

## The Ride Continues: The Ontario Superior Court of Justice Refuses to Certify Class Action Waiver Question as a Common Issue in the Ongoing Uber Driver Litigation

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### Overview

The ongoing employment class action battle between Uber and its drivers continues to develop as the matter proceeds to trial. In reasons released on March 31, 2022, Justice Perell of the Ontario Superior Court of Justice addressed whether two particular questions should be added to the list of common issues in this certified class proceeding. Justice Perell granted Uber's request to certify a common issue regarding the relationship between Uber and the Class Members<sup>1</sup> but dismissed the Plaintiff's proposed common issue about whether the Class Action Waiver (the Waiver) contained in the service agreement (the Agreement) between Uber and its drivers/delivery people was void.

### Background

The Plaintiff, an UberEats driver, commenced a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the CPA) on behalf of Uber drivers/delivery people against Uber for breaching its employment contracts under Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the ESA). The action was certified on August 12, 2021.<sup>2</sup> The members of the class consist of individuals who entered into the Agreement with Uber to provide delivery services and rider transportation. The Agreement contained an Arbitration and Class Action Waiver Clause that was found to be unconscionable and unenforceable by the Supreme Court of Canada in June 2020.<sup>3</sup> Subsequently, Uber amended the Waiver to provide for arbitration and for Uber drivers/delivery people to waive any right to participate in a class action. However, the amendment provided for a right to opt-out of the arbitration provision through the Uber App.<sup>4</sup>

### The Decision

Both parties proposed additional questions to be added to the list of common issues. Uber sought to add an additional question about whether the Class Members and Uber have an employer-employee relationship or a commercial relationship. The Plaintiffs sought to add the following as a common issue: Is the Waiver void

because it: (a) is contrary to the ESA; (b) contravenes the CPA; (c) is contrary to public policy; and/or (d) lacks consideration?<sup>5</sup>

Justice Perell found that the question proposed by Uber was a necessary common issue to reflect the particular circumstances of this class action. Due to problems with vagueness, Justice Perell redrafted the common issue as follows: “Is the relationship between the Class Members and Uber one of: (a) customer (purchaser of software) of Uber; (b) independent contractor; or (c) employee and employer?”

In contrast, the Court found that the question proposed by the Plaintiff was not certifiable because it is not underpinned by any cause of action pleaded by the Plaintiff. The first criterion for certification is that the pleadings disclose a cause of action. The Plaintiff’s Amended Fresh as Amended Statement of Claim did not disclose a cause of action with respect to the Waiver, thus preventing the issue from being indirectly included in the litigation via the common issues.

## Key Takeaways

The decision by Justice Perell is yet another marker on the road of this long-running class proceeding. However, some key principles can be taken from the Court’s reasons:

1. The Court alludes to the potential enforceability of a class action waiver by acknowledging that Uber has strong arguments that the Class Action Waiver is not void.<sup>6</sup>
2. The Court reaffirms that, 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. The cause of action must underpin the issue and must be pleaded to support the allegations.
3. From an employment law perspective, if employees are not provided with knowledge or sufficient time about waivers and clauses in their agreements, then they may still be considered part of a class group. Justice Perell concluded that Class Members who have not opted out of the Waiver are still considered to be Class Members in this case. They may be able to negate the Waiver at individual issues trials if the class action gets that far.

Given the prominence of this litigation and the rising volume of employment-based class proceedings in Ontario and Canada generally, Cassels will continue to monitor this litigation for further jurisprudential developments.

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<sup>1</sup> The fundamental allegation in the class action is that Uber is the employer of the Class Members.

<sup>2</sup> The certification decision is: *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518.

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<sup>3</sup> *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

<sup>4</sup> *Heller v. Uber Technologies Inc.*, 2022 ONSC 1997 at para 12 citing para 131 of *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518.

<sup>5</sup> *Heller v. Uber Technologies Inc.*, 2022 ONSC 1997 at para 27.

<sup>6</sup> *Heller v. Uber Technologies Inc.*, 2022 ONSC 1997 at para 34.

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