of their proposed class action, they ask the court to strike down the Arbitration and Class Action Waiver Clause.

[124] The Plaintiffs rely on several cases about the court's authority under s. 12 of the *Class Proceedings Act, 1992* or other procedural mechanisms to act to preserve the integrity of the opt-out process or the prosecution of the class action by making orders regulating the communications made by a defendant to putative Class Members or to Class Members.[33]Although those cases are of assistance in the sense that they show that the court has the jurisdiction to control the communications by defendants to putative Class Members or to Class Members, those cases are different than the case at bar and raise different factual and legal questions and these cases focus on Defendants' communications to Class Members and not substantive orders.

[125] In the immediate case, a review of the factual background and of the procedural background, reveals three certainties associated with the Arbitration and Class Action Waiver Clause. First, that Uber does not wish to have its relationship with Drivers and Delivery People to be an employer and employee relationship. Second, that Uber wishes any disputes with Drivers and Delivery People to be arbitrated not litigated. Third, Uber wishes to avoid class proceedings under the *Class Proceedings Act, 1992*. All those aspirations existed before Mr. Heller commenced his proposed class action against Uber.

[126] None of these aspirational certainties are *per se* illegal. For the immediate case, while Uber cannot contract out of the *Employment Standards Act, 2000* - if the Act applies - Uber can contract so that the Act does not apply, and there is nothing *per se* illegal about contracting parties agreeing to a referral to arbitration. For the immediate case, there is no legislation; for instance, like sections 7 and 8 of Ontario's *Consumer Protection Act, 2002*,[34] set out below, that would foreclose resort to arbitration and that would protect the rights of a class member to participate in a class action

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[31] *Supporting Local Restaurants Act*, 2020, S.O. 2020 c. 31, s. 2.
[32] Ontario Ministry of Labour, Training and Skills Development, *Ontario's Workforce Recovery Advisory Committee: Leading the Future of Work in Ontario*" (June 17, 2021).
[33] *Del Giudice v. Thompson*, 2021 ONSC 2206; *Arsalani v. Islamic Republic of Iran*, 2021 ONSC 1334; *de Muelenaere v. Great Gulf Homes Ltd.*, 2015 ONSC 7442; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377; *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (S.C.J.); *1176560 Ontario Limited v. The Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Pearson v. Inco*. (2001), 57 O.R. (3d) 278 (S.C.J.), leave to appeal refused [2002] O.J. No. 2134 (Div. Ct.); *Vitelli v. Villa Giardino Homes Ltd*, [2001] O.J. No. 2119 (S.C.J.).
[34] S.O. 2002, c. 30, Sched. A.

notwithstanding contractual provisions that would bar participation.

> *No waiver of substantive and procedural rights*
>
> 7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> *Limitation on effect of term requiring arbitration*
>
> (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.
>
> *Procedure to resolve dispute*
>
> (3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.
>
> […]
>
> *Non-application of Arbitration Act, 1991*
>
> (5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.
>
> *Class proceedings*
>
> 8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding. 2002, c. 30, Sched. A, s. 8 (1).
>
> *Procedure to resolve dispute*
>
> (2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.
>
> […]
>
> *Non-application of Arbitration Act, 1991*
>
> (4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

[127] In *Seidel* v. *TELUS Communications Inc.*[35] Ms. Seidel signed a standard form TELUS cellular phone services contract. The contract included an arbitration agreement and a waiver of any right to commence or participate in a class action. Nevertheless, Ms. Seidel commenced a

[35] 2011 SCC 15 (Chief Justice McLachlin and Justices Binnie, Fish, Rothstein and Cromwell JJ.; Justices LeBel, Deschamps, Abella and Charron dissenting).

proposed class action in British Columbia, and she asserted common law causes of action and also statutory causes of action under British Columbia's consumer protection statutes. She alleged that TELUS falsely represented to her and other consumers how it calculated time for billing purposes. Relying on the arbitration clause, TELUS applied for a stay of all proceedings. Varying the judgment of the British Columbia Court of Appeal, a majority of the Supreme Court, stayed all the causes of action except one of the statutory causes of action that was available to consumers. The *Seidel* v. *TELUS Communications Inc.* demonstrates that courts will enforce agreements designed to resolve disputes by individual arbitration without a class action.

[128] Although the Plaintiffs have reasonably strong arguments that the Arbitration and Class Action Waiver Clause (like the original arbitration agreement contained in the Service Agreements) is unenforceable on the grounds that: (a) it offends the principles of contract formation;[36] (b) it is unconscionable;[37] or (c) it is contrary to public policy,[38] these arguments raise serious genuine issues that require a trial.

[129] These arguments cannot be summarily determined on a certification motion, and, moreover, at first blush these arguments would appear to be individual issue determinations that require individual determinations. (If the parties think otherwise, they may apply for an additional common issue.) And, in any event, these arguments do not negate the circumstance that an agreement to arbitrate is not *per se* illegal.

[130] As the procedural history reveals, when this class action commenced Uber attempted to have it stayed for arbitration. However, that gambit failed when the Court of Appeal and the Supreme Court of Canada found the arbitration provision in the Service Agreements to be unenforceable on the grounds of the contractual doctrine of unconscionability.

[131] As the factual background above reveals, on August 26, 2020, Uber amended the Service Agreements to provide for arbitration and for the Riders and the Delivery People to waive any right to participate in a class action. However, the amendment provided the Riders and the Delivery People for a right to opt out of the arbitration provision. Uber's new gambit is not to move for a stay for arbitration for the Riders and Delivery People who have not exercised their right to opt-out of arbitration; rather, the new gambit is to have the class definition exclude those Riders and Delivery People who did not exercise their right to opt-out of arbitration, which would be a right to opt-in (*i.e.* a right not to opt-out) to the current class proceedings, which was already underway in August 2020.

[132] I can safely assume that if I were to amend the class definition, it would gut the class action. However, I shall not do so.

[133] Uber is confident that it has addressed all of the contracting elements that led the Court of Appeal and the Supreme Court to hold that the former arbitration agreement was unconscionable. Uber is confident that the August 2020 amendment to the Service Agreements is valid and

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[36] *77 Charles Street Ltd v. Aspen Ridge Homes Ltd*., 2021 ONSC 2732; *Georgian Windpower Corp. v. Stelco Inc.*, 2012 ONSC 3759; *Olivieri v. Sherman*, 2007 ONCA 491; *Consulate Ventures Inc v. Amico Contract & Engineering (1992) Inc.*, 2007 ONCA 324; *Van Kruistum v. Dool*, [1997] O.J. No 6336 (Gen. Div.); *Calmusky v. Karaloff*, [1947] S.C.R. 110; *Loranger v. Haines*, [1921] O.J. No 203 (C.A.).

[37] *Pearce v. 4 Pillars Consulting Group Inc*., 2021 BCCA 198; *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

[38] *Pearce v. 4 Pillars Consulting Group Inc*., 2021 BCCA 198; *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, aff'd 2020 SCC 16.

enforceable. At this juncture, it is not for me to say whether Uber may be overconfident, but I can say that the Plaintiffs raise strong arguments that the notifications to the class were insufficient for them to appreciate the significance of the Arbitration and Class Action Waiver Clause.

[134] In any event, the Plaintiffs disagree that the Arbitration and Class Action Waiver Clause is enforceable, and the Plaintiffs submit that what Uber is attempting to do is to interfere with the integrity of the class proceeding and to interfere with the rights of the putative Class Members, including the right to make a decision about opting out of a class proceeding after it has been certified. The Plaintiffs ask the court to strike down the Arbitration and Class Action Waiver Clause for the putative Class Members.

[135] However, in my opinion, striking down the Arbitration and the Class Action Waiver Clause for the putative Class Members is none of possible, appropriate, or necessary at this juncture of the proposed class proceeding since I shall not be amending the class definition to exclude the putative Class Members that may be bound by the Arbitration and the Class Action Waiver Clause.

[136] Striking down the Arbitration and Class Action Waiver Clause is not possible because the *Class Proceedings Act, 1992* is a procedural statute, and it would take a substantive determination not available on a certification motion to strike down a contract term. In the cases where the Court has exercised its jurisdiction under the *Class Proceedings Act, 1992* to oversee the proper prosecution and defence of the class proceeding, the focus has been on controlling communications not on making substantive orders.

[137] Striking down the Arbitration and Class Action Waiver Clause for the putative Class Members is not appropriate for two reasons. First, the persons for whom the substantive order would be made are just putative Class Members and so no binding order can be made to benefit a class that has not yet been certified. Second, it has not been determined that the enforceability, unconscionability, or legality of the Arbitration and Class Action Waiver Clause is a common or an individual issue.

[138] In any event, striking down the Arbitration and Class Action Waiver Clause is unnecessary at this juncture of the proposed class proceeding. Rather, what is necessary is adequate notice of the legal significance, if any, of the Arbitration and Class Action Waiver Clause. The putative Class Members must be provided with sufficient information about the significance of opting out and of not opting out.

[139] With respect to necessity, as already foreshadowed above, I shall be certifying this action as a class action. The *Class Proceedings Act, 1992* requires that the putative Class Members be given notice of this certification of the action. The Class Members will be informed of their right to opt-out and of the significance of not opting out.

[140] In the immediate case, what the putative Class Members need to be told, among other information, is that if they did not opt out of the Arbitration and Class Action Waiver Clause, then should the court determine at the common issues trial that they are employees with rights and should they wish to pursue claims for compensation from Uber at individual issues trials, then they will be met with a defence that they have waived the right to do so in accordance with the Arbitration and Class Action Waiver Clause. The determination of the merits of that defence would be determined at the individual issues trials, unless the enforceability of the Arbitration and Class Action Waiver Clause is made an additional common issue.

[141] In the immediate case, once the putative Class Members are fully informed about the

Arbitration and Class Action Waiver Clause, they can make a reasoned decision about whether: (a) to opt-out to pursue arbitration; (b) to opt-out to pursue a claim directly under the *Employment Standards Act, 2000*, which is not precluded by the Arbitration and Class Action Waiver Clause; (c) to not opt-out and wait and see whether there is a successful common issues determination in which case depending on whether they did not opt-out of the Arbitration and Class Action Waiver Clause, they may have to establish that they are not bound by the provision.

[142] Further, with respect to necessity of making an order about the Arbitration and Class Action Waiver Clause at this juncture of the class action, it may be noted that should Uber succeed at the common issues trial, then the question of the enforcement of the clause is moot.

[143] In the result, I do not propose to do anything at this juncture about the Arbitration and Class Action Waiver Clause.

J. Certification: General Principles

[144] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[145] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[39] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[40] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (a) to provide access to justice for litigants; (b) to encourage behaviour modification; and (c) to promote the efficient use of judicial resources.[41]

[146] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[42]

[147] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court

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[39] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).
[40] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[41] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[42] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[43] In particular, there must be a basis in the evidence to establish the existence of common issues.[44] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[45]

[148] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[46]

[149] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.[47] The evidence on a motion for certification must meet the usual standards for admissibility.[48] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[49]

K. The Cause of Action Criterion

1. General Principles

[150] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,[50] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.[51]

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[43] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[44] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[45] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[46] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[47] *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[48] *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc*., 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd*. 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.
[49] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).
[50] [1990] 2 S.C.R. 959.
[51] *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City*), 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.

2. Discussion and Analysis: Cause of Action Criterion

(a) The Statutory and Employment Contract Claims

[151] In their Statement of Claim, the Plaintiffs advance four causes of action; namely: (a) breach of the *Employment Standards Act*; (b) breach of contract; (c) negligence; and (c) unjust enrichment.

[152] Having reviewed the Statement of Claim, I conclude that the Plaintiffs satisfy the cause of action criterion for (a) breach of the *Employment Standards Act*; and (b) breach of contract.

(b) Unjust Enrichment

[153] The Plaintiffs pleaded that Uber has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Drivers and other unpaid statutory payments, as well as the out-of-pocket expenses paid for gas, insurance, maintenance, parking fines, and cell phone data in connection with the use of personal vehicles and/or mobile phones to perform work for Uber. The Drivers were deprived of unpaid minimum wage, overtime pay, vacation pay and public holiday and premium pay, EI and CPP contributions, and their out-of-pocket expenses.

[154] The Defendants dispute that there is a viable claim for unjust enrichment. I agree that the claim for unjust enrichment does not satisfy the cause of action criterion.

[155] The elements of a claim of unjust enrichment are: (a) the defendant being enriched; (b) a corresponding deprivation of the plaintiff; and, (c) no juristic reason for the defendant's enrichment at the expense of the plaintiff.[52] Disgorgement, a remedy that provides compensation to the plaintiff measured by the defendant's gain, is a remedy for unjust enrichment.[53]

[156] I agree with the Defendants' submission in paragraph 197 of their Responding Factum:

> 197. Unjust enrichment claim should be struck. The plaintiffs' case rises and falls on whether the services agreement violates the ESA. If it does, the proposed class will be entitled to contractual remedies for the defendants' breach of the employment contract. There is no basis for unjust enrichment in this pleading. This is because any "remedial consequences for breach of contract are typically captured by the law of contract."[54] Put simply, "restitutionary relief is not available if the claimant possesses a right to contractual relief."[55] When the parties' relationship is governed by contract, so too are their remedies.

[157] The Plaintiffs' claims for *Employment Standards Act, 2000* entitlements, other unpaid statutory payments, as well as the out-of-pocket expenses are all breach of employment contract claims.

[158] I would add that in the immediate case, even if there was a viable unjust enrichment claim, the Supreme Court in *Atlantic Lottery v. Babstock* confirmed that disgorgement is not generally available for breach of contract and is available only in extraordinary circumstances where other remedies are inadequate. There is nothing in the circumstances of the immediate case that would justify a disgorgement remedy. A gains-based remedy is not appropriate. As was the case for the

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[52] *Moore v. Sweet*, 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para 30; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at p. 784; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848.
[53] *Atlantic Lottery v. Babstock*, 2020 SCC 19.
[54] *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 at para. 47; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 at para. 9.
[55] M. McInnes, *The Canadian Law of Unjust Enrichment*, (Toronto: LexisNexis, 2014) at p. 645.

majority in *Atlantic Lottery v. Babstock*, in the immediate case, there is no reasonable chance of achieving disgorgement damages for unjust enrichment or for breach of contract.[56]

(c) **The Common Law Negligence Claim**

[159] At the certification motion hearing, having recently addressed in other class actions the issue of negligence law's treatment of claims for pure economic loss,[57] I questioned the legal viability of this claim, and the viability of the negligence cause of action was fully argued. Uber added the related issue of the matter of concurrent liability in contract and tort.

[160] The Plaintiffs' pleading of negligence is found in paragraphs 102 and 103 of the Amended Fresh as Amended Statement of Claim, as follows:

> SYSTEMIC NEGLIGENCE
>
> 102. Uber owed Heller, and the Class Members, a duty to take reasonable steps to properly characterize their employment relationship when retaining the Class Members to provide services to Uber's customers. Uber systemically breached that duty by, *inter alia*:
>
> > (a) improperly and arbitrarily misclassifying the Class Members as "Partners" and/or independent contractors;
> >
> > (b) misrepresenting to Class Members that the Class Members were "Partners" and/or independent contractors;
> >
> > (c) failing to monitor and keep track of the hours worked by the Class Members; and,
> >
> > (d) encouraging, directing, requiring and/or permitting the Class Members to work regular hours and hours in excess of the Overtime Threshold;
> >
> > (e) failing to compensate the Class Members as required for the Minimum Wage, Overtime Pay, Vacation Pay and Public Holiday Pay and Premium Pay;
> >
> > (f) failing to pay the Class Members Termination Pay, as applicable; and
> >
> > (g) failing to apply income tax, EI, and CPP deductions at the source and to remit EI and CPP contributions on behalf of the Class Members.
>
> 103. As a result of Uber's negligence in mischaracterizing the relationship between Uber and the Class Members, the Class Members have suffered damages and losses, including: lost Minimum Wages; Overtime Pay; Vacation Pay; Public Holiday and Premium Pay; Termination Pay, if applicable; employer EI and CPP contributions, and Out-of-Pocket Expenses; and any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not "Partners" and/or independent contractors, all of which were reasonably foreseeable to Uber.

[161] The negligence claim is a claim for pure economic losses. A pure economic loss is economic loss that is unconnected to physical or mental injury to the plaintiff's person, or to physical damage to property.[58] However, tort claims for pure economic losses are available only

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[56] Justice Karakatsanis dissented in part because her opinion was there was a viable breach of contract claim and a possibility of disgorgement remedy.
[57] *Del Giudice v. Thompson*, 2021 ONSC 5379; *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138.
[58] *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 17; *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 34.

in rare circumstances.[59]

[162] In *Martel Building Ltd. v. Canada,*[60] Justices Iacobucci and Major stated for the Supreme Court of Canada at para. 37:

> 37. […] In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[163] Although the categories are not closed, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,[61] the Supreme Court recognized five established categories where recovery for pure economic losses was permitted in negligence; namely: (a) negligent misrepresentation; (b) negligence of public authorities; (c) negligent performance of a service; (d) supply of shoddy goods or structures; and (e) relational economic losses. None of these recognized categories is available in the immediate case.

[164] In *1688782 Ontario Inc. v. Maple Leaf Foods*, in a majority decision written by Justices Brown and Martin,[62] the Supreme Court dismissed a negligence claim in a proposed class action by Mr. Submarine franchisees, whose supply chain for sandwich meats was disrupted for several months when the defendant Maple Leaf Foods, the franchisor's supplier, recalled its goods because of a listeria outbreak at its processing plant. The facts of *Maple Leaf Foods* are obviously far different from the immediate case, but the case demonstrates that the legal policy of the law of negligence is that with a few exceptions that can be justified on public policy grounds, tort law leaves pure economic losses to be addressed by the law of contract. In the immediate case, the putative Class Members' economic loss claims are more than adequately addressed by the *Employment Standards Act* and the alleged contracts of employment.

[165] Turning to the matter of concurrent liability in contract and tort, the leading cases are *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*[63] and *Central Trust Co. v. Rafuse*.[64] In *BG Checo International Ltd.*, B.C. Hydro was found liable for breach of contract and one issue for the Supreme Court of Canada was whether it was also liable in tort. Relying on *Central Trust Co. v. Rafuse,* a majority of the court concluded that tort liability may, but does not always, yield to the parties' superior right to arrange their rights and duties by contract. In their joint judgment, Justice La Forest and Justice McLachlin, as she then was, (L'Heureux-Dubé and Gonthier, JJ., concurring) stated at paragraphs 15 and 16:

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[59] *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35; *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, affd. 2013 ONCA 657; Winnipeg Condominium *Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.
[60] 2000 SCC 60 (McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.).
[61] [1992] 1 S.C.R. 1021.
[62] Abella, Moldaver, Côté, and Rowe, JJ. concurring with Justice Brown. Justice Karakatsanis wrote the dissent for herself and Wagner C.J., Martin and Kasirer JJ.
[63] [1993] 1 S.C.R. 12.
[64] [1986] 2 S.C.R. 147

> 15. In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. ... So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on <u>how</u> they have dealt with it.
>
> 16. Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. [...]

[166] In my opinion, the case at bar, is one of the cases where tort liability does yield to the principle of private ordering in contract. The claim in negligence would be based on a duty of care to properly classify the Class Member as an employee of Uber pursuant to the Service Agreement. But whether the Class Member is an employee of Uber pursuant to the Service Agreement is precisely the subject matter dealt with by the parties by their private ordering in contract. This is not an occasion for concurrent liability in contract and tort.

[167] Put somewhat differently, just as there is no duty of care in negotiating a contract, there is no duty of care in how to perform it. Rather, there is strict liability in contract (without considering the standard of a care of a reasonable contracting party), if the contract is breached. Moreover, any claim in negligence would be redundant and cumbersome and would not satisfy the preferable procedure criterion.

[168] I conclude that the negligence claim does not satisfy the cause of action criterion.

L. <u>Identifiable Class Criterion</u>

1. <u>General Principles</u>

[169] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (a) it identifies the persons who have a potential claim against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (d) it describes who is entitled to notice.[65]

[170] In *Western Canadian Shopping Centres v. Dutton*,[66] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> 38. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment.

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[65] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[66] 2001 SCC 46 at para. 38.

> It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[171] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[67] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[68] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[69] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[70] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[71]

2. Analysis and Discussion: Identifiable Class Criterion

[172] A modest revision is required to the proposed class definition which otherwise satisfies the principles of a proper class definition.

[173] The proposed definition defines a class member as "any person who …. worked or continues to work in Ontario transporting passengers and/or providing delivery services pursuant to a Service Agreement with … " The problem with this definition is it obscures the fundamental issue that is the critical issue in the immediate case which is whether the Class Members all of whom are Uber App users are working for Uber or working for themselves.

[174] A better definition for the class by which they can identify themselves and decide whether to participate in the class proceeding is as follows:

> Any person who, since January 1, 2012, in Ontario used an Uber app to transport passengers and/or to provide delivery services pursuant to a Service Agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V.
>
> "Service Agreement" means: an agreement with Uber B.V., Rasier Operations B.V., and/or Portier B.V. to provide any or all of the following services using the Uber App: Uber Eats, UberX, UberXL,

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[67] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[68] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[69] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[70] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.
[71] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).

Uber Comfort, Uber Black, Uber SELECT, Uber Black SUV, Uber Premier, Uber Premier SUV, Uber Taxi, Uber WAV, Uber Assist, Uber Pool, Uber Green, and Uber Connect.

3. The Temporal Length of the Class Period and the *Limitations Act, 2002*

[175] Uber submitted that the class definition should be amended to exclude Uber App users whose claims are presumptively barred under the *Limitations Act, 2002*.[72]

[176] The proposed class period commences on January 1, 2012, and Mr. Heller commenced the proposed class action on January 22, 2018. If Uber's submission was accepted then the class definition would need to be amended to commence on January 22, 2016, disqualifying from class membership some persons who used the Uber App between January 1, 2012, and January 21, 2016.

[177] I say "some" persons who used the Uber App because a person who used the Uber App between January 1, 2012 and January 21, 2016 may have continued its use after January 21, 2016 and while the quantum of his or her claim for compensation might be trimmed by the *Limitations Act, 2002*, he or she would not be disqualified from class membership. I also say some persons who used the Uber App because the presumptive limitation period is rebuttable based on discoverability principles.

[178] In these circumstances of the immediate case, in my opinion, the temporal length of the class period should not be amended and that the matter of limitation periods should be addressed at individual issues trials if the action goes that far.[73]

[179] I conclude that the identifiable class criterion is satisfied.

M. Common Issues Criterion

1. General Principles

[180] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[74]

[181] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[75]

[182] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[76] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[183] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue

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[72] S.O. 2002, c. 24, Sched. B
[73] *Smith v Inco Ltd.*, 2011 ONCA 628.
[74] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[75] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[76] 2013 SCC 57 at para. 106.

for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[77]

[184] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[78] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[79]

[185] The common issue criterion presents a low bar.[80] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[81] Even a significant level of individuality does not preclude a finding of commonality.[82]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[83]

[186] From a factual perspective, the Plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and, (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class Members and the proposed common issues.[84]

2. Analysis and Discussion: Common Issues Class Criterion

[187] As observed at the outset of these Reasons for Decision, the commonality or the idiosyncrasy of the fundamental proposed common issue questions is the major factual and legal battleground of this proposed class action. The contest between the parties is over whether there is some basis in fact for a common issue about whether the relationship between Uber and the putative Class Members is that of: (a) service provider and customer; (b) employer and employee;

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[77] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572 at para. 48; *McCracken v. CNR,* 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 40.

[78] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

[79] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[80] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[81] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[82] *Hodge v. Neinstein,* 2017 ONCA 494 at para. 114; Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[83] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[84] *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.).

or (c) employer and independent contractor.

[188] The Plaintiffs argue that there is some basis in fact for the commonality of all the proposed common issues that would determine and classify the relationship between Uber users and Uber. The Plaintiffs submit that there is some basis in fact for commonality based on the commonality of: (a) the functionality of the Uber App; (b) standard form service contracts that are not negotiable; and, (c) associated rules of contract performance imposed on Drivers and Delivery People and some external rules and regulations imposed by municipalities on the users of the Uber apps.

[189] Uber argues, however, that whatever may be the relationship between Uber users and Uber, there is no basis fact for a finding that there is commonality across the putative Class Members. Uber argues that whatever relationship it has or had with the 366,359 putative Class Members is intrinsically, inherently, and fundamentally idiosyncratic. Uber submits that however the relationship might be classified, the classification would have to be determined on an individual case-by-case basis. Uber therefore submits that there are no common issues and that the common issues and the preferable procedure criteria for certification cannot be satisfied.

[190] I will discuss the matter of the preferable procedure criterion later in these Reasons for Decision, but as I have already foreshadowed above, in my opinion, there is some basis in fact for proposed common issues 1 to 13.

[191] I come to this conclusion not by putting myself in the position of the common issues judge, which would take me into the forbidden territory on a certification motion of a merits decision, but I rather place myself in the position of determining whether there is some basis in fact for a common issues judge making a determination that would bind all the putative Class Members who did not opt out of the class proceeding.

[192] In this regard, based on the voluminous evidentiary record that I have reviewed and considered there is some basis in fact for any of the following answers to the common issue questions, including several answers that would be favourable to the putative Class Members and some that would be favourable to Uber; visualize there is some basis in fact for concluding:

a. In some or all Uber Service Agreements, there was no employment or independent contractor relationships between the Uber App users and Uber and the relationship between Uber users and Uber was of a customer and a service provider.

b. In some or all of the Uber Service Agreements, the relationship between Uber App users and Uber is that of independent contractor and employer.

c. In some or all of the Uber Service Agreements, the relationship between Uber App users and Uber was or is that of employee and employer.

d. In all Uber Service Agreements, it will take a case-by-case analysis to determine whether there was an employment or independent (or dependent) contractor relationship but either relationship is possible depending upon the circumstances of the particular case.

[193] Notwithstanding Uber's arguments to the contrary, there is some basis in fact that there is a genuine dispute about whether the Uber App users are working only for themselves in a shared economy with Uber or are working for Uber as an employee or as an independent contractor.

[194] And there is some basis in fact that there is a commonality of evidentiary factors including principally the system and controls imposed by the Uber App and by the associated Service Agreements. All of the putative Class Members used Uber Apps that along with the associated

standard form Service Agreements established a business model. A model is a system or thing used as an example to follow or imitate. Synonyms of a model are prototype, stereotype, archetype, version, mold, template, framework, pattern, design, and exemplar. It will be for the common issues trial judge to determine whether the model designed by Uber in the immediate case amounts to an employment relationship or some other kind of relationship, but at this juncture of the proceeding, I am satisfied that there is some basis in fact that there are common issues to determine that will bind all the Class Members.

[195] It should be noted that whatever the answers to the common issues there would be a quite robust class proceeding in terms of access to justice for either Uber or for the Class Members. If the answer to the common questions was (a) or (b) as set out in paragraph 192, then Uber would be discharged of liability to up to 366,359 Class Members. If the answer to the common questions was (c) or (d), then Uber would be exposed to liability, but the actions would have to proceed to individual assessments of damages because there is no prospect of an aggregate assessment of damages. While in theory, Uber would be exposed to up to 366,359 claims, the take up of individual assessment trials might be quite small because of the attrition of Class Members who for their own idiosyncratic reasons do not want to be working for Uber or whose own idiosyncratic experience is such that they do not have a provable claim that they were working for Uber or no provable breaches of the *Employment Standards Act, 2000*.

[196] I do not certify the proposed common issues associated with the unjust enrichment and negligence causes of action for the obvious reason that those causes of action do not satisfy the cause of action criterion and while I shall not develop the point, those causes of action would also not satisfy the preferable procedure criteria principally because they would make the class action unmanageable and they are either redundant or derivative of the causes of action that do satisfy the cause of action criterion.

[197] I do not certify the aggregate damages common issue. Pursuant to s. 24 (1) of the *Class Proceedings Act, 1992*, aggregated damages are only available when: (a) monetary relief is claimed on behalf of Class Members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate of the defendant's liability can reasonably be determined without proof by individual class members.

[198] The *Class Proceedings Act, 1992* is a procedural statute, and it does not create a new type of damages known as aggregate damages. All that s. 24 (1) of the *Class Proceedings Act, 1992* does is that it recognizes that in certain circumstances depending upon the nature of the Class Members' claims, it may be possible to avoid individual assessments of damages and arrive at a calculation of damages equal to what the defendant would have to pay if there were individual assessments. The case at bar is not that type of case.

[199] In the immediate case, individual questions of fact relating to the determination of each Class Member's damages remain to be determined. There is no statistical sampling that would assist in determining what individual Class Members are owed. Granted that these assessments will be facilitated by the Uber Apps detailed record keeping and tracking of the Drivers' and Delivery Peoples' activities, but the determinations are still individual assessments. Uber's liability remains to be determined, and the aggregate of its liability cannot be determined without proof by individual Class Members of their individual claims, which some of them may not wish to advance at individual issues trials.

[200] I do not certify the punitive damages common issue question. Punitive damages are awarded when a defendant's conduct is so reprehensible and outrageous that the conduct merits punishment. There is no basis in fact for concluding on an individual much less on a class wide basis that Uber's conduct was reprehensible or outrageous or meriting punishment.[85]

N. Preferable Procedure Criterion

1. General Principles

[201] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[86]

[202] In *AIC Limited v. Fischer*,[87] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[203] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[88] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[89]

[204] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[90]

2. Analysis and Discussion: Preferable Procedure Criterion

[205] Uber's arguments about preferable procedure are largely a reprise of their arguments about

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[85] *Omarali v. Just Energy*, 2016 ONSC 4094 at paras. 99-103; *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 110-112.
[86] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[87] 2013 SCC 69 at paras. 24-38.
[88] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[89] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[90] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

the lack of the commonality of the common issues and a class action defendant's prosaic argument - which sometimes works - that the individual issues will so overwhelm the common issues that the class action will be unmanageable or unproductive or futile and the Class Members are better off without the drag of a class proceeding impeding access to justice. Uber adds an argument that waiting legislative action is the better alternative to a class action since the Ontario government (and also other governments or public authorities) are investigating the regulation of the sharing economy workplace.

[206] For the reasons expressed above, there are viable common issues and a class action in the immediate case is a meaningful route to access to justice for both the Class Members and for Uber. In so far as the preferable procedure criterion is concerned, the immediate class action would be manageable and the common issues trial would provide considerable momentum for individual issues trials if the common issues favoured the Class Members.

[207] Waiting for legislative reform is of no use to the Class Members who have present day claims. If the class action gets that far, the court will be able to use s. 25 of the *Class Proceedings Act, 1992* to develop protocols for the resolution of the individual issues trials.[91]

[208] In short, in my opinion, the Plaintiffs satisfy the preferable procedure criterion.

O. Representative Plaintiff Criterion

[209] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[92]

[210] In the immediate case, the Defendants do not dispute that the fifth criterion for certification is satisfied and that both Mr. Heller and Ms. Garcia are qualified to be Representative Plaintiffs.

P. Conclusion

[211] For the above reasons, I grant the Plaintiffs' certification motion as set out above. Order accordingly.

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[91] See for example how the courts of Ontario and Québec are administering the administrative segregation class actions which will have thousands of claimants: *Brazeau v. Canada (Attorney General),* 2021 ONSC 4982 (No. 4); *Brazeau v. Canada (Attorney General),* 2021 ONSC 4294 (No. 3); *Brazeau v. Canada (Attorney General),* 2021 ONSC 1828 (No. 2); *Brazeau v. Canada (Attorney General),* 2020 ONSC 7229 (No. 1).

[92] *Drady v. Canada (Minister of Health),* [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health),* [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

[212] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within thirty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further thirty days.

Perell, J.

Released: August 12, 2021

Schedule A: *Employment Standards Act, 2000*, Ont. Reg. 285/01, and Ont. Reg. 288/01

***Employment Standards Act, 2000*, S.O. 2000, c. 41**

Definitions

1 (1) In this Act,

"employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or

(d) a person who is a homeworker, and includes a person who was an employee;

[…]

PART III

HOW THIS ACT APPLIES

To whom Act applies

3 (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Exception, federal jurisdiction

(2) This Act does not apply with respect to an employee and his or her employer if their employment relationship is within the legislative jurisdiction of the Parliament of Canada.

Exception, diplomatic personnel

(3) This Act does not apply with respect to an employee of an embassy or consulate of a foreign nation and his or her employer.

[…]

Other exceptions

(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

1. A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled.

2. An individual who performs work under a program approved by a college of applied arts and technology or a university.

2.1 An individual who performs work under a program that is approved by a private career college registered under the Private Career Colleges Act, 2005 and that meets such criteria as may be prescribed.

3. A participant in community participation under the *Ontario Works Act, 1997*.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary, is being held in a detention facility within the meaning of the *Police Services Act* or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act (Canada)*, if the individual participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act (Canada)*, if the individual participates inside or outside the institution, penitentiary or place in a work project or rehabilitation program.

5. An individual who performs work under an order or sentence of a court or as part of an extrajudicial measure under the *Youth Criminal Justice Act (Canada)*.

6. An individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation.

7. A holder of political, religious or judicial office.

8. A member of a quasi-judicial tribunal.

9. A holder of elected office in an organization, including a trade union.

10. A police officer, except as provided in Part XVI (Lie Detectors) or in a regulation made under clause 141 (2.1) (c).

11. A director of a corporation, except as provided in Part XX (Liability of Directors), Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title).

12. Any prescribed individuals.

Dual roles

(6) Where an individual who performs work or occupies a position described in subsection (5) also performs some other work or occupies some other position and does so as an employee, nothing in subsection (5) precludes the application of this Act to that individual and his or her employer insofar as that other work or position is concerned.

[…]

Ont. Reg. 285/01, (*When Work Deemed to be Performed, Exemptions and Special Rules*)

DEFINITIONS

Definitions

1. In this Regulation,

"taxi cab" means a vehicle, with seating accommodation for not more than nine persons exclusive of the driver, used to carry persons for hire; ("taxi")

EXEMPTIONS RE OVERTIME PAY

Exemptions from Part VIII of Act

8. Part VIII of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;

(b.1) Revoked: O. Reg. 498/18, s. 7.

(c) a person employed as a hunting or fishing guide or a wilderness guide;

(d) a person employed,

(i) as a landscape gardener, or

(ii)to install and maintain swimming pools;

(e) a person whose employment is directly related to,

(i) the growing of mushrooms,

(ii) the growing of flowers for the retail and wholesale trade,

(iii) the growing, transporting and laying of sod,

(iv) the growing of trees and shrubs for the retail and wholesale trade,

(v) the breeding and boarding of horses on a farm, or

(vi) the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;

(f) a person employed as a student to instruct or supervise children;

(g) a person employed as a student at a camp for children;

(h) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the Income Tax Act (Canada) and whose work or duties are directly connected with the recreational program;

(i) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(j) a person employed as a taxi cab driver;

(k) a person employed as an ambulance driver, ambulance driver's helper or first-aid attendant on an ambulance; or

(l) an information technology professional.

EXEMPTIONS RE PUBLIC HOLIDAYS

Exemptions from Part X of Act

9. (1) Part X of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person employed as a hunting or fishing guide or a wilderness guide;

(c) a person employed,

(i) as a landscape gardener, or

(ii) to install and maintain swimming pools;

(d) a person whose employment is directly related to,

(i) mushroom growing,

(ii) the growing of flowers for the retail and wholesale trade,

(iii) the growing, transporting and laying of sod,

(iv) the growing of trees and shrubs for the retail and wholesale trade,

(v) the breeding and boarding of horses on a farm, or

(vi) the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;

(e) a person employed as a student to instruct or supervise children;

(f) a person employed as a student at a camp for children;

(g) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act (Canada)* and whose work or duties are directly connected with the recreational program;

(h) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(i) a person employed as a taxi cab driver; or

(j) a person who is employed as a seasonal employee in a hotel, motel, tourist resort, restaurant or tavern and provided with room and board.

(k) Revoked: O. Reg. 443/08, s. 1.

***ONT. 288/01,* (*Termination and Severance of* Employment)**

Employees not entitled to notice of termination or termination pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

1. Subject to subsection (2), an employee who is hired on the basis that his or her employment is to terminate on the expiry of a definite term or the completion of a specific task.

2. An employee on a temporary lay-off.

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

5. An employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer.

6. An employee whose employment is terminated after refusing alternative employment made available through a seniority system.

7. An employee who is on a temporary lay-off and does not return to work within a reasonable time after having been requested by his or her employer to do so.

8. An employee whose employment is terminated during or as a result of a strike or lockout at the place of employment.

9. A construction employee.

10. Revoked: O. Reg. 397/09, s. 4.

11. An employee whose employment is terminated when he or she reaches the age of retirement in accordance with the employer's established practice, but only if the termination would not contravene the Human Rights Code.

12. An employee,

i. whose employer is engaged in the building, alteration or repair of a ship or vessel with a gross tonnage of over ten tons designed for or used in commercial navigation,

ii. to whom a legitimate supplementary unemployment benefit plan agreed on by the employee or his or her agent applies, and

iii. who agrees or whose agent agrees to the application of this exemption.

(2) Paragraph 1 of subsection (1) does not apply if,

(a) the employment terminates before the expiry of the term or the completion of the task;

(b) the term expires or the task is not yet completed more than 12 months after the employment commences; or

(c) the employment continues for three months or more after the expiry of the term or the completion of the task.

(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

CITATION: Heller v. Uber Technologies Inc., 2021 ONSC 5518
COURT FILE NO.: CV-17-567946-00CP
DATE: 20210812

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID HELLER

Plaintiff

- and -

UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., RASIER OPERATIONS B.V. and UBER PORTIER B.V.

Defendants

REASONS FOR DECISION

PERELL J.

Released: August 12, 2021