CITATION: Lewis v. Uber Canada Inc. et al., 2023 ONSC 6190
COURT FILE NO.: CV-21-659095-00CP
DATE: 20231101

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: William Daniel Lewis

AND:

Uber Canada Inc., et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *Robert Ben, Stephen Birman Lucy Jackson, and Christos Lazaris*, for the plaintiff

Dana Peebles, Gillian Kerr, Emilie Bruneau, and Britanny Cerqua, for the defendants

HEARD: September 27, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff brings this proposed class action, in which he alleges that he, and the proposed class members, overpaid for the food orders they made using promotional discounts on the Uber Eats App. Specifically, he alleges that goods and services tax ("GST") was improperly calculated on the pre-discounted amount of the order, when it should have been calculated on the post-discounted amount. He thus claims that he and other Uber Eats customers paid for GST they did not owe. On this contested motion, the plaintiff seeks certification of his action.

Background

[2] At this juncture, I set out some brief background to orient the reader. To the extent other facts and evidence are relevant to this motion, I address them in my analysis of the issues.

[3] The defendants (collectively, "Uber") operate a digital platform accessed through the Uber Eats App. The App connects customers with merchants, like restaurants, to order food or other items for delivery.

[4] When a customer places an order on the App, the merchant supplies the food. Up until July 1, 2021, the merchant also supplied the delivery service to the customer. After July 1, 2021, Uber began offering, and charging for, delivery services.

[5] Uber is the collection agent for the merchant for the cost, including GST, that is charged to customers for food and delivery services. Apart from the cost of delivery services that Uber began offering on July 1, 2021, customers do not and did not pay Uber anything; everything they pay goes to the merchant.

[6] The contract between Uber and the merchant provides that Uber transfers the GST it collects from the customer to the merchant, and the merchant remits the tax to the Canada Revenue Agency ("CRA").

[7] The plaintiff claims that he, and other customers who took advantage of promotional offers available on the App, overpaid for their orders on the basis that Uber charged them GST on the pre-discounted price of the food or delivery. They allege that charging GST in this manner violates the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which, according to the plaintiff, requires that the GST owing be calculated on the price of the consideration paid by the customer.

[8] Three kinds of promotional offers may be available on the App, although from the customer's perspective, they are unable to discern into which category a promotional offer falls. The categories are:

a. Merchant offers, where the merchant discounts the value of the good or service provided. These can be offered pursuant to an agreement between the merchant and Uber, or directly from the merchant without Uber's involvement.

b. Uber discounts, since July 1, 2021, where Uber discounts the cost of its delivery fees; and

c. Uber promotions, where Uber offers a promotion to customers without the approval or involvement of merchants for items or delivery services offered by the merchant to customers. In effect, in this category of offer, Uber pays the merchant a portion of the cost of the customer's order.

[9] Although the plaintiff has defined the class he wishes to certify to include customers who used any of the three types of promotional offers when placing an order on the App, it is now common ground that GST on orders placed using Merchant offers or Uber discounts was

calculated on the post-discounted value of the order, just as the plaintiff states it ought to have been[1].

[10] Thus, the crux of this action relates to Uber promotions, where Uber paid a portion of the consideration for the customer's order, but the customer paid GST on the pre-discounted amount, including the amount paid by Uber.

[11] It is common ground that the GST charged by Uber on Uber promotions was remitted to the merchant, and then to CRA. Uber has not retained the GST paid.

[12] It is also common ground that, from the merchant's perspective, and the perspective of CRA, the correct amount of GST was remitted from orders to which Uber promotions applied.

[13] In effect, the plaintiff alleges that Uber, not the customer, ought to have paid the GST on the consideration that Uber paid in respect of the customers' orders.

[14] The plaintiff seeks to certify a national class, defined in its factum as[2]:

> All persons resident in Canada who made a purchase through the Uber EATS App platform using an Uber EATS Promotional Discount at anytime from March 19, 2019 to present.

[15] The plaintiff's amended amended statement of claim pleads the following causes of action:

a. Unfair practices pursuant to provincial consumer protection legislation;

b. False or misleading representations pursuant to ss. 36 and 52 of the *Competition Act*, R.S.C. 1985, c. C-34;

c. Breach of contract; and

d. Unjust enrichment.

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[1] There is one exception, related to the two-month period immediately after Uber began offering delivery services. During that time, Uber offered Uber discounts on its delivery fees and acknowledges that it mistakenly calculated GST on the pre-discounted amount of customers' orders for almost 227,000 customers who made close to 500,000 orders using a $0 delivery charge offer. I am advised that Uber is looking into an effective way in which to refund the overpayment to customers, but over a year after the error was acknowledged, no refund has yet been issued.

[2] The class definition in the amended amended statement of claim has been narrowed by the plaintiff on the motion. In these reasons, I use the most recent proposed class definition.

[16] The plaintiff seeks aggregate damages of $2,000,000 and further punitive, aggravated and exemplary damages of $2,000,000. The plaintiff also seeks declaratory relief, including a declaration that Uber breached the *ETA*. However, the proposed common issues do not include any questions related to Uber's alleged breach of the *ETA*.

Issues

[17] On this motion, I must determine whether to certify the plaintiff's action as a class proceeding under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). This case raises the following issues:

a. As a threshold matter, is it plain and obvious that the claim will not succeed, such that certification must be denied under s. 5(1)(a) of the *CPA* because it is barred by ss. 224.1 and 312 of the *ETA*?

b. If it is not plain and obvious that the claim is barred by the *ETA*:

    i. Do the pleadings disclose a cause of action in:

        1. Breach of provincial consumer protection legislation;

        2. Breach of the *Competition Act*;

        3. Breach of contract;

        4. Unjust enrichment?

    ii. Is there an identifiable class of two or more persons that would be represented by the proposed representative plaintiff?

    iii. Do the claims of the class members raise common issues?

    iv. Is a class proceeding the preferable procedure? This includes considering whether a class proceeding is superior to all reasonably available means of determining the class members' entitlement to relief, and whether the questions of fact or law common to the class members predominate over individual questions.

    v. Is there a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members, and does not have, on the common issues for the class, an issue in conflict with the interests of the other class members?

Is it plain and obvious that the plaintiff's action is barred by the provisions of the *ETA*?

[18] The threshold question posed by Uber – whether it is plain and obvious that the plaintiff's action is barred by the provisions of the *ETA* – is raised in the context of s. 5(1)(a) of the *CPA* which requires that a claim disclose a cause of action.

[19] The question must thus be considered in light of the relevant legal principles, succinctly described by Lax J. in *Fresco v. CIBC*, 2009 CanLII 31177, (Ont. S.C.) at para. 22. Of particular note here, the pleading will only be struck if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect. Moreover, the pleading must be read generously to allow for inadequacies due to drafting frailties.

[20] Uber argues, as a threshold matter, that the plaintiff's action is, properly characterized, an action to recover GST paid under the *ETA* but outside of the scheme created by the *ETA* for the recovery of GST wrongly paid. Uber states that it is plain and obvious that the action is not permitted by the terms of the *ETA* such that the action fails the first element of the test for certification: that the pleadings disclose a cause of action.

[21] The plaintiff argues that his action is not for the recovery of GST, but rather a claim against Uber in which the question is which of them had the obligation to pay the GST. The plaintiff thus characterizes the claim as being outside of the *ETA* regime. The plaintiff argues that his action is not captured by the statutory bars in the *ETA*.

[22] There are several provisions of the *ETA* relevant to this motion, all of which are contained in Part IX of the *ETA*. First, s. 165(1) sets out the obligation to pay GST:

> Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

[23] There is also a provision, enacted in 2010, barring any action for the collection of tax, in s. 224.1:

> No person, other than Her Majesty in right of Canada, may bring an action or proceeding against any person for acting in compliance or intended compliance with this Part by collecting an amount as or on account of tax.

[24] Section 312 of the *ETA* limits the right of recovery for taxes paid under Part IX to those contained in the statute only:

> Except as specifically provided in this Part, … no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.

[25] The *ETA* provides for a rebate of a payment of GST that was not payable or remittable by a person, in s. 261(1):

> Where a person has paid an amount
>
> (a) as or on account or, or
>
> (b) that was taken into account as,
>
> tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, … pay a rebate of that amount to the person.

[26] In the context of this statutory scheme, I must consider whether the plaintiff's action, properly characterized, is for the recovery of tax paid, and if so, whether it is barred by the statutory provisions.

What is the plaintiff's claim for?

[27] As I have already noted, the plaintiff grounds his claim in four causes of action. At this juncture, it is necessary to dig a little deeper into the nature of the claims to ascertain their proper characterization.

[28] At the heart of the plaintiff's claim lies the allegation that Uber wrongly calculated tax under the provisions of the *ETA*. This alleged error grounds the different causes of action in different ways.

[29] First, the plaintiff alleges that, in breach of provincial consumer protection legislation, Uber engaged in an unfair practice by making a false, misleading or deceptive representation in its Uber promotion proposals. In particular, the plaintiff alleges that Uber overstated the value of the promotional discounts, by, among other things, representing that class members would receive promotional discounts without specifying that GST would be calculated on the regular purchase price, thereby reducing the value of the discount, and failing to disclose that the manner in which it calculated GST does not comply with the *ETA*.

[30] The plaintiff also alleges that the Uber promotion proposals were unconscionable representations because Uber knew or ought to have known that it calculated GST in a manner that does not comply with the *ETA*.

[31] There are other allegations pleaded, but they amount to the same thing: a complaint that Uber did not tell consumers that, in the case of Uber promotions, the consumer would be charged tax on the pre-discounted value of the order, a calculation of GST that Uber knew was in breach of the *ETA*. There are thus two key elements to the claims made under provincial consumer protection legislation: (i) failing to disclose that Uber was improperly overcharging its customers GST; and (ii) improperly overcharging GST under the *ETA*. Both are indelibly linked to alleged breaches of the *ETA*.

[32] Second, the plaintiff alleges breaches of the *Competition Act*, arguing that Uber knowingly or recklessly made a representation to the public that is false or misleading in a material aspect. Specifically, the plaintiff argues that Uber's promotional discounts were false and misleading for the same reasons that they are alleged to be unfair practices, that is, because Uber knowingly failed to disclose to customers that it was overcharging GST, and because it was charging GST in a manner that does not comply with the *ETA*. As with the claims grounded in consumer protection legislation, the plaintiff's claims under the *Competition Act* are indelibly linked to alleged breaches of the *ETA*.

[33] Third, the plaintiff claims against Uber for breach of contract. The statement of claim pleads that Uber's customers entered into a contractual relationship with Uber, as part of which Uber agreed to honour the promotional discounts it offered. The promotional discounts appeared in many forms, with varying language dealing with taxes payable. Examples include: "Taxes and Delivery Fee still apply"; "Discount does not apply to taxes and fees…"; "Discount will not apply to order taxes and fees"; "Discount not valid on taxes and fees which still apply"; and "Discount is based on regular menu item price and does not apply to taxes and fees".

[34] The plaintiff pleads that it was an express or implied term of the agreement that GST would be calculated on the discounted price of the food order, and the promotional discount would not be offset by improperly charging GST on the regular purchase price. There is no such express term.

[35] However, there is an express term on which the plaintiff relied heavily in argument, although (i) it was not pleaded; (ii) it was not mentioned by the plaintiff's expert; (iii) no cross-examination questions were asked of Uber's witnesses with respect to the term; and (iv) when questions were asked on cross-examination of the plaintiff's witnesses about the term, the questions were refused. This term provides that: "[c]harges will be inclusive of applicable taxes where required by law." At the motion, the plaintiff argued that the contract thus included an express term that Uber would not calculate or charge tax except "where required by law."

[36] In his factum on the motion, the plaintiff identifies the breaches of contract as (i) charging GST on the regular purchase price contrary to a plain reading of the promotion offered, and (ii) charging tax in a manner that contravenes the *ETA*.

[37] Both of these alleged breaches come down to the same thing: the allegation that Uber, contrary to its agreement to charge tax "where required by law", charged GST in a manner not permitted by the *ETA*. There is no other conclusion to reach, because while the plaintiff raises the "plain reading of the promotion offered", it does not identify any such promotion. The only term that the plaintiff has identified is the term that Uber would charge tax "where required by law".

[38] It is thus apparent that the breach of contract term hinges on a determination that the GST Uber charged the customers was not permitted under the *ETA*.

[39] Finally, the plaintiff claims based on the doctrine of unjust enrichment. The unjust enrichment pleaded is that Uber was enriched by overcharging GST to its customers. If GST were charged in accordance with the *ETA*, that would be a juristic reason for the enrichment.

Accordingly, the unjust enrichment claim also hinges on a determination that Uber charged GST in a manner contrary to the *ETA*.

[40] Each of the plaintiff's causes of action requires a finding that Uber breached the *ETA* in the manner in which it calculated the taxes owing by its customers when an Uber promotion was used. The recovery the plaintiff seeks is a return of the money he says he was not obliged to pay in taxes.

[41] Although the plaintiff has structured his claim to seek damages, it is, in fact, a claim for the recovery of the tax he alleges was wrongfully charged by Uber.

[42] Having properly characterized the plaintiff's claim as one for the recovery of tax, I turn to consider whether such an action is prohibited under the terms of the *ETA*.

Is it plain and obvious that the plaintiff's claim captured by the statutory bar?

[43] The parties disagree about the proper interpretation of the statutory bars. The plaintiff argues that it is not plain and obvious that they apply, in part, because his action is not for the recovery of tax, an argument I have already rejected, and in part because he states Uber is not a "supplier" under the *ETA*, and thus is not entitled to the benefit of the statutory bars.

[44] I turn to review the case law that has interpreted the provisions at issue.

[45] The Federal Court of Appeal considered s. 312 of the *ETA* in *Merchant Law Group* v. *Canada Revenue Agency*, 2010 FCA 184. In that case, the appellant law firms had brought a proposed class action in the Federal Court against CRA in which they alleged that CRA should not have required them to collect or remit GST on exempt disbursements charged to their clients. The Federal Court struck the statement of claim.

[46] On appeal to the Federal Court of Appeal, Stratas J.A. found that the proposed class action, properly characterized, was an attempt to recover GST outside of the *ETA*.

[47] Stratas J.A. noted the wording of s. 312 of the *ETA*. He agreed with the Federal Court that the statutory language of the provision was determinative: it removes any right to recover any money paid as tax except as provided by Part IX of the *ETA*: *Merchant Law Group*, at paras. 17-18. "[I]f recovery of GST can only be had under Part IX of the Act, all causes of action pursued outside of the Act must be barred."

[48] In reaching his conclusion, Stratas J.A. regarded the decision in *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506, 98 O.R. (3d) 673, as highly persuasive (on me, it is binding). In *Sorbara*, the Court of Appeal for Ontario found the *ETA* "provides a complete statutory framework with respect to a taxpayer's claim for a rebate of GST paid under Part IX of the *Excise Tax Act*". The Court of Appeal concluded that Parliament has given the Tax Court exclusive jurisdiction to deal with claims arising out of, among other things, taxpayers' claims for rebates of GST paid: *Merchant Law Group*, at paras. 14-15, citing *Sorbara*, at paras. 9 and 11.

[49] The plaintiff distinguishes these cases on the basis that they were each brought against the government, while his case is against private entities. He is correct that is a difference, but recall the wording of s. 312:

> Except as specifically provided in this Part, … no person has a right to recover any money paid to Her Majesty as or on account of, or that has been taken into account by Her Majesty as, tax, net tax, penalty, interest or any other amount under this Part.

[50] The section does not limit the bar against recovery to only those proceedings against the government. Nor does it restrict the application of the bar to suppliers. On its face, the bar is engaged when money is paid to the government as tax, because Part IX of the *ETA* provides a mechanism for a rebate. The funds in issue in this case were remitted to the government as GST. I conclude that it is plain and obvious that s. 312 prohibits the plaintiff's action. The scheme of the *ETA* requires the plaintiff to turn to the rebate mechanism contained in s. 261(1) to obtain a rebate of the GST wrongly paid.

[51] I pause here to note the plaintiff's argument that the government would not give a rebate because it has received the correct amount of GST on the orders Uber customers placed using an Uber promotion. Apart from the fact that there is no evidence in the record about what the government might do were a request for a rebate made by an Uber customer, a plain reading of s. 261(1) does not support the conclusion that a rebate is not a viable option for the plaintiff or class members. The section applies when a person (e.g. a class member) has paid an amount in tax "in circumstances where the amount was not payable or remittable by the person", and directs that in such circumstances, the Minister shall grant a rebate. The focus of the section is on tax payable or remittable by the person, not the tax owing with respect to the goods or service. If the plaintiff is correct that he paid an amount in GST that was not payable by him, but was payable by Uber, s. 261(1) suggests that he is entitled to a rebate.

[52] I also find that it is plain and obvious that s. 224.1 applies to bar the plaintiff's claim. For ease of reference, I repeat that s. 224.1 provides that "no person, other than Her Majesty in right of Canada, may bring an action or proceeding against any person for acting in compliance or intended compliance with this Part by collecting an amount as or on account of tax."

[53] To the extent the plaintiff argues that s. 224.1 applies only to suppliers under the *ETA*, which in the plaintiff's view is the merchant, not Uber, that argument has been rejected. In *Vancouver City Savings Credit Union v. Naidoo*, 2014 BCSC 2143, the British Columbia Supreme Court considered s. 224.1 and found that its intent is "to protect parties in the position of [the petitioner] or its agents who, at some stage, collect GST funds directly or indirectly on behalf of the Crown."

[54] The court's conclusion about the breadth of s. 224.1 is supported by the well-respected David Sherman, who writes in *Canada GST Service*, Analysis/Commentary – Analysis, 224.1, that s. 224.1 provides that "no-one can sue anyone else for charging or collecting GST or HST".

[55] Moreover, giving s. 224.1 a broad interpretation is consistent with a plain reading of the provision, and with the Ontario Court of Appeal's conclusion in *Sorbara* that Part IX of the *ETA* is a complete statutory framework which provides a mechanism for recovery of GST wrongly paid.

[56] The plaintiff argues that he has pleaded that Uber knowingly or recklessly overcharged GST, such that it cannot avail itself of s. 224.1 because it did not act in "compliance or intended compliance". The problem with this argument is that the plaintiff has not pleaded any material facts to support its allegation that Uber's actions in charging and delivering the GST (assuming it was incorrectly calculated) to the merchant to remit were knowing or reckless. Rather, the plaintiff has pleaded the allegation only. As the Federal Court of Appeal held in *Merchant Law Group*, at para. 34, a bare assertion of the conclusion the court is called to pronounce is not an allegation of material fact. There are no pleaded material facts that operate to take this case outside of the ambit of s. 224.1 of the *ETA*.

[57] I thus conclude that it is plain and obvious that the plaintiff's claim cannot succeed because it is barred by ss. 312 and 224.1 of the *ETA*. The claim fails scrutiny under s. 5(1)(a) of the *CPA*.

[58] This conclusion also applies to the claim related to the error in calculating GST that Uber has admitted occurred when it transitioned to offering delivery services in July 2021. In the case of those claims, Uber has admitted an error in the calculation of tax. However, the wrongly paid tax is subject to the rebate scheme set out in s. 261(1), and for the reasons above, cannot be recovered in an action against Uber.

[59] My conclusion that the statutory bars in the *ETA* operate to bar the plaintiff's claim in its entirety is sufficient to dispose of the certification motion. However, had I not concluded that the *ETA* operates to bar the plaintiff's claim, I would not have certified it for other reasons. For completeness, I briefly discuss the other fatal problems that I find plague this claim.

Other Reasons not to Certify the Claim

General Principles Applying to Certification Motions

[60] Because the parties were in substantial agreement as to the legal principles that apply to certification motions, I do not propose to repeat them all in these reasons. However, before I describe the other reasons why I would decline to certify the plaintiff's claim, I take note of the Supreme Court of Canada's jurisprudence on the standard of proof to apply on a certification motion, because that jurisprudence is relevant to my conclusions in this case.

[61] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court of Canada provided guidance on the proper approach to the standard of proof and evidence on a certification motion.

[62] The Court noted that Canadian courts do not engage in a robust analysis of the merits of a claim at the certification stage; the outcome of a certification motion is thus not predictive of the success of the common issues trial. However, neither does the certification motion "involve such

a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys*, at paras. 103, 105.

[63] On a certification motion, the class representative is required to show some basis in fact for each of the certification requirements set out in the *CPA*, other than the requirement that the pleadings disclose a cause of action. The focus is on whether the form of the action is such that it can proceed as a class action. Thus, the question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact that establishes the certification requirements: *Pro-Sys*, at paras. 99-100.

Section 5(1)(a) – do the pleadings disclose a cause of action?

[64] With respect to this factor, my concerns are as follows.

[65] First, the plaintiff's claim that sounds in provincial consumer protection legislation is flawed because the plaintiff has not pleaded material facts in support of his allegation that there is a consumer agreement in place between the plaintiff and Uber. The definition of "consumer agreement" in the Ontario legislation requires that there is an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment. In this case, the plaintiff has not pleaded that he paid Uber anything. The claim pleads the standard services agreement, which indicates that Uber will "facilitate payments to Third Party Providers". Thus, the claim fails to adequately plead the requirements of a breach of Ontario consumer protection legislation. Moreover, an amendment is not likely to correct the issue, as the evidence that exists on the record suggests that the plaintiff did not pay Uber for anything.

[66] With respect to the consumer protection legislation in other provinces, the claim makes no effort to distinguish the elements relevant to any province apart from Ontario. In British Columbia, Alberta, Saskatchewan, and Newfoundland, reliance is required to claim a remedy, but no reliance in pleaded. Quebec only allows claims for damages to proceed when pleaded under the *Civil Code of Quebec*, but that statute is not referenced in the claim. Although the plaintiff pleads a claim based in unfair practices, no such cause of action exists in Nova Scotia, the Northwest Territories or Nunavut. Moreover, in British Columbia, there is no statutory cause of action for the failure to disclose information, which is at the heart of the plaintiff's allegations.

[67] Second, under the *Competition Act*, misrepresentation by omission is not actionable. The Act contains no positive duty to disclose: *Rebuck v. Ford Motor Company*, 2022 ONSC 2396, at para. 45. The foundation of the plaintiff's misrepresentation claims is that Uber did not tell him that they would calculate tax on Uber promotions on the pre-discounted value of the order (or, as the plaintiff sometimes characterizes it, that they would charge GST in a manner not permitted by the *ETA*).

[68] More importantly, however, is the fact that the plaintiff has not pleaded reliance. There was some disagreement about whether reliance is required under the *Competition Act*. In my view it is, and has been determined to be so in the jurisprudence.

[69] To ground the claim under the *Competition Act*, the plaintiff relies on s. 52 and s. 36. Section 52(1), a criminal provision contained in "Part VI – Offences in Relation to Competition" provides that:

> No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[70] Section 52 thus proscribes certain conduct. It does not mention reliance, and it would be odd if it did, given its purpose.

[71] A civil cause of action is provided for under s. 36(1), which provides that any person who has suffered loss or damage as a result of conduct that is contrary to any provision of Part VI (like s. 52), may "sue for and recover from the person who engaged in the conduct…an amount equal to the loss or damage proved to have been suffered by him…"

[72] Requiring proof of damage suffered as a result of conduct contrary to s. 52(1) has been determined in the jurisprudence to require proof of reliance: *Matoni v. CBS Interactive Multimedia,* 2008 CanLII 1539 (Ont. C.A.), at para. 40, *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650, at para. 113; *Singer v. ScheringPlough Canada Inc.,* 2010 ONSC 42, at paras. 107-108.

[73] The plaintiff relies on case law that he says casts doubt on this proposition: *Rebuck*, and *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423.

[74] I agree with Perell J. in *Hoy* that it is a "debatable proposition whether on a close reading" *Rebuck* and *Drynan* "are inconsistent with the authorities that establish that proof of reliance is a requisite for a claim under the *Competition Act*", and moreover, "given the binding appellate authority on that matter, to the extent that there is an inconsistency, I ought not and I do not follow those cases on this particular point": *Hoy,* at para. 116.

[75] I also note that there are no material facts pleaded in support of the allegation that Uber acted recklessly or knowingly, even assuming one could find a positive misrepresentation in this case.

[76] With respect to the plaintiff's claim for punitive damages, I note that there are no pleaded material facts to support the bald allegations that Uber's acts were "harsh, vindictive, reprehensible and malicious". Nor is there any reason in the record before me to conclude that this is a drafting frailty; the pleading of material facts is not there because no material facts to support a claim for punitive damages has been identified.

[77] While in my view, there are also problems with the pleadings of breach of contract and unjust enrichment, those are largely amenable to correction by way of amendment, so I do not dwell on those here because they are not controlling issues in the motion.

<u>Section 5(1)(b) – is there an identifiable class?</u>

[78] The class the plaintiff now seeks to certify is:

> All persons resident in Canada who made a purchase through the Uber EATS App platform using an Uber EATS Promotional Discount at anytime from March 19, 2019 to present.

[79] Because we now know that only one category of "promotional discount" was taxed based on its pre-discounted value (the Uber promotions), only those who purchased using an Uber promotion should be in the proposed class. The class definition is thus overbroad, but that is a fixable problem.

[80] It will likely be difficult and time-consuming but at least theoretically possible to identify which orders were purchased with an Uber promotion by calculating the amount on which GST was charged on the order to determine if it was pre-discount or post-discount value.

[81] However, there is one irreparable problem with this class definition; there is no way to determine which Uber promotion a customer used. There were many, many different promotions, and many different versions of the language used on those promotions. The plaintiff argues that the different disclaimer language about the tax amounts to the same thing, but even he acknowledged on cross-examination that at least one example of the disclaimer language was sufficient to let people know they would be charged tax on the pre-discounted value of the order. If different language attracts different consequences in the action, there will be no way to identify which purchaser is in or out of the class.

[82] Put another way, the workability of the class definition, at least with respect to the misrepresentation-related causes of action, depends on the plaintiff securing a certain result at the common issues trial that would render the differences in wording of the representations meaningless. But that is far from a given result, and inconsistent with the evidence of the representative plaintiff.

[83] As the British Columbia Court of Appeal said in *Harrison*, 2018 BCCA 165, at para. 51:

> Given the number of different packages and the frequency of changes in the representations, the practical difficulties of placing individuals within or outside of the class will be insurmountable.

Section 5(1)(c) – Common Issues

[84] In my view, there are also problems with the common issues the plaintiff seeks to certify. I detail the most serious of these here. These turn largely on the fact that there is not a sufficient basis in fact to conclude that these issues are in fact common to the class, that is whether the resolution of those issues will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SC 46, [2001] 2 S.C.R. 534, at para. 39

[85] With respect to the provincial consumer protection legislation claims, and the *Competition Act* claims, there were multiple versions of Uber promotions with varying language. Any

misrepresentation analysis will have to look at the individual promotions. I disagree that this is a case like *Drynan*, where the alleged misrepresentation can be distilled into a core misrepresentation or a couple of core misrepresentations. The misrepresentation issues are only common when cast at the most general level. In practice, they will break down into a multitude of individual issues.

[86] Moreover, with respect to the *Competition Act* claims, s. 52 requires that the alleged misrepresentations must be "material", an issue which relates to an individual's purchasing behaviour. All of the plaintiff's evidence, both his own and that of other class members, suggests that they continued to make purchases on the App after this lawsuit was commenced, knowing that in the case of an Uber promotion, tax would be charged on the pre-discounted amount. For some, their purchasing patterns did not change. Others purchased less often. A commons issues trial judge cannot extrapolate from the evidence of a few class members to reach conclusions about the materiality of the misrepresentations (which, I note, is distinct from the materiality of the discount).

[87] Similarly, the reliance required under the *Competition Act* is also an issue that is individual in nature. The plaintiff gave evidence that he did not read the disclaimer language. Other class members may have. There is no basis to conclude that reliance is a common issue.

[88] With respect to the breach of contract claims, to the extent that the alleged breached term is contained in an individual Uber promotion, the issue is not common to all class members. To the extent the claim relies on implied terms, those are often inappropriate for certification because they require individual assessment: *Fairview Donut v. TDL Group*, 2012 ONSC 1252, at paras. 281, 285, aff'd 2012 ONCA 867. Here, the evidence suggests that to the extent the plaintiff or other class members believe that there was an implied term that GST be calculated in a certain manner, that expectation arose from their past purchasing history. The assessment of any implied term in this case would require individual examination of each class member's circumstances.

[89] Finally, the proposed common issues relating to aggregate damages are not supported by expert methodology that is sufficiently credible or plausible to establish some basis in fact for the commonality requirement. The methodology proposed by the plaintiff's proffered expert (whose evidence I address, *infra*) to establish loss on a class-wide basis is not realistic because it assumes an evidentiary foundation which does not exist: *Microsoft*, 2013 SCC 57, at paras. 117-118; *Hoy*, at para. 272. I reach this conclusion principally because the most that can be identified on an aggregate basis is which orders were taxed based on the pre-discounted value. There is no way in which an order can be linked to the specific disclaimer language. Thus, at least with respect to the misrepresentation claims, the aggregate damages questions will break down into individual issues.

Section 5(1)(d) – Preferable Procedure

[90] In my view, a class action is not the preferable procedure in this case.

[91] First, even if the statutory bars in the *ETA* did not apply, the mechanism set out in s. 162(1) provides a preferable procedure for the resolution of the class members' claims. The scheme to recoup an overpayment of GST is an administrative process that does not demand the complex steps of a class proceeding. The administrative procedure is open to anyone who has overpayments

of GST totalling at least $2.00. Given the low threshold for recovery, I find it is a viable method for class members to seek access to justice.

[92] Moreover, since the recent amendments to the *CPA*, s. 5(1.1) requires that the common issues must predominate over the individual issues. I have already explained that many of the proposed common issues will break down into individual issues, in particular as they relate to the misrepresentation-based claims. These proposed common issues are only common when cast at the most general level. They do not predominate over the individual issues in this case.

Section 5(1)(e) – Representative Plaintiff

[93] I note here only briefly that the representative plaintiff has an interest adverse to at least one other class member. He gave evidence that his girlfriend used his Uber account to place orders which she then paid him for. As between them, then, there would be competing claims for reimbursement for orders paid for through his App, but reimbursed by her. However, I would expect this issue could be addressed. On its own, it would not bar certification.

The Expert Evidence

[94] Finally, I turn to the question of the admissibility of the expert evidence. The expert evidence was, almost entirely, unhelpful on this motion. The only time I made any reference to it was in the context of the proposed common issue on aggregate damages, and there only to conclude that the methodology proposed by the plaintiff's expert to calculate aggregate damages did not reflect the reality of the evidence that would be required to calculate damages on an aggregate basis.

[95] However, Uber objected to the plaintiff's expert, and seeks its costs related to both, objecting to the expert, and having to obtain a responding expert report. Uber candidly admitted that its view was that its own expert's report ought also to be excluded, but that if the plaintiff's report went in, its report ought also to go in.

[96] I have no difficulty in concluding that neither expert report meets the requirements set out in *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 S.C.R. 182 and *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9.

[97] The plaintiff's expert, Mr. McQueen, purports to opine that Uber breached the *ETA* by calculating GST on the pre-discount amount of the order when a customer used an Uber promotion. The question of the interpretation and application of the *ETA* is a question of domestic law, and thus generally not an appropriate one for an expert: *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463.

[98] As I have earlier demonstrated, the key issue that is woven through all of the plaintiff's claims is the question of whether Uber correctly calculated tax under the *ETA*. An expert who purports to give evidence on that issue is giving evidence on the ultimate issue, which is the purview of the trial judge. One of the dangers of expert evidence highlighted by the Supreme Court

of Canada in *Mohan*, at p. 24, is that experts may be permitted to usurp the functions of the trier of fact.

[99] I thus conclude that the evidence of Mr. McQueen is not necessary, because it is directed at the interpretation of domestic law which is not outside the competence of the judges of this court. The evidence fails the first branch of the *Mohan* test as a result.

[100] As Mr. McQueen's evidence is inadmissible, so too is the evidence of the defendant's expert.

Costs

[101] The parties made significant progress in negotiations on the appropriate amount of costs for the hearing, with a separate figure attaching to my determination of the issue of the admissibility of the proposed expert evidence. However, their resolution was not final at the time of the motion.

[102] I thus ask the parties to finalize those negotiations, if they have not already done so. In the event they are unable to do so, they shall advise my judicial assistant within three weeks of the release of these reasons that they must make costs submissions, and I will direct a process for so doing.

J.T. Akbarali J.

Date: November 1, 2023