Court of King's Bench of Alberta

Citation: Virani v Uber Portier Canada Inc, 2023 ABKB 240

Date:
Docket: 2001 08472
Registry: Calgary

Between:

Shaneef Mohamed Virani

Plaintiff

\- and -

Uber Portier Canada Inc., Uber Rasier Canada Inc., Uber Castor Canada Inc., Uber Technologies Inc., Uber Canada Inc., Uber B.V., Rasier Operations B.V. and Uber Portier B.V.

Defendants

Decision
of the
Honourable Justice R.A. Neufeld

I. Introduction

[1] Shaneef Virani is an Uber Driver. He uses the Uber application ("Uber app") to provide rideshare services to people who use that same app to get into contact with him, and to pay for his services.

[2] Mr. Virani has agreed to undertake the duties and responsibilities of a Representative Plaintiff in bringing this action against Uber Portier Canada Inc., Uber Rasier Canada Inc., Uber

Castor Canada Inc., Uber Technologies Inc., Uber Canada Inc., Uber B.V., Rasier Operations B.V. and Uber Portier B.V. These Defendants will be referred to as Uber.

[3] Mr. Virani seeks certification of his action under the *Class Proceedings Act*, SA 2003 c C-16.5 [*CPA*]. He does so on behalf of Uber Drivers in all Canadian provinces other than Prince Edward Island and Ontario. The putative class numbers 176,935 as of December 1, 2021.

[4] A similar certification application relating to Ontario drivers only was granted by the Ontario Superior Court of Justice on August 12, 2021: ***Heller v Uber Technologies Inc***, 2021 ONSC 5518 [***Heller***]. I have had the benefit of the extensive reasons for decision of Justice Perell in that case. While not binding upon me, his discussion of Uber's business model and governing principles of employment law as applied to the class action certification process has been of great assistance.

[5] In ***Heller***, Justice Perell determined that certain of the claims in the proposed class action should be certified. He summarized his findings as follows:

> a. The Plaintiffs satisfy the cause of action criterion for their causes of action of: (a) breach of contract; and (b) breach of the *Employment Standards Act, 2000*. They do not satisfy the cause of action criteria or the preferable procedure criteria for their claims of: (a) unjust enrichment; and (b) negligence.
>
> b. The Plaintiffs satisfy the identifiable class criterion, but the class definition needs a modest revision to identify the putative Class Members simply as Uber App users rather than begging the question of whether they are "working for" Uber.
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> c. There are certifiable common issues for the breach of contract and the breach of the *Employment Standards Act, 2000* causes of action. The question of aggregate damages, however, is not certifiable as a common issue. This question of punitive damages is also not certifiable as a common issue.
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> d. The Plaintiffs satisfy the preferable procedures criterion.
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> e. It is conceded that Mr. Heller and Ms. Garcia satisfy the representative plaintiff criterion.
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> f. The Plaintiffs' action should be certified as a class action.
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> g. At this juncture of the proceeding, nothing needs to be done with respect to the Arbitration and Class Action Waiver Clause except insofar as its significance, if any, needs to be addressed in the notice of certification.
>
> h. Extreme care must be taken with respect to the notice of certification to bring to the attention of the putative Class Members: (a) the legal significance of the Arbitration and Class Action Waiver Clause; and (b) the legal consequences of their having exercised or conversely their not having exercised the right to opt-out of the Arbitration and Class Action Waiver Clause.

[6] Justice Perell's decision shaped both the application before me and the arguments advanced. For example, the Applicants propose a definition of the class member that reflects the change required by Justice Perell and have abandoned their request for aggregate damages. In argument, both sides urged me to follow findings from ***Heller*** that were favourable to them and to reject those that were not.

II. Summary of Positions

[7] The Applicant's principal arguments can be summarized as follows:

1. The action is based on well-recognized cause of action: breach of employment statutes, breach of contract, unjust enrichment and illegality of contract, satisfying s. 1(a) of the *CPA*.
2. The proposed class is readily identifiable and definable as any person who used the Uber app to transport passengers and/or provide delivery services pursuant to an Uber Service Agreement in the subject provinces.
3. The claims of Class Members raise common issues that will move the litigation forward and advance the claims of all putative Class Members.
4. A class proceeding is the preferable way of proceeding as it will resolve the common issues to benefit of all Class Members and Uber.
5. Mr. Virani is a suitable Representative Plaintiff, who has no conflict with the rest of the class.

[8] The primary arguments advanced by Uber in opposing the application are:

1. While the Statement of Claim discloses a cause of action in respect of breach of contract (including alleged breach of an implied term of compliance with applicable employment standards legislation), the claim for unjust enrichment is doomed to fail and cannot be certified.
2. The relationship between Uber and those using the Uber app to provide passenger and delivery service is case dependent, and varies by driver, both by time (i.e. the context and vintage of the agreement in question) and by location.
3. The motivation and aspiration of drivers also varies, including their views as to the desirability of being an employee or dependent contractor versus an independent contractor, such that a "common issue" cannot be easily ascertained.
4. A class action is not the preferred method of resolving this dispute. Because the answer to the employee/independent contractor question is fact dependent, or a driver-by-driver basis, (as are damages), no efficiency is gained by proceeding under the *CPA*. In both British Columbia and Quebec, alternative dispute resolution is available – free of charge – under employment standards legislation, and drivers are free to use arbitration remedies under Uber's updated services agreement.

5. While Mr. Virani is otherwise suitable, the position he advocates (that all Uber drivers are, at law, employees for the purposes of employment standards legislation) conflicts with the desire of many Uber drivers to continue under the *status quo*.

III. Facts

A. The Uber Business Model

[9] As I mentioned previously, in ***Heller***, Justice Perell has provided a comprehensive explanation of Uber, its service agreements, the arbitration and class action waivers, and the external regulatory environment of ridesharing: at paras 74-117. Consequently, I shall provide a brief summary of Uber rather than duplicate the description provided there.

[10] Uber is a group of interrelated companies that invent, develop, licence, operate, market, and improve software applications that create a digital marketplace in which service providers (known as Drivers or Earners) provide transportation or take-out delivery services to individuals (known as Riders or Eaters, respectively). Drivers can also provide parcel delivery services using Uber Connect.

[11] On the Uber Rides app, Drivers and Riders connect through their GPS-enabled smartphones to obtain rides. On the Uber Eats app, Drivers, Eaters and merchants likewise connect through their smartphone for delivery services.

[12] Drivers have flexibility to determine when, how, and where they provide services using the Uber apps.

[13] Over the period relevant to the proposed class, Uber has updated its technology and subsequently altered its app features and functions, licencing agreements and addenda, and community guidelines. Some of these changes permit Drivers to negotiate fares, subcontract their service, contractual requirements to wait for Riders, and the possibility of Driver’s losing access to the app for excessive cancelling of trips or deliveries.

B. Affidavits of Potential Class Members

[14] Several Drivers provided affidavits describing their relationship with Uber, on behalf of both sides.

[15] Mr. Virani, the Representative Plaintiff, began providing rideshare services using Uber in July 2018. Mr. Virani describes that he believes he is an employee of Uber and not an independent contractor because Uber has an onboarding process, provides instructions about the performance of duties, controls key information about Riders and Eaters, restricts ongoing relationships with Riders or Eaters, sets the rates for service (although a Driver may negotiate a lower fare), imposes conditions for vehicle type and fitness, maintains a rating system, accepts the risk of loss if there are payment issues with a Riders’ or Eaters’ credit card, controls the flow of payment, amongst other things.

[16] Mazal Yeretzian drives using Uber in Quebec and Colin Smith drives using Uber in Nova Scotia. Their affidavits share similar themes. They depose that they view themselves as employees of Uber and not an independent contractor because Uber facilitates their relationship with Riders. They cannot request specific passengers and *vice versa*, and Uber controls the amount paid to Drivers. Further, Mazal views themselves as an employee because they

completed paperwork with Uber before commencing service, and Colin views himself as an employee because Uber suspended his account while his vehicle was undergoing repair work following a collision.

[17] Burak Saglam is a student in Calgary. Burak originally used DoorDash and SkipTheDishes to earn extra income while not attending classes or studying but switched to Uber after obtaining a class four licence and purchasing a suitable vehicle. Burak uses Uber because it is flexible and provides an opportunity to interact with customers, and views their use of Uber as their own business.

[18] David Kehoe drives for Uber in Saskatoon when not working as a retail store manager and running an online woodshop business. David likes the flexibility and freedom that Uber provides, and is strategic about using the Uber app to provide service when it is most profitable. For example, David logs on when it is evident, from the Rider-side of the app interface, that surge pricing is in effect and logs off when Rider demand abates or Driver supply increases. David considers himself self-employed and would no longer use Uber if considered an employee.

[19] Debra-Lee Taylor delivers food as using Uber Eats in addition to her full-time job as an accountant in the Montreal area. Debra-Lee uses Uber Eats because it is more flexible than part-time food delivery jobs she has had in the past, which required working set shifts, and is less complicated to use than services like DoorDash. Debra-Lee enjoys earning without making commitments about delivering at certain times or at a certain frequency. Debra-Lee uses her own tools, like her vehicle, cellphone, and thermal bags, to deliver and obtains a tax advantage from working as an independent contractor.

[20] Joseph Peterson also delivers food using Uber Eats in addition to working as a land surveyor full-time and enjoys the flexibility. Joseph formerly used DoorDash and SkipTheDishes, but switched to Uber Eats because the others required working set shifts, being assigned to a certain area, or being unable to receive deliveries if too many drivers are already working. At one point, Joseph used all three apps, which required selecting the first delivery presented and closing the remaining two apps. More recently, Joseph has gone several months without using any of the apps – something he could not do in his role as a land surveyor. Joseph considers his use of Uber and other apps to be his own business.

IV. Assessment

A. Disclosure of a Cause of Action

[21] Section 5(1)(a) of the *CPA* provides that the Court must be satisfied that the pleadings disclose a cause of action if the proceeding is to be certified.

[22] Class action certification is a procedural step. At this stage, it is unnecessary and inappropriate to make any determinations on the merits of the claim. The focus of inquiry is whether, from a procedural perspective, the claim is best litigated as a class action or by other processes.

[23] The requirement that the claim discloses a cause of action is to be considered in that context. The criterion is generally met unless it is plain and obvious that the Plaintiff's claim cannot succeed: ***Flesch v Apache Corporation***, 2022 ABCA 374 at para 30 [***Apache***].

[24] The Plaintiff pleads breach of contract, breach of employment standards legislation, unjust enrichment, and illegality of contract as causes of action.

[25] In this case, the Defendants concede that the Statement of Claim discloses a claim for breach of contract and breach of employment standards legislation due to the alleged misclassification as to the employment status of Uber drivers, except in the case of British Columbia drivers.

[26] The Defendants argue that the British Columbia component of the action should be dismissed for failure to disclose a cause of action. They say that under the British Columbia *Employment Standards Act*, RCBC 1996, c-113, the Director of Employment Standards has exclusive jurisdiction over employment standards disputes: ***Macaraeg v E Care Contact Centers Ltd***, 2008 BCCA 182 at paras 102-104.

[27] The Plaintiff says that this argument was rejected by Justice Hall of this Court in ***Walter v Western Hockey League***, 2017 ABQB 382, aff'd 2018 ABCA 188. Justice Hall found that there was at least an arguable case that the action, as framed in that matter, could be maintained: at para 38.

[28] In argument, the Defendants advised that since the ***Walter*** decision, the British Columbia Court of Appeal has applied ***Macaraeg*** on at least two occasions: ***Tucci v Peoples Trust Company***, 2020 BCCA 246 at para 35; ***Lewis v WestJet Airlines Ltd***, 2019 BCCA 63 at para 22. The British Columbia Court of Appeal has made it clear that no civil action exists in British Columbia for employment misclassification. Trial courts have also relied on ***Macaraeg*** in finding that no common law action exists to enforce statutorily-conferred rights: ***Escobar v Ocean Pacific Ltd***, 2021 BCSC 2414 at paras 59, 65; ***Wang v Grace Canada Inc***, 2017 BCSC 1932 at para 15; ***Rothberger v Concord Excavating & Contracting Ltd***, 2015 BCSC 729 at para 83; ***Canuck Security Services Ltd v Gill***, 2013 BCSC 893 at para 91; ***Doerksen v First Open Heart Society of British Columbia***, 2010 BCSC 129; ***Giza v Sechelt School Bus Service Ltd***, 2011 BCSC 669; ***Pedersen v Harbottle et al***, 2015 BCPC 436 at paras 18-20, 27.

[29] In my view, the appropriate context for dealing with this argument in this case is the evaluation of whether a class action initiated in Alberta is the preferred procedure for determining the claim against Uber by British Columbia Class Members. I will therefore return to it at a later point in this decision.

[30] The Defendants do not concede that the Statement of Claim discloses a cause of action for unjust enrichment. The basis for that claim is the allegation that Uber has been unjustly enriched by avoiding making employer contributions to government pension and employment insurance schemes. The Defendants argue that, at best, such avoidance has deprived government authorities of revenue. However, even if that were the case, Uber Drivers have not been "deprived" of anything for the purpose of an unjust enrichment claim. Moreover, the unjust enrichment claim is subsumed by the claim of breach of contract. They urge me to follow the lead of Justice Perell and decline to certify this aspect of the claim.

[31] The Plaintiff relies on ***Omarali v Just Energy Group***, 2016 ONSC 4094 at paras 90-91, for the proposition that unjust enrichment is a suitable remedy. In that case, Justice Belobaba held that the remedy is well-suited for class action determination, as the focus of inquiry is the actions of the defendant, as opposed to individual Class Members.

[32] In ***Apache***, the Alberta Court of Appeal recently held that an unjust enrichment claim within a proposed class action by employees who were adversely affected by a change of ownership of their employer was doomed to fail. It held that Class Members would receive all the compensation to which they are entitled from various contractual claims, and therefore, there would be no deprivation to Class Members or enrichment to the defendants which would not be remedied under other causes of action: ***Apache*** at para 60. Put another way, unjust enrichment was a "hollow cause of action" that provided no incremental benefit to the members of the class: *ibid*.

[33] I agree with the Defendants that the unjust enrichment claim cannot proceed. There is no evidence of a dollar-for-dollar deprivation of Drivers because of the alleged under-contribution of Employment Insurance and Canada Pension Plan by the Defendants. To the extent that there were provable losses by Drivers, such losses can be compensated with damages.

[34] The Defendants also argue that the Plaintiff's challenge to the arbitration clause that applies to service agreements between Uber and Drivers does not constitute a cause of action that is capable of certification. They rely on a finding to that effect by Justice Perell, in which he says at para 136 of ***Heller***:

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

[35] Whether the claims of illegality and unconscionability can be properly characterized as a cause of action is, in my view, somewhat inconsequential. The applicability of the arbitration procedure will be a common issue for determination as this claim proceeds. This is irrespective of whether the issue arises by way of a claim for declaratory relief by the Plaintiff or by virtue of the arbitration procedure being advanced as a defence to the action by Uber. In either case, it is premature to dismiss the claims advanced by the Plaintiff regarding the arbitration procedure on the basis that they do not disclose a cause of action.

B. Is There an Identifiable Class of One or More Persons?

[36] Section 5(1)(b) of the *CPA* provides that there must be an identifiable class of two or more persons to be an identifiable class.

[37] The Plaintiff proposes that the class definition be:

> Any person who used the Uber App to transport passengers and/or provide delivery services pursuant to a Service Agreement with Uber in Nova Scotia, Newfoundland and Labrador, New Brunswick, British Columbia, Alberta, Saskatchewan, Manitoba or Quebec (the "Class" or "Class Members").

[38] This reflects Justice Perell's decision in ***Heller***. He found that referring to the Class Members as those who "work" for Uber begged the question underlying the action. Justice Perell proposed that Class Members being those who "use the Uber App" was a more neutral and appropriate term.

[39] The Defendants do not take issue with the language used in the proposed class definition. Nor do I.

C. Do the Claims of Prospective Class Members Raise a Common Issue?

[40] Section 5(1)(c) of the *CPA* requires that the claims of the prospective Class Members raise a common issue, irrespective of whether the common issue or issues predominate over issues affecting individual prospective Class Members. A common issue is a "substantial ingredient" of each class member's claim and is therefore one which must necessarily be decided to resolve each claim: ***Hollick v Metropolitan Toronto (Municipality)***, 2001 SCC 68 at para 18. However, each class member does not need to be identically situated in relation to the defendant: ***Western Canadian Shopping Centres Inc v Dutton***, 2001 SCC 46 at para 39.

[41] The common issues proposed by the Plaintiff are reproduced at Appendix A.

[42] In dealing with the common issue criterion, I emphasize that the class action certification process is procedural in nature. The basic question to be answered is whether the action raises one or more issues that would be most efficiently determined in one central proceeding rather than through a multitude of single, repetitive proceedings: ***TL v Alberta (Director of Child Welfare)***, 2006 ABQB 104 at para 133. Dealing with common issues in a single proceeding avoids duplicative fact finding and legal analysis: ***Dutton*** at para 39.

[43] The Plaintiff acknowledges that more than a commonality of circumstances is required. There must also be a commonality of interest amongst Class Members. All members of the class must benefit from the successful prosecution of the case; success for one member must not result in failure for another: ***Vivendi Canada Inc v Dell'Aniello***, 2014 SCC 1 at paras 45-46.

[44] The Plaintiff contends that there are many common issues to be decided. The business and contractual framework created by Uber and within which Uber Drivers operate is common for all involved, irrespective of province. While Drivers may use the app differently, they do so subject to common restrictions on how they will serve Riders or Eaters, and how their services will be paid. If the relationship between Uber and Drivers is determined to be one of employer/employee rather than independent contractor, the only matter remaining matter to be determined after the common issues trial will be the individual assessments of damages.

[45] The Plaintiff urges that I take the same approach to this issue as that used in ***Heller***. Justice Perell's principal finding with respect to the common issue criterion comes at para 194 of ***Heller***. He writes:

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

[46] The Defendants contend that the relationships between Uber and Drivers are so diverse, both factually and legally, that identification of common issues is simply not feasible. The Defendants argue that the business model and contractual relationship developed Uber is one of service provider/customer, not employer/employee. Uber provides an app that can be used by Drivers and Riders or Eaters to connect for transportation services. Moreover, even if there was some form of work relationship between Drivers and Uber, Drivers are independent contractors in form and substance, with the degree of dependence varying with each individual.

[47] In support of the latter contention, the Defendants filed extensive affidavit evidence from Drivers across Canada about how they use the Uber app, and in some cases, other apps as well. Uber also provided an extensive affidavit outlining the contractual arrangements currently in place as well previous versions of service agreements in place over the time covered by the Statement of Claim. The Defendants also provided a compendium of the different local and provincial by-laws and employment standards statutes that apply in the provinces in which Uber offers service.

[48] The Defendants say that the problem faced by the Plaintiff, and the reason why most attempts to pursue employment classification claims on a class basis fail, is that there is no single common experience among Uber Drivers. In other words, the answer to the basic question of "whose business is it" varies from Driver to Driver, and from time to time. Some may consider themselves to work for Uber. Others may consider that they work for themselves, using the Uber app as the platform for their business, either exclusively or along with apps like DoorDash, SkipTheDishes or Lyft.

[49] The Defendants contrast the relationship between Uber and Drivers with those of junior hockey players and hockey clubs in which class actions were certified for junior hockey players in the Western Hockey League, the Ontario Hockey League, and the Quebec Major Junior Hockey League: ***Walter***; ***Berg v Canadian Hockey League***, 2017 ONSC 2608; ***Walter c Quebec Major Junior Hockey League Inc***, 2019 QCCS 2334. In those cases, all players were required to sign a standard contract with the team which stipulated the compensation to be paid during the season and the form of scholarships for post-playing years. Deviations were not allowed, and the relationship between the players and their team neither varied on a player-to-player basis, nor by team location.

Assessment of Common Issue Criterion

[50] The proposed action raises unusual but important questions of law and policy, including how historical principles of employment law can or should be applied in a digital or gig economy.

[51] In ***Heller***, Justice Perell properly described the questions to be answered in this case as being compound in nature for the purpose of assessing the common issues criterion.

[52] The first is whether there is an employment relationship of any sort between Uber and those who use the Uber app to provide transportation services. If not, then there can be no action against Uber under the principles of employment law.

[53] If there is an employment relationship of some sort, the second group of questions becomes whether the Uber business model and standard form service agreement imposes such control and uniformity across Uber Drivers that it constitutes an employment relationship across all members of the proposed class. If so, then the nature of that common relationship must be determined, be it employee, dependent contractor or independent contractor. On the other hand, it may be that, although an employment relationship is present, the nature of that relationship can only be determined through assessment of each Driver's relationship with Uber on a case-by-case basis.

[54] For the purpose of certification, Justice Perell found that there was some basis in fact for each of the outcomes embedded in these questions. Consequently, this criterion for certification was met subject to a change of wording to replace the term "working for Uber" with a more neutral "user of the Uber app" when referring to the Drivers.

[55] I generally agree with the findings and conclusions of Justice Perell on this common issues criterion. From an analytical perspective, I regard the broad issue of whether there is any employment relationship as a threshold question to be determined at a common issues trial, and it could be decided without resort to evidence from legions of drivers from across the country.

[56] Assuming that some employment relationship is found to exist, it would then likely be necessary for the Court to hear evidence from Uber and Drivers about the employment classification question. That is, the extent to which the Uber Drivers in business for themselves, both in general and in individual cases. That question is to be considered in light of a variety of factors, including the degree of control exercised by the company, the economic dependency of the worker, and whether the trappings of entrepreneurship are present, such as the provision of one's own tools, the opportunity for profit, and the assumption of financial risk: ***671122 Ontario Ltd v Sagaz Industries Canada Inc***, 2001 SCC 59; ***Omarali*** at para 20.

[57] This would be a difficult task and has sometimes proven to be an insurmountable hurdle to certification: ***Brown v Canadian Imperial Bank of*** **Commerce**, 2012 ONSC 2377, aff'd 2013 ONSC 1284, 2014 ONCA 677. However, in both ***Heller*** and ***Omarali***, certification was granted despite the need for individual evidence.

[58] The Defendants argues that the need to determine the employment classification issue on a case-by-case basis illustrates that there is no common issue to be certified. It says that ***Heller*** does not assist the Plaintiff, as the difficulties acknowledged by Justice Perell about the need for individual analysis are exponentially greater for a nation-wide action involving many more service agreements and variations in legislation.

[59] As discussed earlier, this is an extraordinary case. The fundamental questions raised are important, not only for Uber and Drivers but for everyone involved in the emerging digital economy. Whether the operator of an app-based business is the employer of those who use its app for income, and under what circumstances, is a question that cuts across industries and service providers. So, too, is the expected behavior of such businesses. Class actions are intended as an opportunity for the courts to articulate the behavior expected of companies whose actions have broad-ranging impacts and to grant remedies that will modify past behavior to conform with those expectations.

[60] I am satisfied that there is some basis in fact that the Defendants' business model and relationship with the Drivers leads to a finding that they are employed by Uber. The service agreements, while periodically amended, allow Uber to impose basic requirements on Driver activity, and Uber's community guidelines similarly impose basic standards of behavior for the benefit of Drivers, customers and, ultimately, the Uber brand. Uber also establishes quality control mechanisms such as rating systems and incentives that operate across the board. This is sufficient to satisfy s. 5(1)(c) for procedural purposes. It would be for the common issues judge to decide, based on all the evidence, how to characterize the Uber business model and whether the extent the entrepreneurial opportunity and flexibility available to all drivers outweighs the control exercisable by Uber such that the claim cannot succeed.

[61] Accordingly, I certify the first common issue, save for the sub-issue about unjust enrichment which I found previously does not disclose a cause of action.

[62] The second proposed common issue regards the assessment of aggregate damages. This issue was abandoned by the Plaintiff during argument but warrants brief comment in any event. The Plaintiff must show that damages "can be reasonably be determined without proof by individual class members": *CPA*, s. 30(1)(c). This requires the Plaintiff to show some methodology which offers a realistic prospect of establishing loss on a class basis: ***Pro-Sys Consultants Ltd v Microsoft Corporation***, 2013 SCC 57 at para 118. The Plaintiff did not pursue the second proposed common issue at the certification and acknowledges that the methodology proposed does not speak to the aggregate damages, and that Class Members will have their damages assessed at individual trials. I agree that the damages sustained by each Driver, if any, will vary according to that individual's relationship with the Defendants. Without a suitable methodology to account for this variance, it is not clear to me that aggregate damages are fit for determination as a common issue. I would not have certified this as a common issue.

[63] The third common issue is about the assessment of aggravated, exemplary or punitive damages to be assessed on a class basis. Aggravated damages compensate for emotional suffering which exceeds what would normally be expected. Punitive damages are awarded to in exceptional cases to sanction conduct that is "harsh, vindictive, reprehensible and malicious" or is "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment": ***Keays v Honda Canada Inc***, 2008 SCC 39 at para 68. There is no factual basis at this juncture to suggest that Uber's conduct merits punitive damages on a class basis. There is also nothing which shows that the emotional suffering experienced by drivers, if any, is uniform such that it is compensable on a class basis. I decline to certify the third common issue with respect to aggravated, exemplary or punitive damages.

[64] The fourth common issue relates to the August 26, 2020, arbitration clause and class action waiver. As mentioned previously, my view is that the application and import of those instruments relates to the first common issue as a defence or it may be determined as a standalone issue. I appreciate Uber's argument that unconscionability or public policy arguments require individualized evidence, but I find there is some basis in fact to find that the arbitration clause and cause of action waiver are unenforceable as being contrary to legislative standards, if found to apply. It is for the common issues judge to determine to what determinations can be made about the arbitration clause and class action waiver. I therefore certify the fourth common issue.

[65] In making this determination, I am mindful of the challenges and strain on judicial resources that would arise if certification is granted. However, these are more appropriately addressed under the analysis of preferability.

D. Is a Class Action the Preferable Procedure?

[66] Section 5(1)(d) of the *CPA* requires that "a class proceeding would be the preferable procedure for a fair and efficient resolution of the common issues."

[67] Section 5(2) provides direction as to the factors to be considered in a preferability analysis. They are:

a. whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

b. whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

c. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d. whether other means of resolving the claims are less practical or less efficient; and

e. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[68] The central issue in this action is the employment status of the Class Members. This is a question of mixed fact and law. The legal principles at play are not in serious dispute but establishing the factual foundation for assessing the status of individual drivers, or groups of drivers, will be a challenge. While difficult, such a proceeding would clearly be preferable to having claims advanced on an individual basis – a process that would no doubt spawn requests for case management and test cases to simplify resolution of the claims as a whole, begging the question of why a class proceeding was not used in the first instance.

[69] This application seeks to have me certify a class action by Mr. Virani, a Calgary resident, on behalf of Uber drivers in Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Newfoundland and Labrador, British Columbia and Quebec. The *CPA* allows such multi-jurisdictional actions: s. 9.1.

[70] The Plaintiff argues that a multi-jurisdictional action is the preferred procedure in this case. It would provide access to justice for Uber and Drivers in all of the named provinces, avoiding a duplication of actions and unnecessary strains on the judicial resources of the other provinces. If necessary, procedures could be established to deal with distinct questions of fact or law applying in different provinces, without relitigating common matters that have already been decided. The Plaintiff notes that in ***Walter***, the Alberta Court of Appeal upheld the certification of a multi-jurisdictional misclassification action despite the additional complexity involved.

[71] The Defendants say that the multi-jurisdictional aspect of the action simply layers additional complexity onto an already complicated case. They argue that the litigation plan proposed by the Plaintiff does not deal seriously with the complexities of pre-trial production and questioning that would be required for a cross-Canada action.

[72] The Defendants also argue that in two provinces, British Columbia and Quebec, alternate dispute resolution through employment standards tribunals is available. In the case of British Columbia, such recourse must be pursued because there is no statutory or civil cause of action for breach of employment standards. In Quebec, there is currently a proceeding pending before the Administrative Labour Tribunal of Quebec, which has power to investigate and adjudicate complaints on behalf of workers at no cost.

[73] In ***Walter***, the Alberta Court of Appeal upheld the decision of the chambers justice to certify the British Columbia component of the action notwithstanding the ***Macaraeg*** case. The chambers justice described the answer to the question in ***Macaraeg*** about whether a cause of action for breach of statute could proceed as "murky" and thus it was not plain and obvious that a civil action for breach of employment standards was unavailable. The Court of Appeal upheld that decision but commented that its conclusion was "without prejudice to the possibility that on further evidence these defendants may establish that the British Columbia courts are the preferable location for those proceedings, for reasons of public policy or otherwise: ***Walter v Western Hockey League***, 2018 ABCA 188 at para 13.

[74] As noted earlier, the Defendants argue that since ***Walter*** was decided, the British Columbia Court of Appeal has confirmed on two occasions that ***Macaraeg*** remains as good law in that province. I agree with the Defendants and consider that if there remains any doubt as to that issue it should be resolved by British Columbia courts.

[75] I will deal first with whether a multi-jurisdictional class action is the preferred procedure in this case, having regard to the factors enumerated in s. 5(2), and then return to consideration of the arguments specific to British Columbia and Quebec.

[76] In most cases, the preferability of a single class action over a multitude of individual actions is clear. Where common issues of law and fact can readily be determined based on a single claim, and a single record there are obvious savings of judicial resources, as well as those of the litigants.

[77] In some cases, the same benefits can be obtained by certifying a multi-jurisdictional class action. In ***Walter***, for example Justice Hall correctly observed that the complexity involved in certifying a class action involving hockey players and teams based in Alberta, British Columbia and Saskatchewan paled in comparison of litigating individual actions by each player in those provinces against the teams for whom they had played: at para 64.

[78] At the same time, Justice Hall refused to certify the action against Western Hockey League teams based in Washington and Oregon finding that such claims should be brought and decided in those jurisdictions.

[79] A similar approach was taken in ***Berg***, in which the Ontario Court of Justice refused certification of an action against junior hockey teams based in the United States and playing in the Ontario Hockey Association. Justice Perell found that to do so would amount to deciding issues of American law as applied to American teams: at para 215. The Plaintiff concedes that the Alberta Court would have to apply laws from different provinces but says that making a common determination of the employment status of the approximately 176,000 Class Members would provide them access to justice and serve to modify Uber's misbehavior of avoiding the expense of compensating drivers in accordance with applicable employment standards. It says that the behavior modification that will be achieved will have important impacts on vulnerable gig-economy workers throughout Canada.

[80] The Defendants say that a cross-Canada class action would be unmanageable from an evidentiary perspective and require Alberta Court to interpret and apply legislation in other provinces that might well lead to different results. The Defendants also argue that legislative solutions are preferable and that several legislatures are grappling with how to regulate the gig economy.

[81] I cannot accept the Defendants' latter argument. Waiting for a possible future legislative solution, whatever that may be, does not assist the proposed class in this matter. I must consider the claim as it made presently and not as it may transpire in the future.

[82] However, I do agree with the Defendants' former argument. The latticework of legislation creates uncertainty in the outcome of this matter nationally and unmanageability of process.

[83] Employment matters are subject to provincial legislation. I agree with the Plaintiff that, at a high level, employment standards legislation is functionally similar province-to-province. But this action is about whether the legislation of each province applies, and if so, to what extent. The variation in legal tests adds complexity, especially in a case of first impression; this case does not benefit from previous findings addressing gig economy users in other provinces.

[84] For example, there are differences in how an employer or employee is defined. British Columbia's legislation provides that an employer is someone who has control or direction over an employee or is responsible, directly or indirectly, for the employment of an employee: *Employment Standards Act (British Columbia)*, RSBC 1996, c 113 s 1. To that, Manitoba's legislation adds that a person responsible for the payment of wages is also an employer: *The Employment Standards Code (Manitoba)*, CCSM c E1100 s1(1). Newfoundland and Labrador take a different approach. An employer means someone party to a contract of service with an employee, which is defined as a person who works under a contract of service for an employer: *Labour Standards Act (Newfoundland and Labrador)*, RSNL 1990, c L-2 s 2.

[85] The Defendants also point out that Alberta and British Columbia have employment standards which apply to taxi drivers, which raises the question about whether those regulations affect the analysis of the applicability of employment standards to drivers here.

[86] Consequently, it is not plain and obvious that the result of a national class action, if it can be managed to completion, will be consistent across jurisdictions.

[87] There are also questions which arise about the availability and preferability of administrative regimes. Quebec workers can raise claims through a complaint with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), which is an administrative body that can prosecute employment claims on an employee's behalf with no cost to the employee and can expand its investigation to multiple employees. And in British Columbia, as I have discussed previously, the *Employment Standards Act* "provides a complete and effective administrative structure for granting and enforcing rights to employees": ***Macaraeg*** at para 103. Thus, even if there were doubts as to whether there is a civil cause of action for breach of employment standards in British Columbia the preferred remedy for aggrieved drivers in that province would be through the Employment Standards Act itself.

[88] Apart from the differences in legislation and administrative regulatory schemes, this matter involves numerous different relationships between each class member and the Defendants, depending on when the class member was a driver and the contractual agreements in place at that time. The Defendants' policies and guidelines have changed greatly throughout the relevant period. Drivers could subcontract their work at some times but not others. Drivers could accept tips at some times but not at others. Drivers could lose access to the app for high cancellation rates but not at others. This leads to myriad permutations of factors which influence the finding of whether, and under what circumstances, Class Members were employed by the Defendants.

[89] Differences in employment standards legislation could likely be accommodated in a multi-jurisdictional class action when that is the principal variable, as the Court in ***Walter*** demonstrated. But it becomes an analytical quagmire when the dimensions of individual differences and time are layered into the equation. The combined effect would be a class action that is inherently unmanageable or requires an inordinate resources from the courts and litigants to complete. This is a very different situation than that faced by the Court in ***Walter*** and ***Berg***.

[90] I am also skeptical that there would be a common view amongst drivers, riders, citizens or courts across Canada about the need for modification of Uber's behavior. The answer to this question depends on how the citizens within a particular region (and its judiciary) balance the societal costs and benefits of regulation of transportation service providers. It is reasonable to expect that in a country as diverse as ours, the values and experiences bearing on that balancing exercise will vary from province to province.

[91] Accordingly, I find that while this action is suitable for certification in Alberta, such certification will not extend to other provinces. Narrowing the geographic scope of the class proceeding to Alberta offers the best chance at achieving a process that is fair, just and efficient.

[92] This leaves open the option for Drivers in most other provinces to pursue class actions in their own jurisdiction. That would avoid the need for individual trials and the need for interpretation and application of legislation from another jurisdiction. This would be preferable to individual actions in those provinces, while substantially improving the manageability of those claims as compared to a cross-Canada action.

E. Suitability of the Representative Plaintiff

[93] Section 5(1)(e) of the *CPA* provides that, for certification, the Court must be satisfied that the Representative Plaintiff:

i. will fairly and adequately represent the interests of the class,

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

iii. does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[94] The Plaintiff argues that he has demonstrated a willingness to fairly and diligently represent the interest of Class Members. He has sworn a comprehensive affidavit in support of the certification application, attended at questioning, and is prepared to communicate with counsel and Class Members as litigation progresses.

[95] The Defendants question whether Mr. Virani is a suitable representative. They say that the interests of Uber Drivers are so diverse and they are so geographically scattered that a single Calgary Driver who wants to be treated as an employee is not a suitable representative.

[96] I am satisfied that Mr. Virani is a suitable Representative Plaintiff as demonstrated by his actions to date. I have no reason to doubt that Mr. Virani will fairly and adequately represent the interest of the class.

[97] The Plaintiff has provided a litigation plan, which it argues is workable and modelled after litigation plans in similar certified matters. The plan outlines how counsel will report to Class Members, the process for opting out of the suit, the exchange and management of documents, discovery processes, and a plan to resolve individual issues after the common issues trial, amongst other points.

[98] The Defendants argue that the Plaintiff has failed to address specifically how common issues and individual issues will be resolved. The Defendants note that this Court has held that it is not acceptable that a litigation plan defers important questions of procedure until case management following a common issues trial: ***Fisher v Richardson GMP Ltd***, 2019 ABQB 450, aff'd 2022 ABCA 123, at para 141.

[99] A litigation plan does not need to perfect but it must be workable, meaning that it must be capable of implementation: ***Fisher*** at para 138, citing ***Windsor v Canadian Pacific Railway***, 2006 ABQB348 at para 162. It is expected that a proposed litigation plan is a work-in-progress that will change as the matter develops, particularly in light of direction given by the Court at the certification stage: ***Cloud v Canada (Attorney General)***, 247 DLR (4th) 667, 2004 CanLII 45444 (Ont CA) at para 95. That said, the Plaintiff must nonetheless "translate his or her analytical proposal for a class proceeding into practice by having to explain, in concrete terms, the process whereby the common issues, and any remaining individual issues, will be decided": ***McCracken v Canadian National Railway Company***, 2012 ONCA 445 at para 146.

[100] The litigation plan provided by the Plaintiff provides a workable plan for apprising Class Members about the progress of the litigation. I am satisfied that the Plaintiff has met its obligation in this respect.

[101] However, the litigation plan, in my view, has serious shortcomings with respect to how the litigation will actually be conducted. Like the plan in ***Fisher***, it is general in the extreme. Much of the plan relies upon later agreement by the parties or directions from a case management judge. For example, the discovery plan, method of discovery and exchange of documents, timeline for expert reports, witness lists for common issues trial, and method of determining individual issues all rely on agreement by the parties at some later date. There is no direction about a methodology that would make the common issues suitable for global determination or how the evidence presented at a common issues trial would assist the Court, what questioning would be required on common or individual issues, or how the individual issues would progress following the determination of common issues. The litigation plan, as it stands, raises more questions than it answers.

[102] I appreciate that the Plaintiff has not had the benefit of my determinations on the proposed common issues. Accordingly, although the litigation plan is not acceptable in its current form, I am prepared to certify this action, subject to the direction that the Plaintiff undertake to revise the litigation plan in light of these reasons and circulate a revised copy to opposing counsel within 60 days of these reasons.

[103] Finally, I am satisfied that the Mr. Virani's interests do not conflict with other Class Members to a degree which would make him an unsuitable representative. The reality of this matter, as shown by the affidavits tendered, is that Drivers engage with Uber for a variety of reasons, and the position advanced by Mr. Virani, if successful, could lead to outcomes for some Drivers which they do not want. The affidavits discussed above show plainly that some Drivers do not wish to be viewed as employees. I expect that Uber will continue to present evidence and argument to support the proposition that, on a balance of probabilities, Uber Drivers are not employees or dependent contractors. I have no doubt that the position of Drivers who take a different view than Mr. Virani will be capably and thoughtfully raised by the Defendants' counsel.

V. Conclusion

[104] For the foregoing reasons, I grant the Plaintiff's certification motion, subject to my direction on the certified common issues, the geographic limitation to Alberta, and the revision of the litigation plan. Counsel for the Plaintiff is directed to prepare an order incorporating my findings for the Defendants' approval as to form. If the parties cannot on the terms of the order, including any claims period to be incorporated in the order, a direction can be obtained by way of brief written submissions.

[105] If the parties cannot agree on costs, they may provide written submissions to me. The Plaintiff's submissions shall be due within 30 days of the release of this decision, followed by the Defendants' submissions due not more than 30 days after that.

Heard on the 7th to 9th days of December, 2022
Dated at the City of Calgary, Alberta this 25th day of April, 2023.

R.A. Neufeld
J.C.K.B.A.

Appearances:

Evan Edwards, Paul Edwards, Sabrina Lombardi, Michael Peerless and Jonathan Bradford
for the Plaintiff

Alex Bogach, Sarah Whitmore, Linda Plumpton and Colette Koopman
for the Defendants

Appendix A – Proposed Common Issues

1. Do the predominate features of the Defendants' business model and relationship with the Class Members lead to a finding on the balance of probabilities that the Class Members are the Defendants' employees?

   i. If the answer to Common Issue 1 is "yes," do the minimum requirements of the Applicable Employment Standards Legislation with respect to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with Class Members?

   ii. If the answer to Common Issue 1 is "yes," do the Defendants owe contractual duties and/or statutory obligations to:

      1. Ensure that the Class Members were compensated with the minimum wage?
      2. Ensure that the Class Members were compensated for overtime pay?
      3. Ensure that the Class Members were compensated with vacation pay?
      4. Ensure that the Class Members were compensated with public holiday and premium pay?

   iii. If the answer to Common Issue 1 is "yes," did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the Defendants' contractual duties and/or statutory obligations pursuant to the Applicable Employment Standards Legislation?

   iv. If the answer to Common Issue 1 is "yes," did the Defendants fail to make employer contributions to the Canada Pension Plan, Employment Insurance, Quebec Pension Plan, and Quebec Parental Insurance Plan (collectively the "Applicable Statutory Deductions Legislation")? If so, have the Defendants been unjustly enriched?

2. Should damages be assessed on an aggregate basis against the Defendants, on the basis that the Defendants:

   a. Breached the Applicable Employment Standards Legislation;
   b. Breached their contracts with Class Members;
   c. Breached the Applicable Statutory Deductions Legislation and were unjustly enriched.

3. Are the Class Members entitled to an award of aggravated, exemplary, or punitive damages based on the Defendants' conduct? If so, in what amount?

4. Is the arbitration clause and/or class action waiver clause implemented by the Defendants on or about August 26, 2020 unenforceable on the basis that it:

   a. Is contrary to the Applicable Employment Standards Legislation;

b. Is contrary to class proceedings legislation;
c. Offends principles of contract formation;
d. Is an abuse of process;
e. Is unconscionable; and/or,
f. Is contrary to public policy.