COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Williams v. Amazon.com Inc.,* 2023 BCCA 314

Date: 20230804
Docket: CA46763

Between:

John Williams

Appellant
(Plaintiff)

And

Amazon.com Inc., Amazon Services International, Inc., and Amazon.com.ca, Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated March 4, 2020 (*Williams v. Amazon.com Inc.,* 2020 BCSC 300, Vancouver Registry Docket S1810560).

Counsel for the Appellant: M. Sobkin, D. Klein

Counsel for the Respondents: M. Sampson, A. Goodman, R. Eghan

Place and Date of Hearing: Vancouver, British Columbia, January 25, 2023

Place and Date of Judgment: Vancouver, British Columbia, August 4, 2023

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch

Summary:

This is an appeal from an order staying the majority of claims advanced in a proposed class action. The partial stay was granted under British Columbia's Arbitration Act because the contract between the parties provides for mandatory arbitration. The appellants opposed the stay on various grounds, including that the arbitration agreement is unconscionable and contrary to public policy. A chambers judge rejected that submission. The appellants say the judge erred in doing so.

HELD: appeal dismissed. A judge's conclusion that an arbitration agreement is neither unconscionable nor contrary to public policy raises questions of mixed fact and law and is reviewed on a palpable and overriding error standard. In the circumstances of this case, it was open to the judge to affirm the arbitration agreement, even though the agreement forms part of a standard form contract in the consumer context. There is inequality of bargaining power between the parties; however, the appellant has not established an improvident bargain. Nor has the appellant shown that the arbitration agreement imposes undue hardship on him or similarly situated consumers, rendering it contrary to public policy. Presenting an arguable case on these issues is not sufficient to displace the deferential standard of review.

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Introduction

[1] This is an appeal from an order staying the majority of claims advanced in a proposed class action. The stay was granted because the contract between the parties includes an agreement to arbitrate. The only claims allowed to continue were claims for relief under ss. 172(1)(b) and 172(3) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*Consumer Protection Act*].

[2] The appellant, John Williams, says the arbitration agreement is unconscionable and contrary to public policy, and that the judge erred in granting a stay. If this Court disagrees, the appellant says the stay should apply only to his personal claims and he should be allowed to continue with the proposed class action on behalf of other class members.

[3] The respondents, Amazon.com, Inc., Amazon Services International, Inc. and Amazon.com.ca, Inc., ask that the appeal be dismissed.

[4] The arbitration agreement is embedded in a contract of adhesion that was formed in the consumer context. It contains a choice of law clause (the United States), and a class waiver, which denies the appellant and similarly-situated consumers an important procedural tool for the collective pursuit of relief arising out of small-value claims.

[5] With that backdrop, the issues raised by the appellant appropriately attract careful consideration. However, the legislative scheme that governs domestic arbitration matters in British Columbia renders arbitration agreements presumptively enforceable, even in the consumer context and when embodied in standard form contracts. These agreements are generally respected, and, when they apply, the affected disputes must proceed to arbitration unless a plaintiff is able to establish on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed.

[6] The judge concluded that the appellant did not meet this test. In my view, this conclusion was open to her on the whole of the record.

[7] I also agree with the judge that the stay properly applies to all claims in the proposed class action that fall subject to the arbitration agreement and that those claims cannot proceed in court — whether on behalf of the appellant or any other proposed class member.

[8] Accordingly, and for the reasons that follow, I would dismiss the appeal.

Background

[9] In March 2015, the appellant created an account with Amazon.ca ("Amazon"), allowing him to purchase goods online.

[10] To do this, he agreed to certain Conditions of Use. The Conditions of Use had been in place since June 2002. However, the wording was amended in October 2014 and it is the amended version the appellant agreed to when he established his account. I will refer to this version as the "2014 Conditions of Use".

[11] The judge found that only the 2014 Conditions of Use were properly before her. I agree. The appellant's notice of civil claim has not been certified as a class action. At this point, it is a single action and he is the only plaintiff. His contractual relationship with Amazon is governed by the 2014 Conditions of Use and the application for a stay was grounded in those Conditions. Given the circumstances, the judge did not consider the 2002 version material to her analysis of unconscionability or public policy. Nor do I. The 2002 version is not engaged by the appellant's access to and use of Amazon.

[12] The 2014 Conditions of Use include an agreement to arbitrate all disputes other than small claims actions or actions involving an alleged infringement or other misuse of intellectual property rights. There is also a choice of law clause and a class "dispute resolution" waiver:

> APPLICABLE LAW and DISPUTES

> (Not applicable to Quebec consumers) Any dispute or claim relating in any way to your use of any Amazon.ca Service, or to any products or services sold or distributed by Amazon.ca or through Amazon.ca Services will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The U.S. Federal Arbitration Act and U.S. federal arbitration law apply to this agreement.
>
> There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.
>
> To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98051. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon.ca will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location.
>
> We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration we each waive any right to a jury trial. We also both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.
>
> (Not applicable to Quebec consumers) By using any Amazon.ca Service, you agree that the U.S. Federal Arbitration Act, applicable U.S. federal law, and the laws of the state of Washington, United States, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.ca.
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> …
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> [Emphasis added.]

[13] Amazon sells its own products. However, it also allows third-party sellers to market and sell their products. These include sellers of new and used books, videos, music and DVDS (the "Booksellers").

[14] The appellant alleges that to sell their products through Amazon, Booksellers must enter into certain arrangements that unduly favour Amazon. In particular,

Booksellers agree that the "Buy Box" feature of Amazon's online marketplace will highlight only books sold by Amazon. The "Buy Box" feature is described this way in the appellant's amended notice of civil claim (December 2019):

> On its website and marketplaces, including www.amazon.ca, the Buy Box is a box on a product detail page where customers can begin the purchasing process by adding items to their shopping carts, using the "Add to Cart" button.
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> Customers can also see additional purchasing options … To access these [options] requires additional effort by a customer, and navigation to a different area or webpage, whereas the Buy Box is immediately available and accessible.

[15] The appellant claims that Amazon's monopolization of the "Buy Box" leaves book consumers paying higher prices for new books because it eliminates competition.

[16] The appellant has commenced an action against the respondents in the British Columbia Supreme Court. The action seeks: (a) damages under the *Competition Act*, R.S.C. 1985, c. C-34; (b) damages for the tort of conspiracy; (c) an accounting and restitution; (c) alternatively, disgorgement of benefits received; (d) relief under the *Consumer Protection Act*; and (e) punitive damages.

[17] The appellant intended to have his notice of civil claim certified as a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. He served the respondents with an application for certification. The appellant has proposed that the class be defined as "all persons in Canada [other than Quebec and Ontario residents] who purchased new books, music, videos or DVDs through the Buy Box on www.amazon.ca for personal use between November 5, 2003 and the date of certification". This class would include Amazon consumers who agreed to the 2014 Conditions of Use, as well as the 2002 version.

[18] The application for certification has not been heard. In June 2019, the respondents applied for a stay of proceedings under what was then s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 [*Arbitration Act*]:

> (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
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> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
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> …

[19] In light of the Supreme Court of Canada's decision in *Seidel v. Telus Communications Inc.,* 2011 SCC 15 [*Seidel*], the respondents did not ask for a stay of claims seeking relief under s. 172 of the *Consumer Protection Act.* Section 172(1) allows someone to bring an action for: (a) a declaration that a supplier's act or practice contravenes the *Consumer Protection Act* or its regulations; and (b) an interim or permanent injunction restraining the supplier from contravening the statute or its regulations. Where relief is granted under s. 172(1), a court may order that the supplier restore money or property that may have been acquired because of a contravention of the statute or its regulations: s. 172(3)(a).

[20] *Seidel* affirmed the long-standing principle that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause": at para. 2. However, the Court found that s. 172 of the *Consumer Protection Act* manifests a legislative intention to the contrary, thereby overriding the contractual freedom to choose arbitration to settle these claims: at paras. 31, 40. As a result, a party who can "bring [their] case within s. 172" of the *Consumer Protection Act* can "extricate" themselves from an arbitration agreement: *Seidel* at para. 31.

[21] The respondents' application for a stay was granted on March 4, 2020. In accordance with *Seidel*, the *Consumer Protection Act* claims were allowed to proceed.

Supreme Court's Reasons

[22] The reasons on the stay application are indexed as 2020 BCSC 300.

[23] The judge began her analysis by identifying the main issue for her to resolve: "whether the Arbitration Clause in the 2014 Conditions of Use agreed to by the [appellant] require[d] a stay of his [non-*Consumer Protection Act* claims] in favour of arbitration": at para. 22.

[24] She then turned to s. 15 of the *Arbitration Act* (now s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2). The parties agreed that this scheme governs the respondents' application. No one takes issue with this proposition on appeal. As a result, the appeal has proceeded on the assumption (without deciding), that it does.

[25] Citing *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.), 1995 CanLII 2487 [*McElhanney*], the judge noted that s. 15 establishes three pre-requisites for a stay (at para. 25):

> (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
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> (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
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> (c) the application must be brought in a timely manner; that is, before the applicant takes a step in the proceeding.

[26] In deciding whether the respondents met these criteria, the judge only had to determine whether they established an "arguable case": at para. 26, citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), 1992 CanLII 4033 at 120 [*Gulf Canada*], and other authorities. If they did, she was obliged to grant a stay of the "legal proceedings" unless she determined that the arbitration agreement was "void, inoperative or incapable of being performed": at para. 28; *Arbitration Act*, s. 15(2).

[27] The judge next turned to the parties' positions. This is how she framed the questions before her (at para. 36):

i. Are the prerequisites to a stay under s. 15 of the *Arbitration Act* absent on one or both of the following grounds:

(1) The Arbitration Clause does not mandate arbitration because a claimant has the option of pursuing the claim in small claims court.

(2) The Conditions of Use are unclear as to the identity of the contracting parties.

ii. Alternatively, is the Arbitration Clause void, inoperative or incapable of being performed on one or both of the following grounds:

(1) An arbitrator applying U.S. law is not a court of competent jurisdiction for the purpose of granting remedies under the *Competition Act*.

(2) The Arbitration Clause is unconscionable in imposing a prohibitive cost and burden on an individual with a relatively small claim in pursuing a remedy.

iii. What is the effect of any stay that is granted on the [non-*Consumer Protection Act* claims] of potential class members other than the [appellant]?

[28] In answering these questions, the judge reached a number of conclusions.

[29] She interpreted the 2014 Conditions of Use as disentitling the appellant from filing a proposed class action in the British Columbia Supreme Court: at paras. 41–42. The only exception to arbitration allowed by the 2014 Conditions of Use is a small claims action: at para. 42. (This was not a case alleging an infringement or other misuse of intellectual property rights.) The judge defined a small claims action as one that proceeds in the Provincial Court of British Columbia pursuant to the *Small Claims Act*, R.S.B.C. 1996, c. 430: at para. 43.

[30] The judge concluded that the respondents established an arguable case that each of them is a party to the 2014 Conditions of Use: at para. 51.

[31] She also concluded that the arbitration agreement is capable of being performed. The appellant argued that the agreement was incapable of being performed on the basis that an arbitrator is not a court of competent jurisdiction for a claim under the *Competition Act.* Section 36(1)(a) of the *Competition Act* allows any person “who has suffered loss or damage as a result of” conduct that is contrary to Part VI of the *Act* to sue for damages in “any court of competent jurisdiction”.

[32] Applying the Federal Court of Appeal's decision in *Murphy v. Amway Canada Corporation*, 2013 FCA 38 [*Murphy*], the judge held that a claim under the *Competition Act* is arbitrable: at paras. 59–60.

[33] In *Murphy*, the appellant started a proposed class action against Amway Canada Corporation, claiming that its business practices violated the *Competition Act*. In turn, the respondent filed a motion to stay the action on the basis of an arbitration agreement. The class action was stayed. The stay was upheld on appeal.

[34] An issue raised on appeal was "whether a private claim for damages brought under section 36 of the *Competition Act* is arbitrable": at para. 40. The Federal Court of Appeal answered this question in the affirmative:

> [60] On the principles stated by Binnie J. in *Seidel*, I must conclude that the issues raised by the appellant in his Statement of Claim brought under section 36 of the *Competition Act* are arbitrable. The Supreme Court has made it clear that express legislative language in a statute is required before the courts will refuse to give effect to the terms of an arbitration agreement. In that regard, the *Competition Act* does not contain language which would indicate that Parliament intended that arbitration clauses be restricted or prohibited. More particularly, there is no language in the *Competition Act* that would prohibit class action waivers so as to prevent the determination of a claim by way of arbitration.
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> [61] Although the Supreme Court held in *Seidel* that Ms. Seidel's claim under section 172 of the *BPCPA* was not arbitrable, it nonetheless determined that her claim under section 171 could go to arbitration … Binnie J. contrasted the wording of section 171 with that of section 172, and found the differences meaningful in that they showed the legislature's intent in ensuring that the matters raised pursuant to section 172 be dealt with by the Supreme Court of British Columbia, and that where necessary, interim or permanent injunctions be issued against suppliers guilty of infractions under the *BPCPA*. In other words, by reason of the different wording of section 172, the legislature's intent was that matters raised under that section not be kept private and confidential, which would be the situation if the matter was dealt with by way of arbitration.
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> [62] As the respondent submits, the private action in damages under section 171 of the *BPCPA* and that created under section 36 of the *Competition Act* are very similar. It is clear that in deciding as it did with regard to section 172 of the *BPCPA*, the Supreme Court not only relied on the wording of the provision itself, but on the wording of section 3 of the statute, which stated in clear terms that the rights, benefits or protections given by the Act to consumers could not be waived or released, unless the waiver or release was allowed by the Act. On that basis, the Supreme Court held that Ms. Seidel's claims under section 172 could proceed in the

> Supreme Court of British Columbia, and that Ms. Seidel could pursue her certification proceedings.
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> …
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> [64] In the end, as I understand the appellant's arguments, he says that competition law, by its very nature, should never be the subject of arbitration because arbitration is not compatible with the public interest objectives found in the *Competition Act*. In other words, there is something sacrosanct about competition law that trumps any arbitration agreement …
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> [65] In my view, there is no basis to conclude, as the appellant argues, that claims brought under section 36 of the *Competition Act* cannot be determined by arbitration. As the Supreme Court made clear in *Seidel* … it is only where the statute can be interpreted or read as excluding or prohibiting arbitration, as in the case of section 172 of the *BPCPA*, that the courts will refuse to give effect to valid arbitration agreements.
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> [Emphasis added; internal references omitted.]

[35] The judge acknowledged that an arbitrator appointed under the 2014 Conditions of Use might decide they have no jurisdiction to decide a *Competition Act* claim because of the requirement that the arbitration be conducted under the laws of the United States. However, she concluded that this possibility was not a ground for finding the arbitration agreement void within the meaning of s. 15(2) of the *Arbitration Act*: at para. 81. The judge had expert evidence before her opining that even if an arbitrator declined jurisdiction, the "alternative remedy of damages under U.S. antitrust law" was likely available: at para. 80. As such, on the evidence, the appellant had not established he would be deprived of a remedy because of the choice of law clause.

[36] In response to the application for a stay, the appellant also asserted that the arbitration agreement is unconscionable because it imposes a prohibitive cost and burden on consumers with relatively small claims to advance. He argued the agreement is not negotiated; it is the product of unequal bargaining power; and it inequitably forces consumers to pursue a claim in a foreign country, subject to foreign law: at para. 82.

[37] The judge rejected the unconscionability argument.

[38] She found that the arbitration agreement does not represent a "substantially unfair bargain so as to meet the test for unconscionability": at para. 87. To the contrary, it provides for "a low cost, and in many cases no cost, arbitration process where the claims advanced are less than $10,000": at para. 87.

[39] The judge also rejected any suggestion that the arbitration agreement is contrary to public policy (at para. 91):

> Some legislatures in Canada, including Alberta, have been motivated to address this concern by enacting legislation that renders arbitration clauses in consumer contracts void: see s. 16 of the Alberta *Consumer Protection Act*. The British Columbia legislature has not been so motivated, except to the extent that arbitration clauses do not bar proceedings under s. 172 of the *BPCPA*. The consistent direction of the Supreme Court of Canada is that absent legislative intervention, arbitration clauses are to be enforced: *Seidel* at para. 2; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 84. In light of that direction, I do not consider it open to me to invalidate an arbitration clause on the basis of such policy concerns where the legislature has chosen not to act.
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> [Emphasis added.]

[40] Finally, the appellant argued that if the judge granted a stay and his personal (non-*Consumer Protection Act*) claims cannot proceed in the British Columbia Supreme Court, he is nonetheless entitled to pursue those claims on behalf of other potential class members: at para. 94.

[41] The judge disagreed. In her view, once the pre-requisites for a stay had been established, the *Arbitration Act* mandated that she stay the "legal proceedings" advancing the claims subject to the arbitration agreement, unless the appellant met his burden under s. 15(2). Having failed to do so, there were no claims for the appellant to take forward other than the *Consumer Protection Act* claims, even on behalf of other potential class members: at para. 98.

Issues on Appeal

[42] On appeal, the appellant does not challenge the conclusion that the respondents established an arguable case under s. 15(1) of the *Arbitration Act* that they are parties to the arbitration agreement.

[43] Nor does the appellant challenge the determination that the proposed class action seeks to advance claims in relation to matters agreed to be submitted to arbitration.

[44] The timeliness of the application for a stay is not in issue.

[45] As such, the appeal is exclusively focused on the conclusion reached under s. 15(2) of the *Arbitration Act.*

[46] Whether it was proper for the judge to engage in a s. 15(2) analysis on this record is not before us. The appellant opposed a stay by challenging the jurisdiction of an arbitrator to determine his claims. The jurisdictional challenge had two aspects to it: (1) the appellant said the arbitration agreement is incapable of being performed because of the *Competition Act* claim; and (2) he said it is void because of unconscionability and public policy concerns. The respondents did not suggest that the judge was precluded from considering these issues under s. 15(2) on the basis that doing so required more than a superficial review of the record, or otherwise. (See *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 31–36, 122 [*Uber*]; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117 at paras. 31–34 [*Octaform*]).

[47] Instead, the respondents were content to address the merits of the appellant's contentions. I assume, from this, that they agreed the judge could reach the "necessary legal conclusions" based on facts that were "either evident on the face of the record or undisputed by the parties": *Uber* at para. 36.

[48] On appeal, the appellant says the judge erred in not finding the arbitration agreement void. More specifically, she erred in: (1) failing to find the agreement unconscionable; and (2) failing to find it is contrary to public policy.

[49] The appellant has not formulated or asserted a ground of appeal specific to the judge's determination that the *Competition Act* claim is arbitrable and the arbitration agreement is therefore capable of being performed. Instead, although this was raised as a distinct issue in the Court below, the appellant's concerns about this aspect of his lawsuit are now advanced as part of his public policy submission.

[50] As an alternative ground of appeal, the appellant argues that if it was proper to grant a stay, the stay should apply only to his personal claims against Amazon. It is his position he is entitled to continue with all claims asserted on behalf of other proposed class members.

Standard of Review

[51] The standard of review in this appeal is a matter of contention.

[52] The appellant says his alleged errors constitute errors of law and must be reviewed applying a standard of correctness. For this proposition, he relies on the decision of the Ontario Court of Appeal in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1. The Court held that a correctness standard applied to the interpretation and assessment of a mandatory mediation and arbitration agreement because the agreement at issue in that case raised questions of law and was embedded in a standard form contract: at para. 19. In adopting that view, the Court cited *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37 at para. 46 [*Ledcor*].

[53] The respondents disagree with the appellant's suggested standard of review — in part.

[54] They say the judge's determination that the arbitration agreement is neither unconscionable nor contrary to public policy raises questions of mixed fact and law and is subject to a deferential standard of palpable and overriding error.

[55] The respondents accept that the appellant's alternative ground of appeal is subject to a correctness review.

[56] In my view, the respondents have it right.

[57] To conduct an unconscionability or public policy assessment, a court must first interpret the arbitration agreement, which forms part of the contract between the parties. Contractual interpretation is generally a matter of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 49–55 [*Sattva*]. In

Octaform, this Court held that the interpretation of an arbitration clause embedded within a contract also generally raises a question of mixed fact and law: at para. 44. After defining the terms of the agreement, a court must then consider whether the arbitration agreement, as interpreted, is unconscionable or contrary to public policy. These latter two inquiries are contextual and necessarily informed by the facts of the case. As one example, to assess improvidence (a component of the unconscionability analysis), the arbitration agreement must be "read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties": *Uber* at para. 75, internal references omitted. See also paras. 77, 78, 79, 122, 130, 131, 134, 136 and 170 of *Uber*, which affirm the contextual nature of the unconscionability and public policy analyses.

[58] The fact that an arbitration agreement forms part of a contract of adhesion does not change the factual and legal nature of the unconscionability or public policy inquiries. Instead, it introduces a contextual feature to the case that informs the analyses. In my view, *Ledcor* is not dispositive of the standard of review. In that case, the Supreme Court of Canada adopted a correctness standard for the interpretation of a standard form contract because there was "no meaningful factual matrix that [was] specific to the particular parties to assist the interpretation process": at para. 4. Here, in addressing unconscionability and public policy concerns, *Uber* tells us that the factual matrix specific to the parties is of considerable significance to the analyses. This is an important distinguishing feature.

[59] In *Irwin v. Protiviti*, 2022 ONCA 533 [*Protiviti*], a post-*Uber* decision involving an arbitration agreement, the Ontario Court of Appeal described the unconscionability analysis as a "probing factual inquiry", quoting from *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 at para. 15 [*Rogers*]. Among other things, the analysis requires a court to "assess the sophistication of the parties, their bargaining power, and other aspects of the factual matrix related to the drafting of the agreement": *Protiviti* at para. 12.

[60] I agree with this characterization and conclude that in the absence of an extricable question of law with material impact that would attract correctness review (*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 76 [*Teal*]), a finding that an arbitration agreement is neither unconscionable nor contrary to public policy for the purpose of s. 15(2) of the *Arbitration Act* is properly treated as a matter of mixed fact and law. As such, it is reviewable for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8–10.

Discussion

Stay Application Under the *Arbitration Act*

[61] For purposes of a stay application, a judge's assessment of unconscionability and public policy occurs under s. 15(2) of the *Arbitration Act*. Once an applicant has met the pre-requisites for a stay under s. 15(1), the court must grant a stay "unless it determines that the arbitration agreement is void, inoperative or incapable of being performed": s. 15(2).

[62] The mandatory stay reflects and gives meaningful effect to the competence-competence principle and allows an arbitrator to be the first to assess jurisdiction under the arbitration agreement. An affirmative finding under s. 15(2) enables a plaintiff to avoid the mandatory stay and functions as an exception to the competence-competence principle.

[63] In *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [*Peace River*], the Supreme Court of Canada explained the s. 15 analysis this way:

> [76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:
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> (a) the technical prerequisites for a mandatory stay of court proceedings; and
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> (b) the statutory exceptions to a mandatory stay of court proceedings.

> [77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.
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> [78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29–30 (CanLII)).
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> [79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.
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> …
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> [88] At this second stage, the key question is whether, even though the technical requirements for a stay are met, the party seeking to avoid arbitration has shown on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court must grant a stay. The mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy.
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> [89] It follows that a court should dismiss a stay application on the basis of a statutory exception only in a "clear" case (McEwan and Herbst, at § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 155). A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration (McEwan and Herbst, at § 3:55; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390 (S.C.J.), at paras. 3–5, aff'd (2003), 228 D.L.R. (4th) 179 (C.A.)).
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> [Per Côté J., writing for the majority, emphasis added.]

See also *Octaform* at paras. 20–34.

Judge's Consideration of Section 15(2)

[64] Less than four months after the judge delivered her reasons in this case, the Supreme Court of Canada released its judgment in *Uber* and clarified the analytical framework for assessing the validity of an arbitration agreement on grounds of unconscionability and/or public policy. The judge did not have the benefit of those

reasons when she conducted her s. 15(2) inquiry. On some issues, her analysis does not align with the framework adopted in *Uber*.

[65] For purposes of this appeal, I will treat any misalignment as an error in principle. However, whether one or more of these errors in principle justifies appellate intervention is a different question and depends on the materiality of the error in the context of the judge's analysis, considered as a whole and in light of the record. Appeal courts generally take a cautious approach to identifying errors in principle as extricable questions of law that attract a correctness standard: *Teal* at para. 45; *Sattva* at para. 54. The judge's findings of fact, of course, cannot be disturbed unless the appellant shows palpable and overriding error.

Uber **Framework**

[66] Before addressing the specific grounds of appeal, it is helpful to review *Uber*. Both parties have relied on the case in advancing their positions.

[67] In *Uber*, the plaintiff started a class action in Ontario for alleged violations of a service agreement between *Uber* and its food delivery drivers. Drivers were required to enter into this agreement before using Uber's software applications. The software applications are widely used for purchasing take-out food. Consumers and drivers can download the applications onto their smartphones. Consumers use the applications to order food. Drivers use them to view and respond to orders. Payment to the driver is facilitated through the applications and Uber takes a share of the driver's payments.

[68] The service agreement for drivers provided for mandatory mediation and arbitration. The arbitration had to occur in the Netherlands. The related processes required a driver to pay up-front administration and filing fees of USD $14,500, plus potential legal fees and other costs of participation. For the plaintiff in *Uber*, these fees represented most of his annual income.

[69] After the start of the class action, Uber brought a motion to stay the proceedings in favour of arbitration in the Netherlands. In response, the plaintiff

argued that the arbitration agreement was invalid. Among other things, he said the agreement was unconscionable. The motion judge decided he did not have authority to determine the validity of the arbitration agreement and he stayed the class action under the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 [*ICAA*]. (The Supreme Court of Canada found that the *ICAA* was not the correct statute; however, nothing turns on this point.) The Ontario Court of Appeal reversed the motion judge: *Uber* at paras. 1–6.

[70] A majority of the Supreme Court of Canada agreed with the reversal, concluding that the arbitration agreement "[made] it impossible for one party to arbitrate. It [was] a classic case of unconscionability": *Uber* at para. 4.

[71] In reaching this determination, the majority held that the doctrine of unconscionability encompasses two issues: inequality of bargaining power and resultant improvident bargains.

[72] The majority said this about unequal bargaining power:

> [66] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process …
>
> [67] There are no "rigid limitations" on the types of inequality that fit this description … Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes …
>
> [68] In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both …
>
> [69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation …
>
> …
>
> [71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" … This may occur because of personal vulnerability or because

> of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met …
>
> [Internal references omitted.]

[73] Specific to improvident bargains, the majority explained that:

> [74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable … Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" …
>
> [75] Improvidence must be assessed contextually … In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties …
>
> [76] For a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.
>
> [77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party … or cause an "unfair surprise" ... This is an objective standard, albeit one that has regard to the context.
>
> [78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" … Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.
>
> [Italics in the original; internal references omitted.]

[74] The majority summarized the doctrine of unconscionability at para. 79:

> Unconscionability, in sum, involves both inequality and improvidence … The nature of the flaw in the contracting process is part of the context in which improvidence is assessed. And proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their

> interests … It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power.
>
> [Internal references omitted.]

[75] In the appeal, *Uber* advocated for a more stringent unconscionability doctrine. The majority rejected that approach, holding that to establish unconscionability, a claimant is not required to show that the parties' transaction was grossly unfair; the claimant did not obtain independent legal advice before agreeing to mandatory arbitration; the imbalance in bargaining power was overwhelming; or there was an intention to take advantage of the claimant as a vulnerable party: *Uber* at paras. 81–82.

[76] *Uber* involved a standard form contract. The majority noted that the doctrine of unconscionability has a "meaningful role" to play in examining contracts of adhesion (at para. 89):

> … The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand (see Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016), 33 *Windsor Y.B. Access Just.* 177, at p. 179; Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2013), 53 *Can. Bus. L.J.* 475, at pp. 475–76; Thal, at pp. 27–28; William J. Woodward, Jr., "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006), 2 *Hastings Bus. L.J.* 1, at p. 46). The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply.

[81] Applying the unconscionability doctrine to Uber's arbitration agreement, the majority found there was "clearly inequality of bargaining power" when the plaintiff agreed to mandatory arbitration as part of a standard form contract: at para. 93. He was "powerless to negotiate any of its terms" and there was a "significant gulf in sophistication" between the plaintiff and Uber: *Uber* at para. 93. The plaintiff could

not have been expected to appreciate the financial and legal implications of the arbitration agreement: at para. 93.

[77] The majority also found that the arbitration agreement resulted in an improvident bargain. The costs of accessing arbitration were "disproportionate to the size of an arbitration award that could reasonably have been foreseen" when the service agreement was entered into: *Uber* at para. 94. The structure of the agreement would have also left the impression that drivers had little choice but to travel to the Netherlands at their own expense for the purpose of arbitration: at para. 94.

[78] Justice Brown wrote concurring reasons in *Uber.*

[79] He agreed that the arbitration agreement was invalid. However, not on the basis of unconscionability. Rather, it was his view that contractual stipulations that "foreclose access to legally determined dispute resolution … undermine the rule of law by denying access to justice, and are therefore contrary to public policy": at para. 101. (The majority did not take issue with this conclusion or the public policy analysis.)

[80] From Justice Brown's perspective, the arbitration agreement effectively barred the plaintiff from advancing any claim against Uber, no matter how significant that claim might be. It was not an agreement to arbitrate. Rather, it was an agreement to <u>not</u> arbitrate, and, in those "exceptional circumstances", "a central premise of curial respect for arbitration agreements — that they furnish an accessible method of achieving dispute resolution according to law — falls away": at para. 102.

[81] Justice Brown set out the factors to consider in deciding whether an arbitration agreement is contrary to public policy:

> [131] Several factors should be considered to decide whether a contractual limitation on legally determined dispute resolution imposes undue hardship and is therefore contrary to public policy. <u>The first consideration is the nature of disputes that are likely to arise under the parties' agreement</u>. Where the cost to pursue a claim is disproportionate to the quantum of likely disputes

> arising from an agreement, this suggests the possibility of undue hardship. This consideration must, however, be situated in the context of the agreement as a whole; a clause that discourages the pursuit of certain low-value claims may be proportionate in light of overall risk allocation between the parties.
>
> …
>
> [134] Courts should also consider the relative bargaining positions of the parties. To be clear, an imbalance in bargaining power is not required to find that a provision bars access to dispute resolution. An outright prohibition on dispute resolution would undermine the rule of law, even in the context of an agreement between sophisticated parties. That said, the hardship occasioned by a limit on legally determined dispute resolution is less likely to be "undue" if it is the product of negotiations between parties of equal bargaining strength. What is reasonable between the parties must be considered in light of the parties' relationship. The role that bargaining strength plays in this context is comparable to its role in the enforcement of other contractual provisions that raise public policy concerns, including restrictive covenants and forum selection clauses …
>
> [135] Finally, it may be relevant to consider whether the parties have attempted to tailor the limit on dispute resolution. Arbitration agreements may, for example, be tailored to exclude certain claims or to require the party with a stronger bargaining position to pay a higher portion of the upfront costs …
>
> [Emphasis added; internal references omitted.]

Post-*Uber* Application

[82] Since the release of *Uber*, this Court has had occasion to apply the majority and concurring judgments in the context of a class action waiver contained in a standard form contract: *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 [*Pearce*]. The contract did not include a provision for mandatory arbitration; however, the appellant has relied heavily on this case in advancing his position.

[83] In *Pearce*, the respondent filed a proposed class action alleging that various non-regulated debt advisors were operating illegally. His causes of action included statutory claims under the *Consumer Protection Act* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, unjust enrichment and civil conspiracy. At the hearing of the certification application, the appellants applied to strike the claims on grounds that they were bound to fail. They also sought a stay of all claims as at a certain date on the basis of the class action waiver. The class action waiver read this way (at para. 14):

> To the extent permitted under applicable law, you may only resolve disputes with us on an individual basis, and may not bring a claim as a plaintiff or class member in a class, consolidated, or representative action. Class arbitrations, class actions, general actions, and consolidation with other arbitrations are not allowed.

[84] Writing for the Court, Justice Griffin upheld the conclusion of the lower court that the class action waiver was unenforceable, "due both to the doctrine of unconscionability and to public policy": at para. 184.

[85] Unconscionability and public policy were described as "separate but … doctrinal cousins", each of which can justify a court departing from the general rule that contracts should be respected: at para. 192. Unconscionability "focuses on the vulnerability of and unfairness to the party who is seeking to void the contract": at para. 192. The public policy basis for voiding an agreement or a particular clause is focused on "the harm to society that would flow from upholding a particular contract": at para. 192.

[86] Applying these doctrines, the Court found inequality of bargaining power: at para. 236. Similar to *Uber*, the contract in *Pearce* was a standard form contract in respect of which the proposed class members had no power to negotiate terms: at para. 225. They were "consumers, not sophisticated commercial parties": at para. 225. The evidence established that the proposed class members "were in vulnerable and difficult circumstances" when they entered into the contract: at para. 226. They were "distressed people — on the verge of insolvency and struggling to service and repay debt — turning to the appellants for help" at para. 226. The "very fact that the class members were people who had difficulty managing their debts and needed the appellants' help in this regard indicates a significant gulf in the relative sophistication of the parties": at para. 228.

[87] The Court found the contract did not effectively communicate the consequences of agreeing to a class action waiver (at para. 230):

> … The clause does not explain what it means by precluding "general actions" and it is far from obvious what it means (a term that the respondent speculates might have been copied from standard form contracts in the United States). The clause does not communicate that a class action may be

> the only economic and viable way to bring claims arising from wrongs committed by the appellants and that the application of this clause may have the practical effect of barring recovery for damages.

[88] The appellants in *Pearce* were unable to establish a legitimate commercial reason for the class action waiver. The "only possible reason [was] to impede [the] customers' rights to access justice": at para. 231. On the evidence, Justice Griffin was satisfied that the "true expectation" of the appellants was that the class action waiver would "protect them from being sued *at all*": at para. 233, italics in the original.

[89] The Court also found that the class action waiver resulted in an improvident bargain. The appellants argued that the waiver did not absolutely restrict the proposed class members from accessing justice. They were not precluded from bringing individual actions in either the Supreme Court or Provincial Court of British Columbia. For claims under $5,000, they could proceed before the Civil Resolution Tribunal: at para. 239.

[90] The Court found it was unclear that the nature of the claims advanced in *Pearce* could properly proceed in the Provincial Court or before the Civil Resolution Tribunal: at paras. 242–243. In any event, the waiver absolutely deprived the proposed class members of a preferable and likely more effective way of litigating their claims (at para. 241):

> It is important to remember that one of the key purposes of allowing representative and class proceedings is to provide access to justice for people whose claims would otherwise be too small to be economical to prosecute: see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 28 [*Dutton*]. Allowing a number of people with common issues to band together in a single lawsuit gives them the leverage to vindicate their rights. As a group, they are able to afford legal representation (either through their shared resources or more commonly through a contingency fee that their group representation makes feasible), and they are able to prosecute civil claims that would be too costly or complex to pursue as individuals.

[91] In reaching this conclusion, the Court made note of the lower court's finding that "the proposed class members would likely not be able to pursue their claims

individually because of the novel and complex nature of the legal questions and the relatively low monetary value of the claims, where individual claims were at most in the range of $5,000": at para. 244. This finding was not challenged on appeal.

[92] Lastly, the Court was satisfied that the class action waiver was also unenforceable because it offended public policy: at para. 248. It had the "practical effect of precluding the respondent, and class members, from having access to a dispute resolution process in accordance with the law for claims arising from the relationship between these parties": at para. 248.

[93] The denial of access adversely affected the administration of justice: at para. 256. Forcing litigation to occur in the form of individual claims would "lead to the wasting of judicial resources and the problems of duplication of fact-finding and the potential for inconsistent results": at para. 256. It would prevent proposed class members from sharing their legal costs and likely deter individual plaintiffs from seeking relief: at para. 259. They would be denied access to justice because the "value of their claims [would] not justify commencing individual proceedings": at para. 260. Consistent with the concurring judgment in *Uber*, the Court was satisfied that "a contract that functionally prohibits access to the courts is just as offensive to public policy as those that explicitly do so": at para. 261.

[94] The class action waiver in *Pearce* was also found to frustrate the behavioural modification objective of class proceedings (at para. 262):

> … given the unchallenged finding of the chambers judge that it was unlikely the plaintiffs would pursue their claims individually, the class action waiver would frustrate the behavioural modification purpose of class proceedings. The defendants would be allowed to operate in a way that is contrary to law, causing widespread harm without fear of consequences, so long as they kept the monetary value of the harm to each customer relatively low. A substantive practical barrier to accessing the courts as is presented by the clause will thereby have a negative impact on society at large.

Unconscionability and Public Policy in This Case

[95] I turn now to the challenge to the arbitration agreement in this case. I consider it appropriate to address the first two grounds of appeal together. They speak to the

same issue, namely, whether the judge erred in declining to find that Amazon's arbitration agreement is void within the meaning of s. 15(2) of the *Arbitration Act*.

[96] For ease of reference, the arbitration agreement in the 2014 Conditions of Use stipulates that:

- for eligible claims an Amazon consumer can elect to pursue a small claims action rather than arbitration;
- if they choose arbitration, the process is initiated by way of a letter;
- the arbitration will be conducted in accordance with the rules of the American Arbitration Association [*AAA*];
- the agreement explains that an arbitration does not involve a judge or a jury, but that the arbitrator can award the same damages and relief as a court. It also flags for the consumer that a "court review of an arbitration award is limited";
- the *AAA* rules are accessible online or by telephone. The website domain that houses the rules and a toll-free phone number are provided in the agreement;
- all filing, administration and arbitrator fees are governed by *AAA* rules;
- any administration fees payable by a consumer will be reimbursed by Amazon for claims totaling less than $10,000, unless the claim is found to be frivolous;
- if a consumer does not succeed in the arbitration, Amazon will not seek legal fees or costs against them, unless the claim is found to be frivolous;
- the consumer can choose to have the arbitration conducted by telephone, in writing, or in-person in the country in which they reside or at another mutually agreed upon location;

- the arbitrations will be conducted on an individual basis only, not on a class basis; and,
- the U.S. *Federal Arbitration Act*, 9 United States Code [*FAA*], applicable U.S. federal law, and Washington laws apply.

Appellant's Position

[97] The appellant says the arbitration agreement is both unconscionable and contrary to public policy. Relying on *Uber* and *Pearce*, he submits that the judge committed multiple errors. She: (a) did not complete a proper unconscionability assessment, asking only whether the arbitration agreement was improvident on the basis that is "substantially unfair"; (b) failed to appreciate the relevance and significance of the fact that the arbitration agreement is embedded in a contract of adhesion; (c) did not conduct a proper public policy assessment, erroneously instructing herself that it was not open to her to override the parties' freedom to contract in the absence of a supportive legislative intention; (d) failed to give meaningful effect to the notion that Canadian courts, not foreign tribunals, should properly decide *Competition Act* claims; and (e) erred in holding that this latter issue should be left to an arbitrator to decide.

[98] The appellant contends that had the judge conducted a proper analysis, she would have concluded that the arbitration agreement in the 2014 Conditions of Use is void within the meaning of s. 15(2) of the *Arbitration Act.*

[99] Specific to the issue of unconscionability, the appellant says the agreement forms part of a standard form contract that is imposed without opportunity for the consumer to negotiate the terms. It is offered on a take-it-or-leave-it basis. There is gross inequality of bargaining power. The 2014 Conditions of Use provide scant information about the costs of arbitration, forcing the consumer to search out the applicable rules and associated costs. The agreement does not say anything about the consequences of waiving the entitlement to engage in class proceedings, which may be the only economic and viable way to bring a claim. There is no legitimate commercial reason for that waiver.

[100] The appellant contends that the up-front administration fee for initiating an arbitration is clearly disproportionate to the size of the claims likely to be brought by consumers. The appellant's estimated claim, for example, is CAD $100. It is also probable a consumer will have legal representation costs given the inherent complexity of a *Competition Act* claim.

[101] In terms of public policy concerns, the appellant reiterates that the costs of pursuing an arbitration are disproportionate to the likely value of the claims. The parties do not possess equal bargaining strength. To the contrary, Amazon consumers have no bargaining strength. The arbitration agreement has not been tailored in a way that effectively counterbalances the inequality of bargaining power. For one, Amazon has not agreed to pay costs up-front. The arbitration agreement only exempts intellectual property disputes (a narrow type of claim), and small claims actions (which proceed before a statutory court with limited jurisdiction). The appellant argues that the arbitration agreement causes undue hardship. The class waiver prevents consumers from sharing legal costs and hinders their access to justice. It means potentially thousands of claims have to be litigated as "small claims", wasting scarce judicial resources and raising the realistic potential for duplicate fact-finding and inconsistent results. The class waiver interferes with the behavioral modification objective of class proceedings.

[102] Finally, the appellant says the arbitration agreement is also contrary to public policy because the choice of law clause results in non-application of the *Competition Act*. The laws of the United States and Washington would govern the arbitration, depriving Canadian consumers of the opportunity to have their claims determined with reference to core Canadian values.

Respondents' Position

[103] In their factum, the respondents emphasize the generally accepted notion that courts should maintain a hands-off approach to matters involving arbitration. They point to *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 [*Wellman*]), in support of that position. In *Wellman*, the Supreme Court of Canada noted that

Canadian courts have long held they "must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting": at para. 54.

[104] The respondents say their arbitration agreement is profoundly different from the one in *Uber*, and that it was reasonably open to the judge to find the agreement is neither unconscionable nor contrary to public policy. The respondents stress that in *Uber*, the Supreme Court of Canada did not rule that all mandatory arbitration agreements are unconscionable or contrary to public policy, even when included in a standard form contract. Rather, the ruling was specific to the arbitration agreement in that case, as informed by its unique features. The respondents say the appellant's position, if accepted, would effectively prohibit the enforcement of any arbitration agreement housed in a standard form contract. That was not the intent of *Uber* and the appellant's arguments to the contrary have far-reaching, adverse consequences for alternative dispute resolution and the administration of justice.

[105] The respondents say there is no inequality of bargaining power here. The appellant is not a vulnerable plaintiff who is dependent on the use of Amazon for his livelihood. The 2014 Conditions of Use disclose the relevant features of the arbitration process, and, unlike the situation in *Uber*, they do not hide an exorbitant administrative fee.

[106] The respondents also argue that the arbitration agreement does not represent an improvident bargain. To the contrary, it is low-cost, flexible in location and format, and consumer-friendly. The fact that the agreement contains a class waiver does not render it unconscionable. The concerns expressed in *Pearce* have no application. This is not a stand-alone class waiver; rather, the waiver in the 2014 Conditions of Use forms an integral part of the arbitration agreement and it is only by virtue of that agreement that consumers agree to waive the entitlement to bring a class action, consistent with the choice to remove the parties' disputes from the superior court.

[107] Specific to public policy concerns, the respondents again distinguish *Uber* and *Pearce* from this case. Unlike the findings in those decisions, the 2014

Conditions of Use do not prevent consumers from resolving their disputes according to law. Arbitration has long been recognized as providing a measure of justice comparable to the courts.

[108] From the respondents' perspective, the facts of this case do not raise the same level of concern about access to justice as did *Uber* and *Pearce.* In making this argument, they point to para. 278 of *Pearce*, in which the Court distinguished *Pearce* from situations in which the contract provides for mandatory arbitration.

[109] The respondents deny that the arbitration agreement is contrary to public policy because it applies to a claim under the *Competition Act*. They say the *Competition Act* does not expressly oust the availability of arbitration, or mandate that a claim for damages be adjudicated in Canada, and this Court should follow the approach taken in *Murphy*.

Analysis

[110] I agree with the appellant that the judge's assessment of unconscionability and her public policy analysis under s. 15(2) of the *Arbitration Act* are not on all fours with *Uber.* This is understandable given that she did not have the benefit of those reasons when deciding the case.

[111] In addressing unconscionability, the judge turned her mind to inequality of bargaining power and whether the arbitration agreement represents an improvident bargain. However, she did not do so as robustly as required by *Uber* and consider all of the factors raised in that decision. The judge also asked, as part of her unconscionability analysis, whether the appellant had shown that the arbitration agreement is "substantially unfair": at para. 85, citing *Do v. Nichols*, 2016 BCCA 128, leave to appeal to SCC ref'd, 37016 (6 October, 2016). Although the fairness of an agreement is certainly a legitimate factor to consider in the unconscionability analysis, a finding of unconscionability is not dependent upon the ability to prove a particular degree of unfairness: *Uber* at paras. 80–82.

[112] The judge's public policy analysis also has some frailties in light of *Uber*.

[113] She recognized the concerns associated with arbitration agreements that contain class waivers, namely, the avoidance of "liability for wrongs that have widespread effect": at para. 90, citing *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 30. However, the judge instructed herself that she had no room to "invalidate an arbitration clause on the basis of such policy concerns where the legislature has chosen not to act": at para. 91. Consequently, a number of the factors identified by Justice Brown as relevant to the public policy analysis were not considered by her, specific to that issue: *Uber* at paras. 131–135.

[114] This includes inequality of bargaining power associated with the use of a standard form contract. *Uber* recognizes this factor as relevant to both the unconscionability and public policy analyses. The judge appeared to be of the view that the fact the arbitration agreement finds form in a contract of adhesion is "irrelevant to the question of its enforcement": at para. 78. Such is not the case: *Uber* at paras. 119–120.

[115] In deciding it was "not open" to her to invalidate the arbitration agreement on the basis of policy concerns without a supporting legislative intention (at para. 91), the judge relied on *Seidel* and *Wellman.*

[116] In *Wellman,* the Supreme Court of Canada affirmed that "arbitration clauses, even those contained in adhesion contracts … will generally be enforced 'absent legislative language to the contrary'": at para. 46, citing *Seidel* at paras. 2 and 42, emphasis added. However, the Court did not say that a judge has no jurisdiction or authority to find an arbitration agreement contrary to public policy in the absence of a discernable legislative intention to override this form of dispute resolution. Neither *Seidel* nor *Wellman* involved an enforceability analysis based on public policy concerns. Rather, those decisions examined whether particular claims were exempt from an arbitration agreement on the basis that legislation in the applicable jurisdictions contained "language overriding the principle that arbitration clauses will generally be enforced": *Wellman* at para. 46. That is a different issue, and, if the judge was of the view she had no room to invalidate an arbitration agreement on

public policy grounds in a jurisdiction that legislatively favours arbitration, she erred in principle.

[117] However, notwithstanding the analytical shortcomings, I am satisfied the judge's overall assessment of unconscionability and public policy in the context of this particular case warrants deference and should be affirmed. The appellant has not persuaded me, with reference to the *Uber* framework or otherwise, of a principled justification for overturning that assessment.

[118] It is clear that in conducting her analysis, the judge was alive to the appellant's concerns about: inequality of bargaining power (para. 82); disproportionality between the costs of arbitration and the value of the appellant's claim (paras. 85–87); the potential for unfairness arising from use of a standard form contract (paras. 89–90); and the possibility of an unjust result when arbitrating a *Competition Act* claim in a "foreign forum and under foreign law" (para. 69).

[119] She considered these issues, and, in the context of a jurisdiction that has chosen to not legislatively restrict the use of arbitration clauses in consumer contracts (*Seidel* at para. 25), the judge determined that the issues raised by the appellant did not, individually or in their cumulative effect, establish the arbitration agreement as void, inoperative or incapable of being performed within the meaning of s. 15(2) of the *Arbitration Act.* In my view, this conclusion was open to her, even with the benefit of the *Uber* framework.

[120] From the judge's perspective, the Amazon arbitration agreement is substantially different from the agreement at issue in *Uber*: at para. 86. (The judge did not have the benefit of the Supreme Court of Canada's reasons in *Uber*; however, she did consider the lower court decision, indexed as 2019 ONCA 1).

[121] This was not an unreasonable conclusion.

[122] According to the evidence, the *AAA* rules require an up-front administration fee of USD $200 to be paid by a consumer who requests arbitration under the 2014 Conditions of Use. The judge fairly described this fee as "modest": at para. 86.

Under the *Uber* agreement, the up-front filing and administration fees were significantly higher, amounting to USD $14,500. That amount was “close to Mr. Heller’s annual income”: *Uber* at para. 94. In addition, there was the potential for costs arising from travel to participate in an arbitration, accommodation, legal representation and lost wages: *Uber* at para. 94.

[123] Unless a claim under the *Amazon* agreement is found to be frivolous, Amazon refunds the up-front fee for all claims of less than $10,000: at para. 86. Furthermore, Amazon will not seek legal costs against an unsuccessful claimant, unless the claim is found to be frivolous. Given these features, the judge described the arbitration process as “low cost, and in many cases no cost”: at para. 87. The *Uber* agreement did not contain these same features.

[124] Under the Amazon agreement, an arbitration may be conducted by telephone or by written submissions, or at a mutually agreed upon location: at para. 86. In *Uber*, the arbitration had to occur in the Netherlands and did not allow alternatives to personal attendance.

[125] With these distinctions, it was open to the judge to distinguish *Uber* (in which arbitration was the only route available for vindicating rights under the contract), and to allow differences between the two agreements to inform her unconscionability and public policy analyses. These are highly individualized assessments and differences in wording and the surrounding factual matrices properly impact the determination.

[126] Importantly, the plaintiff in this case is in a profoundly different situation from the plaintiff in *Uber.* There is no evidence that as a consumer, the appellant is dependent on Amazon, such that “serious consequences” would flow from not agreeing to the 2014 Conditions of Use: *Uber* at para. 69. Unlike the circumstances in *Uber*, the effects of failing to agree to arbitration as an Amazon book consumer are not “so dire” that equity must intervene to prevent Amazon from “gaining too great an advantage from the weaker party’s unfortunate situation”: *Uber* at para. 69. If the appellant and similarly-situated consumers say “no” to the 2014 Conditions of Use, they cannot open an account for the purpose of accessing Amazon’s online

marketplace. However, there was no evidence before the judge that this is the only marketplace available to them (virtual or otherwise), for the purchase of books, videos, music and DVDS, or that their livelihoods or financial well-being are somehow dependent on access.

[127] The appellant is also differently situated than the plaintiffs in *Pearce*, who were found to be in "vulnerable and difficult circumstances": *Pearce* at para. 226. The class members in that case were "distressed people — on the verge of insolvency and struggling to service and repay debt — turning to the appellants for help": at para. 226. Their vulnerability played a significant role in this Court's analysis of unconscionability (at paras. 226, 228, 236).

[128] I accept there is inequality of bargaining power between the appellant and Amazon. To establish an Amazon account, the appellant had no choice but to accept the 2014 Conditions of Use. His contract with Amazon is a contract of adhesion. He had no opportunity to negotiate the terms of the contract and no input into the articulation, the meaning or the breadth of its terms. For purposes of this appeal, no one took issue with the appellant's assertions in his notice of civil claim that Amazon is the "world's largest online retailer" and one of the "world's wealthiest and most powerful companies". It had exclusive control over setting the contractual parameters of its relationship with the appellant. Consistent with the Supreme Court of Canada's finding in *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 54, 57, 76 and 111 [*Douez #1*], I agree with the appellant that in this context, the difference between the parties in bargaining power is "large": *Douez #1* at para. 57.

[129] However, and this is where I depart from the appellant, the fact of inequality of bargaining power is not determinative of the unconscionability and public policy analyses. Both the majority and concurring reasons in *Uber* make this clear. Unconscionability requires a finding of inequality of bargaining power and a resultant improvident bargain: *Uber* at para. 79. The public policy analysis is also multi-factorial and inequality of bargaining power is but one of the relevant considerations: *Uber* at paras. 131, 134. Moreover, the analysis under both doctrines is contextually

informed. Consequently, in some cases, substantial differences in bargaining power may weigh in favour of unconscionability or a finding that a particular agreement is contrary to public policy. In others, it may have lesser impact, depending on a plaintiff's vulnerability at the time the contract was formed, the nature of the relationship between the parties, the hardship produced by the arbitration agreement, and a balancing of all relevant circumstances.

[130] For example, as recognized in *Uber*, inequality of bargaining power in a "contract of necessity" may attract heightened concern in the analysis:

> [69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation …
>
> [70] The classic example of a "necessity" case is a rescue at sea scenario (see *The Medina* (1876), 1 P.D. 272). The circumstances under which such agreements are made indicate the weaker party did not freely enter into the contract, as it was the product of his "extreme need . . . to relieve the straits in which he finds himself" (*Bundy*, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party" (*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637–38) …
>
> [Emphasis added.]

[131] I do not view the contractual relationship in this case to be one of "necessity".

[132] I also disagree with the appellant that the 2014 Conditions of Use are so "dense or difficult to understand", that only Amazon would be able to "appreciate the full import of the contractual terms": *Uber* at para. 71. In his affidavit material, the appellant deposes that he does not have "personal knowledge of Washington state law or U.S. federal law" and is "not a lawyer". However, nowhere is it stated that on reading the arbitration agreement, he did not understand its implications, including the implications of a class waiver, or that United States' law would govern the dispute. The agreement does not identify the costs of an arbitration under the *AAA*

rules. However, it does indicate that those costs will be refunded and identifies the circumstances in which they will not. The *AAA* rules are not attached; however, specific information about where and how to access the rules at no-cost to the consumer is provided. The arbitration agreement does not spell out the consequences of a class waiver; however, for reasons I discuss below, I do not consider the inclusion of a class waiver to be prohibitive of enforceability in the particular context of this case.

[133] As to whether the arbitration agreement results in an improvident bargain, the second step in the unconscionability analysis, I agree with the judge that the appellant has not established this aspect of the test. I do not see that this agreement "unduly" advantages Amazon or "unduly" disadvantages the appellant: *Uber* at para. 74. In so holding, it is important to emphasize that whether a particular agreement is improvident "cannot be reduced to an exact science": *Uber* at para. 78. An improvident bargain can take many forms, and, as noted, the assessment of whether it crosses the line of acceptability is "inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances": *Uber* at para. 78.

[134] Here, the filing fee of USD $200 is twice as much as the appellant's anticipated claim. However, it is refundable — an important distinguishing feature from *Uber*. The appellant says that in describing the costs of the arbitration process as "relatively modest", the judge "failed to factor in the costs of legal representation of prosecuting a complicated competition law claim": appellant's factum at para. 75. The affidavit filed in support of the appellant's position deposes that he has read the notice of civil claim filed on his behalf in the British Columbia Supreme Court, describes it as "complicated", and states that it is beyond his ability to represent himself. However, the affidavit does not say anything more than this. It does not explain why legal representation would be necessary in an arbitration, as opposed to a court proceeding. Nor does it set out the likely costs of that representation, specific to one or more of the issues raised.

[135] The appellant's submission about disproportionate costs also fails to account for the fact that an arbitration can be "conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location" (emphasis added). Again, this is a profoundly different from *Uber.* It is not readily apparent from the face of this agreement that an arbitration with Amazon would require time away from work, or travel, or accommodation costs.

[136] That brings me to whether the arbitration agreement is contrary to public policy. There is overlap between the unconscionability and public policy analyses. Some of the factors already discussed are relevant to both.

[137] I have already addressed the inequality of bargaining power between these parties. I accept the existence of inequality; however, I do not consider it to be determinative in the context of the relationship, the appellant's degree of vulnerability, and the nature of the transactions at issue.

[138] There is no question that the disputes likely to arise under the 2014 Conditions of Use will not be of high value. Indeed, as noted, the appellant anticipates a claim of USD $100. The filing fee under the *AAA* amounts to twice that amount. However, USD $200 is nowhere near the amount found to be prohibitive in *Uber.* And, the filing fee is reimbursed by Amazon for non-frivolous claims, whether or not the consumer succeeds. To access arbitration, the Amazon consumer need not travel. They have the choice of participating in writing or by telephone. On balance, I do not consider the costs of pursuing a claim by arbitration to realistically raise the possibility of undue hardship in the context of a non-dependent consumer relationship: *Uber* at paras. 131, 136.

[139] A relevant consideration in the public policy analysis is whether "the parties have attempted to tailor the limit on dispute resolution. Arbitration agreements may, for example, be tailored to exclude certain claims or to require the party with a stronger bargaining position to pay a higher portion of the upfront costs": *Uber* at para. 135.

[140] As conceded by the appellant, tailoring has occurred here. An Amazon consumer can elect to pursue a small claims action rather than arbitration. In British Columbia, this includes claims of up to $35,000 in value: s. 3 of the *Small Claims Act*, R.S.B.C. 1996, c. 430. Up-front administration costs for non-frivolous claims under CAD $10,000 will be reimbursed. Amazon will not seek legal costs against the consumer when a non-frivolous claim fails. There is flexibility in the mode of procedure. And, claims involving the misuse of intellectual property are exempted from the requirement to arbitrate. These elements of the agreement provide Amazon consumers with greater flexibility than did the *Uber* agreement. The 2014 Conditions of Use have better capacity to accommodate individual needs and circumstances.

[141] In support of his public policy challenge, the appellant argues it is "contrary to Canadian public policy to not apply the *Competition Act* to [his] claims": appellant's factum at para. 100. He contends this would be the result if the arbitration agreement is held to be enforceable, as the 2014 Conditions of Use stipulate that the arbitration would be subject to "the U.S. Federal Arbitration Act, applicable U.S. federal law, and the laws of the state of Washington, United States".

[142] To the extent that this submission takes issue with the judge's conclusion that the *Competition Act* claim is arbitrable (see paras. 56–69 of her reasons), it is not properly before us. The appellant's first two grounds of appeal challenge the judge's conclusion under s. 15(2) on grounds that she erred in finding the arbitration agreement neither unconscionable nor contrary to public policy. Whether a claim under the *Competition Act* can, at law, be determined by an arbitrator raises a different question under s. 15(2), namely, whether the arbitration agreement is incapable of being performed: *Peace River* at paras. 144–145. The appellant has not appealed that aspect of the judge's ruling. In light of the way he has framed his appeal, arbitrability has been conceded. The appellant's expressed concerns about a *Competition Act* claim being decided under the law of a foreign jurisdiction must therefore be considered within the context of his public policy submission.

[143] The judge accepted for the purpose of her public policy analysis that there is a "realistic prospect … an arbitrator would decline to entertain a claim under the *Competition Act*": at para. 70. However, she decided that this possibility did not render the arbitration agreement void.

[144] She provided two reasons for this conclusion.

[145] First, although there is the prospect that an arbitrator would decline to entertain this type of a claim, it is also possible (on the evidence before her), that the arbitrator would reach the opposite conclusion and determine they have the "ability to award damages under s. 36 of the *Competition Act*": at para. 80.

[146] Second, even if damages were not available under the *Competition Act*, an arbitrator may be in a position to grant the "alternative remedy of damages under U.S. antitrust law": para. 80. The respondents' expert opinion evidence asserted this remedial potential. The judge found nothing in the record to "suggest that damages under U.S. antitrust law would be an inferior remedy to damages under the *Competition Act*": at para. 80.

[147] These conclusions are grounded in the record and entitled to deference. Functionally, they rendered neutral the prejudice the appellant says arises from arbitration of a *Competition Act* claim in a foreign jurisdiction.

[148] The appellant says his public policy argument finds support in *Douez #1*, in which the Supreme Court of Canada declined, in the consumer context, to give effect to a forum selection clause that required disputes to be determined under Californian law. The plaintiff in *Douez #1* sued the defendants for breach of British Columbia's *Privacy* Act, R.S.B.C. 1996, c. 373. In plurality reasons, the Court declined to enforce the forum selection clause because there was "an inherent public good in Canadian courts deciding [the *quasi*-constitutional claim advanced by the plaintiff]. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians": at para. 58.

[149] In my view, the judge was correct to find *Douez #1* distinguishable and not dispositive of her public policy analysis.

[150] First, and importantly, *Douez #1* is not an arbitration case, in which a challenge to the validity or enforceability of an arbitration agreement is necessarily adjudicated within the context of a legislative framework that gives presumptive force to arbitration agreements and allows for only narrow bases on which to challenge that presumption.

[151] Second, the claim advanced in *Douez #1* alleged a breach of a *quasi*-constitutional right. The majority recognized that in that context, "… it is especially important that such harms do not go without remedy": at para. 59. The appellant does not suggest that his *Competition Act* claim is *quasi*-constitutional in nature. It is a private claim for damages.

[152] In deciding this aspect of the appellant's opposition to a stay, the judge cited the Federal Court of Appeal's decision in *Murphy*.

[153] The appellant in *Murphy* filed a proposed class action against Amway Canada Corporation and Amway Global, claiming that their business practices violated the *Competition Act.* The defendants obtained a stay of proceedings in favour of mandatory arbitration. The appellant sought to overturn the stay. Among other things, he argued that resolving the *Competition Act* claims through "private, confidential arbitration" was contrary to the public interest: at para. 16. The arbitration agreement in that case provided that disputes between the parties would be governed by the United States' *FAA* and the law of Michigan.

[154] The position advanced in *Murphy* was similar to the one advanced here:

> [41] The appellant argues that private claims under [the *Competition Act*] are not arbitrable … The appellant says that compelling public policy reasons and the legislative intent of the *Competition Act* support his submissions. He quotes passages from the Supreme Court's decision in *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641 (S.C.C.), as it pertains to the importance of competition to the Canadian market, the American anti-trust experience and the public policy foundations which support competition law. The appellant expresses concern that if forced to

> proceed to arbitration, the claim under section 36 will be submitted to an American arbitrator who will apply the laws of Michigan. The appellant contends that this undesirable outcome, combined with the private and confidential nature of arbitration proceedings, indicates that arbitration should not be permitted for public interest reasons.
>
> [42] As he did before the Judge, the appellant relies on the Supreme Court's recent decision in *Seidel* as authority for the proposition that the Federal Court is a competent court of jurisdiction in which to bring forward his class action proceeding, notwithstanding the Arbitration Agreement. In particular, the appellant asserts a public interest rationale as justification for why the class action should be permitted: he asserts the private and confidential nature of arbitration as being manifestly incompatible with the underlying objectives of the *Competition Act* of promoting an economic environment free of anti-competitive practices. The appellant further argues that *Seidel* stands for the proposition that public interest concerns — and in particular, class action waivers — can displace an arbitration agreement.
>
> [Emphasis added.]

[155] Justice Nadon, writing for the Court, rejected these submissions:

> [64] In the end, as I understand the appellant's arguments, he says that competition law, by its very nature, should never be the subject of arbitration because arbitration is not compatible with the public interest objectives found in the *Competition Act*. In other words, there is something sacrosanct about competition law that trumps any arbitration agreement. Similar arguments were made in *Dell* and *Rogers Wireless* in the context of consumer law, which arguments the Supreme Court rejected.
>
> [65] In my view, there is no basis to conclude, as the appellant argues, that claims brought under section 36 of the *Competition Act* cannot be determined by arbitration. As the Supreme Court made clear in *Seidel*, and as it had done previously in *Dell* and in *Rogers Wireless*, it is only where the statute can be interpreted or read as excluding or prohibiting arbitration, as in the case of section 172 of the *BPCPA*, that the courts will refuse to give effect to valid arbitration agreements.
>
> [66] The appellant's claim brought under section 36 of the *Competition Act* is a private claim and, in my respectful view, must be sent to arbitration as the parties intended when they entered into the Arbitration Agreement.
>
> [Emphasis added.]

[156] Like the judge in this case, I find the reasoning in *Murphy* persuasive. (See also *Defederico v. Amazon.com, Inc.*, 2023 FCA 165 at paras. 70–81.) I see nothing in the *Competition Act* that evinces a legislative intention to prohibit an arbitrator from adjudicating a claim for damages based on an alleged breach of the *Act*, or to prohibit adjudication of a *Competition Act* claim outside of Canada. Nor does the

appellant suggest, with reference to the terms of the *Act*, that such an intention exists. For reasons I explained earlier, the arbitrability of the appellant's *Competition Act* claim is not properly before us. However, if the *Act* itself does not override the availability of arbitration (which appears to be the case), or grant exclusive jurisdiction to a Canadian court or tribunal, it is difficult to understand how applying the Amazon arbitration agreement to a *Competition Act* claim will, standing alone, offend public policy.

[157] The judge's disinclination to give effect to the appellant's public policy arguments finds support in *Peace River*. As per Justice Côté:

> [133] ... courts must be careful not to overstep their role on a stay application under s. 15 [of the *Arbitration Act*]. They must bear in mind the competence-competence principle, the intention of the parties to refer their disputes to arbitration, and the legislative purposes underlying the *Arbitration Act*. As I have noted, the text and scheme of s. 15 make it *mandatory* for a court to defer to arbitral jurisdiction where the technical prerequisites in s. 15(1) are met, subject only to the narrow statutory exceptions in s. 15(2). This deferential approach accords with the purposes of the *Arbitration Act*, which were identified by the enacting legislature as follows: (a) providing a "simpler, faster, less expensive and less formal process" for resolving disputes, thereby minimizing costly and time-consuming court procedures; and (b) limiting judicial review in respect of disputes that parties have agreed to resolve by arbitration (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 7, 4th Sess., 33rd Parl., April 21, 1986, at p. 7865 (Hon. Brian Smith, Attorney General)).
>
> [Italics in the original; underlining added.]

[158] Lastly, the appellant says the arbitration agreement is both unconscionable and contrary to public policy because it prohibits seeking relief against Amazon in the form of a class proceeding. Relying on *Pearce*, the appellant says the ability to seek relief on a class basis is critical to achieving an effective remedy against Amazon, and, importantly, behavioural modification.

[159] The appellant is not alone in criticizing this aspect of the arbitration agreement. For many, class waivers are viewed as inherently problematic in the consumer context:

> The negative consequences of disallowing class action claims due to mandatory arbitration clauses or class action waivers are readily apparent in

> the consumer context. Consumer class action suits may involve dispersed individuals or groups who have suffered the same relatively minor harm, in terms of dollar value, resulting from the faulty goods or services of a company. It seems difficult to refute that these wronged consumers should be able to seek some form of remedy through the legal system, but it makes little sense for an individual to incur the large costs associated with legal proceedings to initiate a small-value claim against a large corporation. The Supreme Court of Canada endorsed such a view when it ruled that the purpose of class actions is "to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights." A 1982 report on class action claims by the Ontario Law Reform Commission reiterated this point, concluding that the prominence of class actions is a response to the fact that an "individual is very often unable or unwilling to stand alone in meaningful opposition" to large corporate entities.
>
> [Internal references omitted.]
>
> Theodore Milosevic, "What Makes a Consumer? Mandatory Arbitration Clauses and Free Digital Services in Canada" (2017), 75 U.T. Fac. L. Rev. 9 at p. 15.

[160] Fully appreciating these concerns, the social dimension of class actions, and the findings in *Pearce* about the class action waiver in that case (see paras. 230, 236, 240, 244–245, 246–278 of the decision), I nonetheless agree with the respondents that this case involves a different set of circumstances and *Pearce* is not dispositive, even in a post-*Uber* world.

[161] As stated, *Pearce* involved an appeal from two orders: (1) certification of a court-based class proceeding; and (2) dismissal of an application to strike the plaintiffs' claims. In the latter application, the defendants argued that the claims were bound to fail. They also contended that the class action could not proceed because the parties agreed to waive that form of a proceeding. The agreement obliged the parties to attempt to resolve their disputes in good faith. If they were unable to reach a resolution within a defined timeframe, either side could file a court action. However, court claims could not be brought in the form of a "class, consolidated, or representative" action: at para. 89.

[162] There was no arbitration agreement in *Pearce.* As such, the Court's unconscionability and public policy analyses did not take place under the *Arbitration Act*. The appellant suggests this is irrelevant or of diminished impact. However,

Justice Griffin made specific note of the contextual distinction in *Pearce*, acknowledging that "arbitration clause cases" raise different and countervailing considerations:

> [278] The appellants rely on the arbitration clause cases as analogous and as supporting their position that the class action waiver is enforceable. In my view, these cases are of little assistance. As is clear from *Uber*, a valid arbitration agreement may provide a comparable measure of justice to the superior courts: Brown J. at para. 120. The arbitration cases involve legislation that directs the court to stay any legal proceedings where there is a valid arbitration agreement. As the judge observed, there is no similar legislation requiring courts to stay legal proceedings where there is a class action waiver clause (at paras. 155, 156) …
>
> [Emphasis added.]

[163] The legislation in support of enforcing arbitration agreements seeks to give meaningful effect to the "reputed advantages of arbitration", including (but not limited to):

> … the freedom of parties to choose their own procedural rules rather than being bound by rules of court … This enhances expediency and cost-effectiveness in arbitral proceedings, where discovery procedures can be curtailed, written submissions can be used instead of witness testimony, and strict evidentiary rules can be relaxed …
>
> [*Peace River* at para. 65, internal references omitted.]

[164] In this context, there is a "presumption in favour of arbitral jurisdiction":

> In many cases, the shared interests in expediency, procedural flexibility, and specialized expertise will converge through arbitration. In such a scenario, the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve. As is evident from the foregoing, valid arbitration agreements are generally to be respected. This presumption in favour of arbitral jurisdiction is supported by this Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit.
>
> [*Peace River* at para. 72.]

[165] In *Pearce*, there was also a specific finding that the proposed class members were likely not in a position to pursue their claims individually: at para. 244. In other

words, without the ability to proceed by way of a class action, individual members of the proposed class would be unable to access any form of justice. That finding was not challenged on appeal: at paras. 244, 259. There is no such finding in this case.

[166] In my view, *Seidel* (although not dispositive), is of greater assistance than *Pearce* in addressing this aspect of the appellant's argument.

[167] The arbitration agreement in *Seidel* provided for mandated mediation and arbitration. Either party to the agreement was entitled to commence court proceedings to enforce the arbitration result; however, they agreed to waive any right to "commence or participate in any class action … related to any [c]laim": at para. 13 (emphasis removed). Justice Binnie, writing for the majority, described the class waiver in *Seidel* as non-severable and "dependent on the arbitration provision": at para. 46. It was "only by virtue of their agreement to arbitrate that consumers [barred] themselves from a class action" in *Seidel*: at para. 46. Accordingly, from his perspective, if the arbitration provision was rendered invalid, the class waiver would also fall: *Seidel* at para. 46.

[168] Logically, if the arbitration provision was not invalid and thereby enforceable, the class waiver would also follow suit.

[169] This result, it seems to me, is consistent with the intent and the policy rationale underlying s. 15 of the *Arbitration Act*. Unless an arbitration agreement is determined to be void, inoperative or incapable of being performed, the statutory objective of s. 15 must prevail and the arbitration clause, as a whole, is to be enforced: *Peace River* at para. 88. The "policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters": *Wellman* at para. 55, emphasis added.

[170] A class action is a procedural vehicle that neither modifies nor creates substantive rights: *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 17 [*Bisaillon*]; *MacKinnon v. National Money Mart Company*, 2009 BCCA 103 at

para. 68 [*MacKinnon #1*]. In *Bisaillon*, the majority held that the existence of a class action procedure "cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal": at para. 22. This Court has taken the same approach, holding that the fact a plaintiff seeks to have an action certified as a class proceeding does not affect the right to a stay under s. 15 of the *Arbitration Act*: *MacKinnon #1* at para 69.

[171] Given this state of the law, I fail to see how, standing alone, an otherwise valid arbitration agreement is rendered unconscionable or contrary to public policy by mere virtue of the fact that it includes a class waiver. To hold otherwise would, in its effect, undermine *Bisaillon*, *MacKinnon #1* and other binding authorities that make it clear a class action cannot be "used to overcome the exclusive jurisdiction of arbitral tribunals or to modify the substantive rights of parties to arbitration agreements": *MacKinnon #1* at para. 70, emphasis removed.

[172] In *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 [*Dell Computer*], the Supreme Court of Canada impliedly rejected the argument that including a class waiver in an arbitration clause offends public policy. See paras. 105–110 and 224–226 of that decision. Although *Dell Computer* was decided in the context of Quebec's arbitration legislation and is bound up with the wording of that scheme (as it then stood), the outcome of the case is instructive. Justices Bastarache and LeBel made clear that parties can agree to waive class action proceedings as part of an arbitration agreement and it is up to the legislature, not the courts, to create exceptions: at para. 226, dissenting, but not on this point.

[173] In *MacKinnon #1*, this Court held that *Dell Computer* applies in British Columbia, notwithstanding differences in the wording of this province's arbitration legislation: at para. 72. "The fact [a] dispute might otherwise be suitable for certification cannot make the arbitration agreement "inoperative" … [this] would permit a purely procedural law to nullify the parties' choice of a different forum — a

choice which the Supreme Court has ruled must be respected as a matter of substantive law": at para. 72.

[174] Some legislatures have precluded mandatory arbitration agreements and/or class waivers in the consumer context. For example, Ontario, Quebec and Saskatchewan have expressly prohibited mandatory arbitration agreements and class waivers: see ss. 7(2) and 8(1) of Ontario's *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A; s. 11.1 of Quebec's *Consumer Protection Act*, C.Q.L.R., c. P-40.1; and s. 101(2) of Saskatchewan's *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2. Alberta's consumer protection legislation also expressly prohibits mandatory arbitration clauses: see s. 16 of the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3.

[175] Unlike these other provinces, British Columbia has chosen to not preclude mandatory arbitration agreements or class waivers in its consumer protection legislation. In fact, under British Columbia's most recent iteration of the *Arbitration Act*, S.B.C. 2020, Ch. 2, the legislature's continued commitment to the enforceability of arbitration agreements has been made clear: "In matters governed by [the] Act, (a) a court must not intervene unless so provided in [the] Act …": s. 4.

[176] On balance, I do not see that the Amazon arbitration agreement forecloses access to "dispute resolution according to law", thereby undermining the rule of law: *Uber* at paras. 136–137. It does not bar the appellant from advancing a claim against Amazon, "no matter how significant or meritorious": *Uber* at par. 102. It does not penalize or prohibit the appellant from enforcing his contractual and other legal rights: *Uber* at 110. Including a class waiver as part of an otherwise valid arbitration agreement does not, standing alone, contravene public policy: *Dell Computer* at paras. 105–110, 224–226.

[177] In *Uber*, Justice Brown noted that it:

> [130] … will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication. Arbitration may require upfront costs, sometimes significant costs and far greater than those required to commence a court action. But those costs may be warranted in light of the

> parties' relationship and the timely resolution that arbitration can provide. Public policy should not be used as a device to set aside arbitration agreements that are proportionate in the context of the parties' relationship but that one party simply regrets in hindsight.
>
> [Emphasis added.]

[178] The appellant has not persuaded me that this is one of those "rare" cases.

[179] In invoking s. 15(2) of the *Arbitration Act*, the appellant bore the onus of justifying judicial intervention with the arbitration agreement: *Peace River* at paras. 79, 88, 172. Dismissal of an application for a stay will be justified where a party to the agreement is able to establish that the agreement is void, inoperative, or incapable of being performed. However, where "invalidity or unenforceability … is not clear (but merely arguable)", the dispute should generally go before an arbitrator in accordance with the terms of the contract: *Peace River* at para. 89, emphasis added. See also *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at paras. 36-37. As affirmed by the majority in *Uber*, in the absence of a legislative intention to the contrary, "[f]reedom of contract remains the general rule": at para. 86.

[180] I would not accede to the appellant's first two grounds of appeal. He has failed to demonstrate that any analytical shortcomings with the judge's reasoning, even if they could be characterized as palpable, had an overriding effect.

Alternative Ground of Appeal

[181] In light of this conclusion, it is necessary to address the appellant's alternative ground of appeal. He says that if this Court upholds the stay, the judge erred in not allowing him to proceed with the proposed class action in the role as a representative plaintiff.

Appellant's Position

[182] Relying on this Court's decision in *MacKinnon v. Instaloans Financial Solution Centres (Kelowna), Ltd.*, 2004 BCCA 472 [*MacKinnon #2*], the appellant says he is

not required to personally hold the causes of action claimed against the respondents to qualify as a representative plaintiff.

[183] In *MacKinnon #2*, a five-member division considered the question of whether a representative plaintiff in a class action can legally advance causes of action that operate solely to the benefit of other class members: at para. 4. In the context of British Columbia's class action regime, the answer is "yes". While the *Class Proceedings Act* "requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff": at para. 51.

Respondents' Position

[184] The respondents submit that *MacKinnon #2* has no application. It does not stand for the principle that once a proposed class proceeding has been stayed, in whole or in part, the plaintiff may continue to advance the underlying claims on behalf of other class members.

[185] From the respondents' perspective, *Douez v. Facebook, Inc.*, 2015 BCCA 279 (overturned in 2017 SCC 33 on different grounds) [*Douez #2*], is a more salient authority. It held that if a forum selection clause is enforceable against a plaintiff that seeks to certify a proposed class action, the clause is enforceable for all purposes and the action, as an action, cannot proceed further. In *Douez #2*, a forum selection clause was held to be enforceable and the Court stayed the proceedings, as a whole: "Logically, only if the clause is unenforceable against Ms. Douez can the action continue and potentially be certified as a class proceeding. At this point in the analysis there is no class; there is only Ms. Douez …": at para. 44, internal reference omitted.

Analysis

[186] I agree with the respondents (and the trial judge) that *MacKinnon #2* is distinguishable and does not address the question that arises here. *MacKinnon #2* focused on the standing of a proposed representative plaintiff to advance causes of

action in an extant proceeding where there is no privity between that plaintiff and the defendant. This case, on the other hand, is about the nature of the claims that underlay the appellant's proposed class action and whether those claims, in whole or in part, can proceed in court or must be arbitrated as agreed between the parties.

[187] The respondents' application for a stay was brought under what was then s. 15(1) of the *Arbitration Act*, which provided that: "If a party to an arbitration agreement commences legal proceedings in a court … in respect of a matter agreed to be submitted to arbitration … a party to the legal proceedings may apply … to that court to stay the legal proceedings" (emphasis added).

[188] The term "proceedings" is not defined in the *Arbitration Act* and is not qualified in s. 15(1).

[189] However, the term is defined under Rule 1-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], which apply to a request for a stay. A "proceeding" is defined in *Rule* 1-1 as "an action, a petition proceeding and a requisition proceeding". If we substitute this definition for the word "proceedings" in s. 15(1) of the *Arbitration Act*, s. 15(1) allows a party to an arbitration agreement to apply to the British Columbia Supreme Court "to stay the [action]" (emphasis added). The focus is on the proceeding as a proceeding, not on the standing or status of the plaintiff to bring the causes of action set out in the notice of civil claim.

[190] In my view, on the plain wording of s. 15(1) and the interplay between the *Arbitration Act* and the *Rules*, the remedy of a stay is clearly directed at the claims that underlay the action and the forum in which those claims must be heard.

[191] In *Octaform*, this Court described an application under s. 15(1) as an application to stay the "court proceedings … whenever the applicant makes out an arguable case that the parties have agreed that the dispute is one that is to be resolved by arbitration": at para. 21, emphasis added. The *Octaform* description is consistent with how stay applications have been described academically. For

example, in his article “Canadian Arbitration Law after Dell Computer Corp. v. Union Des Consommateurs”, Andrew D. Little notes that:

> On stay applications in the common law provinces, it is nearly always mandatory for a court to stay the court proceeding in favour of domestic or international arbitration on proof of an agreement to arbitrate between the parties, unless one of the specified statutory exceptions applies …
>
> [45 Can. Bus. L.J. (2007) 356 at 362, internal references omitted, emphasis added.]

[192] It is also consistent with *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2023 ONCA 260, in which the Ontario Court of Appeal described a stay in the arbitration context as “effectively [ending] the action before the court”: at para. 17, emphasis added.

[193] The appellant’s proposed class action, which has not yet been certified, is an action advancing claims that are predicated on legal wrongs he says occurred since he opened his Amazon account in 2015 and to which the 2014 Conditions of Use apply. The judge determined that all of these alleged wrongs, other than those under the *Consumer Protection Act*, involve disputes that fall subject to the appellant’s arbitration agreement with Amazon and cannot proceed in the British Columbia Supreme Court. The stay of proceedings properly applies to those parts of the action. Only the remaining claims may continue.

[194] To accept the appellant’s approach to the effect of a stay would defeat its purpose, and, in my view, undermine not only the legislative objective of s. 15(1), but the arbitration agreement itself.

Disposition

[195] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Fitch"