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A NEW GIG FOR UNCONSCIONABILITY — EQUITY AND HUMAN DIGNITY IN *UBER TECHNOLOGIES v. HELLER* [2020]

RAÚL MADDEN*

In Uber Technologies Inc. v. Heller the Canadian Supreme Court affirmed the capacity of the doctrine of unconscionability to protect workers in the 'gig economy' from oppressive implications of non-negotiable standard form contracts, tendered by drastically more powerful business entities. On the basis of unconscionability, the Court rejected Uber's attempt to enforce a clause in their non-negotiable standard form contract that would preclude its drivers from invoking employment law rights in a domestic court, having stipulated dispute resolution through arbitration in a foreign jurisdiction at upfront and unaffordable expense to the driver. This case note critically elucidates how the Court's decision advances standards of human dignity for working people through an equitable reading of the relevant statute, and subsequently applying the characteristic elasticity of the Equitable doctrine of unconscionability in addressing changing social and economic circumstances and drastic power imbalances between parties.

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I INTRODUCTION

As the power dynamics of the global economy increasingly favour large multinational corporations at the expense of working people, their wages, and the conditions in which they work and live,¹ the ability of these businesses to instrumentalise the law against or

¹ Soaring profits and personal wealth increases respectively for the world's largest companies and wealthiest billionaires coincide with the proliferation of poverty and precarity in communities crushed between the converging 'gig economy' and the 'COVID economy' (potentially, also the post-COVID economy): Oxfam America, *Pandemic Profits Exposed: A COVID-19 Pandemic Profits Tax as one essential tool to reverse inequalities and rebuild better post-pandemic* (Media briefing, July 2020). Rupert Neate, 'Ten billionaires Reap \$400bn boost to wealth during pandemic' *The Guardian* (Web Page, 19 December 2020) <<https://www.theguardian.com/technology/2020/dec/19/ten-billionaires-reap-400bn-boost-to>

strip its protection from their workers present legal issues of growing concern. The latter occurs, for instance, when entities, sufficiently powerful to withhold opportunity for negotiation from persons applying to work for them, may rely on contract law to prevent their workers from having a dispute heard by domestic courts. One way of accomplishing this is by designing standard form contracts — containing arbitration and choice of law clauses — to avoid rights allocated under employment law and arrogate the jurisdiction of domestic courts to uphold them. Such conduct was the subject of the Canadian Supreme Court’s recent decision in *Uber Technologies Inc. v. Heller* in which, following an exercise of ‘small e’ equitable reasoning permitted by statute, a ‘large e’ Equitable resolution was applied through the doctrine of unconscionability.²

In a David-and-Goliath-like confrontation between a worker leading a class proceeding and a multinational business giant, respectively wielding arguments based on principles of ‘unconscionability’ and ‘freedom of contract’, the Court recognised the appropriateness of the former to prevail over the latter in the circumstances described. The Court’s decision, authored by Judges Abella and Rowe, represents a major blow to contractual methods through which multinational businesses entrench conditions that often force workers to choose between abusive industrial relationships and unemployment.³ Deteriorating working and living conditions intensify the broader need for legal and political strategies for addressing their causal power imbalance.⁴ This case note illustrates, through *Heller*, how litigation based on Equity’s rejection of

wealth-during-pandemic>; The World Bank, ‘Covid-19 to Add as Many as 150 Million Extreme Poor by 2021’ (Press release, October 2020); Larry Elliot, ‘TUC wants clampdown on ‘poverty pay’ in gig economy jobs’ *The Guardian* (Web Page, 28 September 2018) <<https://www.theguardian.com/business/2018/sep/28/tuc-wants-clampdown-on-poverty-pay-in-gig-economy-jobs>>; Juliet Schor, ‘How the Gig Economy Promotes Inequality’ *Milken Institute Review* (Web Page, 18 September 2018) <<https://www.milkenreview.org/articles/how-the-gig-economy-promotes-inequality>>.

² *Uber Technologies Inc. v. Heller* 2020 SCC 16. This case note will distinguish between ‘small e’ equity and ‘large E’ Equity referring respectively to: a principle concerning interpretation of meaning, and the conscience-based body of law in common law jurisdictions.

³ Denial of the industrial nature of the relationship itself, through unilaterally stipulated contractual provisions, is one such method and an aspect of this industrial abuse. While the Canadian Supreme Court has opened the door for Canadian courts to consider the question of employment status, this matter has not been determined by a Canadian court. The United Kingdom Supreme Court, however, upheld earlier tribunal and appeal court decisions rejecting Uber’s argument that its drivers are not ‘workers’ under industrial legislation: *Uber BV v Aslam* [2021] UKSC 5 (see n 35 below). An informative discussion on industrial misclassification and related issues in the gig economy can be found in: Austin Zwick, ‘Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber’ (2017) 83 *GeoJournal* 679.

⁴ Two recent films, Boots Riley’s *Sorry to Bother You* (Significant Productions, 2018) and Ken Loach’s *Sorry We Missed You* (Sixteen Films, 2019), portray conditions experienced by ordinary American and British people working for predatory business entities.

‘unconscionable’ transactional practices offers one such approach when these imbalances materialise specifically as the assertion of contract law by multinational entities against the dignity of the people whose labour generates their profits.

Part II establishes a framework for discussing *Heller*, illustrating the relationship between, and industrial significance of, human dignity and Equity. Part III outlines *Heller*’s factual scenario and procedural history. Part IV summarises the issues the Court considered and conclusions of each judgment. Part V shows how both majority judgements adopt an ‘equitable’ statutory interpretation that preserves the Court’s ability to uphold dignitary standards by invoking exceptions to the principle against judicial questioning of an arbitration clause. Part VI, engaging with the three judicial responses to the validity question, illustrates how the relevant industrial injustice demanded an Equitable defence of human dignity by compelling conscionable standards of conduct pursuant to social and economic developments. It observes, however, that Judges Abella and Rowe’s judgment, which constitutes the Court’s decision, could have, especially in response to their colleagues’ ‘autonomy’ and ‘commercial certainty’ complaints, benefited from a more forcefully affirming unconscionability, (definitively conscience-based) scope, to prevent law from becoming commandeered by, or impotent to restrain, powerful entities determined to transact with less powerful others heedlessly of their dignity. Part VII reflects that while *Heller* indicates Equity’s potential in serving human dignity by mandating conscionable standards within *relations between parties*, deeper dignitary aspirations would require non-curial efforts aimed at conditioning conscience into *social relations* with assistance from a similarly reformative or transformative conceptualisation of equity.

II DIGNITY, EQUITY AND INDUSTRIAL JUSTICE

Human dignity denotes respect owed to people because they are human. Minimally conceptualised, it might support legal intervention only to secure basic freedoms concerning one’s person, transactions, and property (‘formal freedom dignity’).⁵ More

⁵ The intellectual authority for such a position can be drawn, *inter alia*, from Immanuel Kant’s ‘Doctrine of Right’. See Immanuel Kant, *The Metaphysics of Morals*, ed Lara Denis, tr Mary Gregor (Cambridge University Press, 2017), [6:238]. It is not impossible, however, to adapt a more substantive theory of human dignity and human rights from this doctrine. See, e.g., Stephen Riley, *Human Dignity and Law: Legal and Philosophical Investigations* (Routledge, 2018) 42, citing Immanuel Kant, *The Metaphysics of Morals*, tr Mary Gregor, (Cambridge University Press, 1997 [1797]), 30.

substantive conceptions justify standards, beyond the aforementioned rights, obliging engagement with people as morally-valuable ends in themselves, rather than merely a means to one's own self-interest ('people as ends dignity').⁶ Common law jurisdictions, especially through Common Law doctrines, tend to establish *sine qua non* rules of engagement based on the former.⁷ They also tend to supplementarily recognise contexts and circumstances demanding higher standards than those upholding 'formal freedom dignity'. This includes legislative (e.g., employment) protections, as well as Equitable doctrines, compelling engagement of our moral reasoning capacities in evaluating whether contemplated conduct would instrumentalise another and traduce their moral worth. In labour contexts, like *Heller*, where profound power imbalances exist and opportunities often abound for skirting around legislated protection, the significance of 'people as ends dignity' warrants attention.

The need for Equitable involvement in industrial justice is inferable from Stephen Riley's observations about a 'dehumanising aspect of global capitalism' manifesting in contractual practices, utilised by transnational business engaged in 'a race to the bottom to secure cheap labour under the minimum of regulatory oversight'.⁸ Difficulty plagues efforts to impose accountability upon parties' intent on deploying abundant resources and multinational arrangements, to reduce the law to a means for profit-seeking, or an avoidable hurdle thereto.⁹ Courts have observed that Uber, for example, engages 'armies of lawyers' contriving documents ... which simply misrepresent the true rights and

⁶ This idea is articulated in Kant's well known 'Principle of Humanity'. See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr Mary Gregor and Jens Timmermann (eds) (Cambridge University Press, 2nd edn, 2012) [4:429]: '*So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means*' (italics in original).

⁷ In this note, the distinction between uncapitalised 'common law' and capitalised 'Common Law' signifies that between the 'common law system' and 'Common Law' as a body of doctrine (as distinct from Equity which is also part of the common law system).

⁸ Riley, *Human Dignity and Law*, 147. See John W Budd, *Employment with Human Voice: Balancing Efficiency, Equity, and Voice* (Cornell University Press, 2004): In the field of industrial relations, Budd contends that 'society should seek to *balance* efficiency, equity, and voice'. Whereas efficiency is 'the primary objective of employers', equity and voice are 'objectives of labour' that pertain to human dignity, respectively concerning workers' wages and conditions, and meaningful involvement in decisions affecting them (2, 13, 18-25). That common law jurisdictions not only permit exercise of an interpretative principle of 'equity', but a distinct body of law called 'Equity', urges research into the latter's potential to uphold human dignity (including 'voice' concerns). See Duane Rudolph, 'Workers, Dignity, and Equitable Tolling' (2017) 15 *Northwestern Journal of Human Rights* 126: Rudolph contributes to such a project with his work on the potential of the American 'equitable tolling' doctrine to uphold dignity for workers suffering from mental illness by insisting that Courts hear, rather than humiliate, them.

⁹ Riley, *Human Dignity and Law*, 146, 148.

obligations on both sides'.¹⁰ Multinationals like Uber attempt to evade jurisdictions of domestic courts through 'non-statal forms of alternative dispute resolution and 'forum choice'.¹¹ This is coupled with power to 'lobby national governments to pass or import regulations of labour' favourable to their interests.¹² Power dynamics, between multinational business giants and workers in transnational labour contexts, often replicate in deficiencies of governmental willingness and ability to address dignitary concerns arising therefrom. Meaningful commitment to human dignity necessitates enforceable legal standards capable of overriding contractual obligations that assist abuses of private power against workers.¹³

Riley uses the language of conscience to articulate the need for legal developments to protect human dignity from oppressive reliance on contract law. While 'freedom of contract' is a basic concept of justice,¹⁴ 'human dignity implies the impermissibility of *unconscionable* contracts which degrade the individual and encourage a race to the bottom in wages and conditions'.¹⁵ This particularises his broader assertion that any violation of human dignity must be considered legally 'unconscionable' —¹⁶ in other words, against the conscience of the law — as human dignity, he theorises, is constitutive of, and foundational to, legitimate law.¹⁷ From the perspective of human dignity, international and domestic public law often 'fail[s] in the face of the technocratic and profit-generating promises of [multinational entities]'¹⁸ and where its limits appear, '[r]emedies in private law ... offer some promise'.¹⁹ Riley recognises that human dignity requires not only constraints protecting individuals from state power (or upholding their agreements), but also adequately equipped state power to prevent abuses of power imbalances — particularly concerning labour.²⁰ Without discussing Equity, its

¹⁰ Mitchell McInnes, 'Uber and Unconscionability in the Supreme Court of Canada' (2021) 137 *Law Quarterly Review* 30, 31 quoting *Aslam v Uber BV* [2016] EW Misc B68 (Et); [2017] IRLR 18, [96], quoting *Consistent Group v Kalwak* [2007] UKEAT 0535; [2007] IRLR 560, [57].

¹¹ Riley, *Human Dignity and Law*, 146.

¹² *Ibid* 146.

¹³ *Ibid* 148.

¹⁴ *Ibid* 72: As Riley considers human dignity constitutive of and foundational to the law, he holds that 'the capacity to enter into contracts is the presumption of an equal entitlement to enter into contract'.

¹⁵ *Ibid* 148 (my italics).

¹⁶ *Ibid* 6, quoting Mary Neal, 'Respect for Human Dignity as "Substantive Basic Norm"' (2014) 10 *International Journal of Law in Context* 26, 36.

¹⁷ *Ibid* 4–5.

¹⁸ *Ibid* 148.

¹⁹ *Ibid*.

²⁰ *Ibid* 149.

conscionable basis, or ‘unconscionability’, he stimulates consideration of their significance for upholding standards of human dignity in the context of industrial power relationships.

Irit Samet’s explanation of the function of Equity’s conscience picks up where Riley finishes. Whereas Common Law tends to take the form of ‘rules’, Equity provides broader supplementary ‘standards’ and ‘principles’.²¹ Common Law rules reflect the ‘Rule of Law’ ideal,²² promoting ‘human dignity in a very specific way, viz. by limiting the extent to which the state can meddle with people’s long term planning’.²³ Equity, too, honours human dignity through framing its interventions as standards, ‘embod[ying] deep respect for the citizens’ autonomy and competence as practical reasoners’ by requiring them to ethically think through their responses to circumstances confronting them in life and business.²⁴ We realise our own dignity as conscience-bearing moral ends by exercising this capacity of practical reasoning, regarding other people moral as moral ends.²⁵

Whereas rule of law values informing Common Law’s typically rule-based formulation, protecting people from arbitrary exercises of state power, Equity’s conscience-based principles protect people from arbitrary exertion of private power.²⁶ What differentiates formal and more substantive conceptions of dignity, and their respective places in the common law system, becomes apparent here. The first reflects in fundamental rights-oriented Common Law rules valorising our capacities to make *prudent* decisions for oneself, such as entering contractual relations. The second reflects in supplementary Equitable principles promoting our capacities to make *moral* decisions concerning others. Common law systems treat the former as fit to govern most types of interactions

²¹ Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018), 17.

²² *Ibid* 74.

²³ *Ibid* 17.

²⁴ *Ibid* 25. Samet cites Waldron’s view that broadly articulated legal provisions can be appropriate to treat ‘people as having the dignity to respond positively to the task’: Jeremy Waldron, ‘Vagueness and the Guidance of Action’ in Andrei Marmor and Scott Soames (eds) *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011), 66. She also quotes (57) his support for standards concerning human dignity that rely on “a shared sense of positive morality ... and some common “conscience” we already share”: Jeremy Waldron, ‘Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 *Canadian Journal of Law & Jurisprudence* 269, 284.

²⁵ See Kant *Metaphysics*, [6:400], [6:348]. See also Susan Meld Shell, ‘Kant on Human Dignity’, in Robert Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (University of Notre Dame Press, 2003), 56: ‘Dignity in short, applies to any finite being who has, or can be presumed to have, a conscience. It is thus something that all human beings possess because we are all co-legislators of the moral law’.

²⁶ Samet (n 21) 73.

and transactions, while demarcating space for the latter to conceptualise and categorise situations that urge deeper moral questions.

Contrasting with Equity's distinctive character, '[r]ule-based doctrines are prone to be abused by sophisticated players who seek ways to act near the sharp edges of the rule', in acquisitive pursuits regardless of moral duties to others.²⁷ Compounding this, '[c]lever 'legal engineers' advise well-resourced parties on using 'form over substance' methods to avoid legal control by circumventing the true purpose of the norms'.²⁸ By proclaiming conscience-based 'communal' principles and standards of interpersonal morality,²⁹ Equity instructs: 'if we want to be on the right side of the law we should avoid taking advantage of the rule-like nature of our legal rights where that would (clearly) breach our moral duty to the other party'.³⁰ The conscience of law may engage when human dignity is threatened by deviousness and power exercised by a private party. Equity's elasticity to curb arbitrary exercises of private power, promotes exploration of its dignitary significance in contexts of labour engaged by 'gig economy' giants inclined and equipped to manipulate law and evade justice.

Recent gig economy contractual contrivances exemplify potential for manipulation of legal rights to enable market power abuses against human dignity. One controversy arises from a 'gag clause' incorporated into Uber's Australian standard form contract, prohibiting drivers from speaking out against the company's treatment of them,³¹ pursuant to another clause permitting Uber to unilaterally alter the contract at will.³² Following legal challenge, Uber removed their 'gag clause', but still purport the right to arbitrarily change contractual terms.³³ Deliveroo are presently defending their obstruction of their riders from collectively bargaining, by categorising them as

²⁷ Ibid 36.

²⁸ Ibid.

²⁹ Ibid 48.

³⁰ Ibid 63.

³¹ UberEATS, 'Delivery Person Agreement' (Contract) <https://www.twu.com.au/wp-content/uploads/2021/01/AU_Delivery_Person_agreement_Jan_2021.pdf>, cl 14.2 (b) (ii).

³² UberEATS, 'Delivery Person Agreement' 15.2.

³³ Transport Workers' Union, 'Uber Backflips on Rider Gag Order Prompting Fresh Calls For a Tribunal to Set Standards' (Press Release, 31 January 2021); Transport Workers' Union, 'Federal Court Savages Uber Over Sham Business Model' (Press release, 30 December 2020). See also Transcript of Proceedings, *Amita Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia, No. NSD 566 of 2020, Bromberg, Rangiah, and White JJ, 27 November 2020).

‘independent suppliers’, in the English and Welsh Court of Appeal.³⁴ Britain’s Supreme Court rejected Uber’s appeal against the EWCA’s finding that the initial tribunal legitimately deemed their drivers ‘workers’ under workplace legislation, prescribing a minimum wage and holiday pay.³⁵ Gardner notes, however, such a decision may provide little tangible protection if the ‘services agreement’ was designed to render the courts inaccessible like in *Heller*.³⁶ If human dignity, concerning people as morally valuable ends, is accepted, then Equitable solutions, to these forms of industrial exploitation, appear attractive. It is worth evaluating recent Canadian authority for applying Equitable doctrine in the context of standard form contracts in the gig economy. The following account and analysis of *Heller*, postulates Equity’s strength (and the significance of equitable statutory interpretation) in confronting contemporary industrial matters of human dignity.

III FACTUAL SCENARIO AND PROCEDURAL HISTORY

In 2017, David Heller, a Canadian UberEats driver, initiated a class action against Uber for breaches remediable under Ontario’s *Employment Standards Act* (*ESA*).³⁷ Heller’s class proceedings concerned claims that depend on employee status under the *ESA*.³⁸ The substance of these matters and the employment status question were not debatable in

³⁴ Matt Trinder, ‘Deliveroo collective bargaining case reaches Court of Appeal’, *Morning Star* (Web Page, 2 February 2010) <<https://morningstaronline.co.uk/article/b/deliveroo-collective-bargaining-case-reaches-court-of-appeal>>. The matter is on appeal from the High Court’s ruling that the right to collective bargaining under the European Convention on Human Rights (art 11) does not apply to these riders who are classified as ‘independent suppliers’. See *R (on application of The Independent Workers Union of Great Britain) v Central Arbitration Committee & Rooffoods Limited* [2018] EWHC 3342 (Admin).

³⁵ *Uber BV v Aslam* [2021] UKSC 5; *Uber BV v Aslam* [2018] EWCA Civ 2748. Lord Leggatt, writing for the UKSC, stated that ‘the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done’, and ‘a touchstone of [which] is... the degree of control exercised by the putative employer over the work or services performed by the individual concerned’ [87]. He emphasised five aspects of the original tribunal’s reasoning in finding that Uber drivers are, in fact, workers ([93]–[100]), specifically that Uber: (1) fixes ‘the remuneration paid to drivers for the work they do’, (2) dictates ‘terms on which drivers perform their services’, (3) constrains ‘a driver’s choice about whether to accept requests’ upon logging into the app, ‘monitoring [their] rate of acceptance (and cancellation) of trip requests’, (4) ‘exercises a significant degree of control over the way in which drivers deliver their services’, and (5) ‘restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride’.

³⁶ Jodi Gardner, ‘Being Conscious of Unconscionability in Modern Times: *Heller v Uber Technologies*’ (2021) *Modern Law Review* (forthcoming), 2.

³⁷ *Employment Standards Act, 2000*, S.O. 2000; *Heller*, [1]–[3], [12]: for breaches of the *ESA*, breach of contract, negligence, and unjust enrichment.

³⁸ *Heller*, [12].

the present case. It concerned whether they could even be *heard* by a court in the jurisdiction in which Heller worked. This is because Uber invoked the arbitration clause in the contract between them to block the claims of Heller and his co-litigants from being adjudicated by Canadian courts.

To become an ‘Uber driver’ one signs the non-negotiable standard form contract that Uber had drafted to avoid domestic employment protections (‘the agreement’).³⁹ It contained a clause (‘the arbitration clause’) stipulating that any disputes arising under it would be resolved through a process of mediation and arbitration in the Netherlands, under the International Chamber of Commerce rules,⁴⁰ with Dutch law applying — rather than by a Canadian court, under Canadian law, which can enforce workers’ protections under the *ESA*.⁴¹ This imposed an unstated obstacle of an upfront \$14,500 filing fee (before legal and other associated costs) to even have the matter heard through Uber’s chosen dispute resolution process, that the driver could only learn of by seeking out the ICC rules externally to the ‘agreement’. Heller’s yearly take-home earnings as an Uber driver would barely, or not quite, amount to this.⁴²

His counsel argued that the arbitration clause was invalid because it was a) unconscionable, and b) contracted out of *ESA* provisions.⁴³ The motion judge granted Uber’s motion to stay the proceedings. He applied the *International Commercial Arbitration Act* (ICAA) —⁴⁴ not the Arbitration Act (AA) —⁴⁵ which covers ‘international’ and ‘commercial’ arbitration agreements, as the parties were based in different jurisdictions and the agreement seemed to him, *prima facie*, commercial. He also applied the ‘competence-competence’ principle, under which contractually stipulated arbitrators are deemed competent to determine their own jurisdiction and rejected both arguments of invalidity.⁴⁶ This decision was overturned by a unanimous appeal court, which found it unnecessary to determine which arbitration statute applied (because the result would

³⁹ *Ibid* [2].

⁴⁰ *ICC Rules of Arbitration*, International Chamber of Commerce (at 1 March 2017).

⁴¹ *Heller*, [7], [8], [9].

⁴² *Heller*, [10], [11].

⁴³ *Ibid* [3], [13].

⁴⁴ *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2.

⁴⁵ *Arbitration Act, 1991*, S.O. 1991, c. 17.

⁴⁶ *Heller*, [14], [15], citing *Heller v. Uber Technologies Inc.* 2018 ONSC 718, 421 D.L.R. (4th) 343 (Perell J).

be the same regardless),⁴⁷ and the clause invalid for unconscionability and contracting out of *ESA* protections.⁴⁸

IV UBER TECHNOLOGIES V HELLER IN THE SUPREME COURT OF CANADA

Uber appealed to Canada's Supreme Court. The ultimate question was whether the stay of proceedings issued by the motion judge should be reinstated or the appeal court's decision to overturn it upheld; respectively, whether the matter should be referred to Uber's stipulated arbitration process or whether Heller's employment law action — beginning with the question of employment status — should progress into a domestic court.⁴⁹ This depended on two issues. First, whether the general principle of arbitral fitness to assess their own competency, or jurisdiction, to adjudicate a matter governed by an arbitration clause, including the validity of that clause (the 'competency-competency' principle), applies to this case.⁵⁰ This entailed a question of applicable statute.⁵¹ If the *ICAA* applied on the basis that the matter was both 'international' and 'commercial',⁵² this principle would apply,⁵³ unless the court finds the clause 'null and void',⁵⁴ although ordinarily the arbitrator must rule on validity first.⁵⁵ The *AA* applies the same principle to disputes not covered by *ICAA* (therefore, if non-international or non-commercial),⁵⁶ with the exception that a court 'may' reject a 'stay' motion if the 'arbitration agreement is invalid'.⁵⁷ The Court has developed a framework for determining when, exceptionally to the 'competency-competency' principle, validity

⁴⁷ *Heller*, [16], citing *Heller v. Uber Technologies Inc.* 2019 ONCA 1, 430 D.L.R. (4th) 410 (Feldman, Pardu and Nordheimer JJA). Nordheimer JJA wrote that the 'Arbitration Clause [was chosen] in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber'.

⁴⁸ Neither Judges Abella and Rowe nor Judge Brown deem it necessary to address the ground of invalidity for contracting out of *ESA* protections. Judge Cot  does so [259]-[306].

⁴⁹ *Heller*, [1].

⁵⁰ *Heller*, [15], [31] (Abella and Rowe JJ), [122] (Brown J). Judge Cot  [222] refers specifically to the arbitrator's competency to adjudicate the validity of the clause appointing them as the 'rule of systematic referral'.

⁵¹ *Ibid* [18].

⁵² *ICAA*, s. 5(3).

⁵³ *ICAA*, s. 9, implementing *UNCITRAL Model Law on International Commercial Arbitration*, art 1.

⁵⁴ *ICAA*, sch. 2, implementing *UNCITRAL Model Law on International Commercial Arbitration*, art. 8(1).

⁵⁵ *ICAA*, sch. 2, implementing *UNCITRAL Model Law*, art. 16(1).

⁵⁶ *AA*, s. 7(1), s. 17(1). Meshel argues that 'the SCC's decision in *Uber v Heller* signals that it may be time for the provincial legislatures to clarify whether employment disputes should be excluded from Canadian international arbitration statutes, whether particular employment-related claims should be considered as non-arbitrable, and to what extent arbitral tribunals may determine the validity of arbitration agreements such as the one in this case': Tamar Meshel, 'International commercial arbitration in Canada after *Uber Technologies v Heller*' (2021) *Arbitration International*, (forthcoming), 25.

⁵⁷ *AA*, s. 7(2), para. 2.

should be considered by the court.⁵⁸ Second, if deemed permissible under either statute to consider the question of the validity of the arbitration clause, then the Court addresses is. The two grounds pleaded were ‘unconscionability’ and contracting out of employment legislation.⁵⁹ A decision of invalidity would entitle Heller to be heard by the relevant domestic court on the statutory employment status question. Otherwise, the stay would be reinstated, and the matter referred to arbitration.

Judges Abella and Rowe authored the judgment with seven other colleagues concurring, grounding the Court’s decision.⁶⁰ They found that 1) the *AA* rather than the *ICAA* applies,⁶¹ and permits departure from the ‘competence-competence’ principle in this instance;⁶² and 2) the arbitration clause was invalid for unconscionability.⁶³ The Court therefore rejected Uber’s request to stay proceedings, allowing Heller’s class proceedings to progress. Judge Brown agreed 1) on the application and implications of the *AA*,⁶⁴ but rejected 2) the unconscionability argument,⁶⁵ alternatively finding the clause invalid due to public policy for undermining the rule of law.⁶⁶ Judge Coté, dissenting, considered 1) that the *ICAA* applicable, but no exception to the competency-competency principle should arise under either statute,⁶⁷ and found 2) the clause valid,⁶⁸ although the stay should be reinstated conditionally upon Uber paying Heller’s filing fee.⁶⁹

V EQUITY OF THE STATUTE

Equitable reasoning was key in unlocking the Equitable jurisdiction that unblocked the drivers’ right to be heard. *Heller* entails both ‘small e’ equity, as an interpretive principle, and ‘large E’ Equity, as a distinct body of law. The former reflects in judicial attitudes to the ‘equity of the statute’ relating to Ontarian arbitration legislation.⁷⁰ Both statutes enact

⁵⁸ See *Heller*, [31]–[34] (Abella and Rowe JJ), citing *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531.

⁵⁹ *Heller*, [52].

⁶⁰ Wagner CJ, and Moldaver, Karakatsanis, Martin, and Kasirer JJ.

⁶¹ *Heller*, [28].

⁶² *Ibid* [48].

⁶³ *Ibid* [98].

⁶⁴ *Ibid* [104].

⁶⁵ *Ibid* [103].

⁶⁶ *Ibid* [176].

⁶⁷ *Ibid* [201].

⁶⁸ *Ibid* [202].

⁶⁹ *Ibid* [199], [203].

⁷⁰ Insights into this notion can be found in: Gary Watt, *Equity Stirring* (Hart Publishing, 2009), 6-7, James Edelman, ‘The Equity of the Statute’ in Dennis Klimchuck, Irit Samet, and Henry E. Smith (eds),

the ‘competence-competence principle’ with exceptions, inviting judges to apply them through equitable engagement with emerging situations. The Court’s three judgments convey varying attitudes to equitable engagement with an open-ended statute, and the implicit extent to which their reasoning could honour dignitary concerns. The following explains how the spirit of the law was presumed consistent with human dignity through equitably reading legislation in light of private power ploys to instrumentalise it contrarily.

The majority judgments applied the *AA* because employee status controversies are naturally about employment,⁷¹ not ‘international commercial’ arbitration disputes covered by the *ICAA*.⁷² Judge Coté applied the *ICAA*, deeming the dispute *prima facie* commercial because the agreement calls itself a ‘licencing’, rather than employment, agreement.⁷³ In the former logic, equitable reasoning treats arbitration legislation as part of a broader web of law, including the statutory protection affording workers (considering the power bosses naturally have over them), inconsistently with having employers avoid such protections by labelling the relationship ‘international and commercial’.⁷⁴

Under the *AA*, the court ‘may’ refuse to stay proceedings, despite the ‘competence-competence’ principle, for an invalid arbitration agreement.⁷⁵ The framework in *Dell Computer Corp. v. Union des consommateurs*, for exercising the discretion to question

Philosophical Foundations of the Law of Equity (Oxford University Press 2020), 352-3, 369, and; Benoit Jenneau, ‘Equity in French Private and Public Law’ in R.A. Newman (ed), *Equity in the World’s Legal Systems: A Comparative Study* (Etablissement Emile Bruylant, 1973), 223-224.

⁷¹ *Heller*, [26].

⁷² *Ibid* [19] (Abella and Rowe JJ); *ICAA* s. 5(3), incorporating *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann, art. 1(1); [104] (Brown J). *ICAA* and *AA* are mutually exclusive: *AA*, s. 2(1)(b).

⁷³ *Heller*, [217]. Judge Coté added that ‘[t]he Service agreement expressly states that it does not create an employment relationship’ but ‘a software licensing agreement, which... is a type of transaction that is identified as coming within the scope of the model law [that *ICAA* ratified]’: [216]. She argued also that proving otherwise would require further evidence than permissibly considerable, under the relevant framework (explained below), ‘without usurping... the tribunal’.

⁷⁴ At least for Judges Abella and Rowe who explicitly mention the significance of employment law: *Heller*, [39]. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1988), 191-192 (ebook): For Dworkin, judges must treat law as if it were one ‘seamless web’ by endeavouring to interpret and apply the relevant provision to the case before her or him as consistently as possible with the other common law, legislative, and constitutional provisions that comprise the law as a whole. We might infer that the integrity of the law is upheld through a notion of ‘equity’ that extends to ensuring that a legal provision is coherent with the larger corpus, or ‘seamless web’ of law. As Dworkin insists that either human dignity or a similar notion must underpin our conception of legal rights (19, 23), it follows that the law’s integrity might depend on equitable reasoning holding sight of this end.

⁷⁵ *Heller*, [29]–[30], *AA* s.7(1)-(2).

validity, instructs that:⁷⁶ a) this is warranted if the invalidity question is purely of law; b) questions largely of fact must “normally” be referred to arbitration;⁷⁷ and c) mixed fact and law questions require referral unless the factual components require “only superficial consideration” of available documentary evidence.⁷⁸ Respective legislative and judicial choices, of the words ‘*may*’ and ‘*normally*’, indicate scope for the courts to synthesise relevant considerations as they emerge — that might present exigent cause for considering validity — into a dynamic framework for deciding whether the exception *should* be exercised. The approaches by Judges Abella and Rowe to the statutory discretion and *Dell* framework accepted the invitation to uphold the spirit of the law through its refinement pursuant to experience. They found that *Heller*’s facts engage the ‘mixed fact and law’ exception because the validity question could be determined by superficially reviewing the record, but elaborated that even *if* deeper factual considerations were needed, the scenario departs from ‘normal’ circumstances that would demand referral to arbitration.⁷⁹ In abnormal circumstances contradicting the ‘underlying assumption’, informing the framework that referral will result in actual arbitral resolution of the issue, referral would generate an affront to access to justice that parliament ‘could not have intended’.⁸⁰ This includes arbitration stipulations being excessively expensive or logistically inaccessible or containing ‘a foreign choice of law clause ... circumvent[ing] mandatory policy’ (including industrial protections).⁸¹

Judges Abella and Rowe explain the equitable nature of the adjustment to the framework: “These situations were not contemplated in *Dell*. The core of *Dell* depends on the assumption that if a court does not decide an issue, the arbitrator will’.⁸² They counterbalance this flexibility through a ‘good faith’ test concerning such challenges, namely whether: a) a ‘genuine challenge’ is apparent on the pleaded facts, and b) supporting evidence indicates a ‘real prospect’ that staying the proceedings may not result in the arbitrator resolving the challenge.⁸³ Both limbs were satisfied because

⁷⁶ *Heller*, [32], citing *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531.

⁷⁷ *Heller*, [32], quoting *Dell*, [84]-[85].

⁷⁸ *Ibid* [32], quoting *Dell*, [85].

⁷⁹ *Ibid* [37].

⁸⁰ *Ibid* [38].

⁸¹ *Ibid* [39]: ‘In these situations, an arbitration agreement is ‘insulated from meaningful challenge’.

⁸² *Ibid*, [40].

⁸³ *Ibid* [44]. The ‘real process’ question can be determined from ‘a single affidavit’ and ‘[b]oth counsel and judges are responsible for ensuring the hearing remains narrowly focused’.

‘prohibitive fees ... embedded in the fine print ... impose a brick wall’ to resolution.⁸⁴ The machination to prevent determination of employee status without first paying ‘possibly unconscionable’ fees can only be foiled by answering the validity question.⁸⁵ Judges Abella and Rowe equitably exercised their discretion conveyed through the word ‘*may*’ and expanded on the circumstances enlivening it. Their reasoning exemplifies equitable engagement with an open-textured statute framed to enable judges to establish and develop a framework consistent with its own purposes and fundamental values underpinning the legal system. ‘Access to justice’, a dignitary concern,⁸⁶ entails that parties — whom powerful entities would silence — be heard; statute is interpreted in this light.⁸⁷

Judge Brown narrowed his recognition, of exceptional considerations of fact requiring more than superficial review, to stipulations ‘preclud[ing] access to legally determined dispute resolution’, as a matter of ‘public legitimacy of the law in general’.⁸⁸ He ‘limit[ed] [the] exception to cases where arbitration is arguably inaccessible’, asserting that ‘it should not apply merely because the parties’ agreement contains a foreign choice of law provision’.⁸⁹ For him, public policy ensures that the AA is interpreted and applied in accordance with the ‘rule of law’ hallmark, access to justice,⁹⁰ as the ‘integrity of the justice system’ would be assailed if this were no longer treated ‘as a right inalienable even by the concurrent will of the parties’.⁹¹

⁸⁴ Ibid [47].

⁸⁵ Ibid.

⁸⁶ See David Luban, *Human Dignity and Legal Ethics* (Cambridge University Press, 2007), 69, 88: Luban’s conception of human dignity as ‘nonhumiliation’ — which he contextualises with reference to the role of lawyers in litigation — centralises the right to be heard and the corollary insistence that a person be heard. ‘The courtroom advocate defends human dignity by giving the client a voice and sparing the client the humiliation of being silenced and ignored’ (72).

⁸⁷ A similar attitude, that could be explained as an equitable approach to interpreting legislation in light of fundamental rights, is promoted by Australia’s High Court. *Bropho v Western Australia* (1990) 171 CLR 1, 304 (Mason CJ, Deane, Dawson, Toohey, Gaudron, and McHugh JJ): ‘... the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is “in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used” (citations omitted).

⁸⁸ *Heller*, [125]–[126].

⁸⁹ Ibid [126].

⁹⁰ Ibid, [105]–[106], [120]–[121].

⁹¹ Ibid [110], quoting *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, 1133.

The plurality, however, identified and closed potential loopholes that the present case revealed as readily exploitable by powerful parties.⁹² This includes tactics for ‘evading the result of this case through a choice of law clause’ by ‘convert[ing] a jurisdictional question... of law (which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings [on] foreign law’.⁹³ Had Uber introduced questions or evidence concerning any Dutch counterpart to ‘unconscionability’, the Court would have to uphold the stay — unless prepared to recognise that the word ‘normally’ implies potential for this type of abnormality.⁹⁴ Giving the word this operation also closes a wider loophole for parties in Uber’s position to force referral to arbitration by ‘unreasonably disputing facts’.⁹⁵ Judge Abella and Rowe’s concern with ‘access to justice’ not only includes costs and logistics precluding resolution, but also choice of law provisions ‘circumvent[ing] mandatory local policy’, including statutory employment protections. Granting a stay in either situation would ‘insulate [the arbitration agreement] from ‘meaningful challenge’.⁹⁶ The plurality equitably presumed legislative consistency with prior dignitary commitments to access to justice and labour standards by identifying loopholes available to flout them.

Both majority judgments adopt equitable reasoning in factoring newly emerging factors into the framework for exercising the statutorily prescribed scope of discretion. The minimum ‘equity of the statute’ is that, while the legislature generally intends referral of disputes, to arbitration, that arise under agreements stipulating such avenue for resolution, there are appropriate times for courts to find that questions concerning validity of an arbitration clause warrant refusal to order referral and resume their function of determining such questions. Judge Brown’s milder equitability implies narrower dignitary influence in his ‘legitimacy of the law’ and ‘inalienable rights’ basis,⁹⁷ for his limited exception which only applies by demanding access to resolution when arbitration is rendered inaccessible. The plurality’s reasoning more equitably implies

⁹² Ibid [50].

⁹³ Ibid [49]–[50]. Their honourable justices astutely noted, this is ‘something that one would not ordinarily contemplate in a superficial review of the record’.

⁹⁴ Ibid [50].

⁹⁵ Ibid [51]. It was observed that this would allow avoidance of potential adverse costs orders that civil courts can award following such conduct.

⁹⁶ Ibid [39].

⁹⁷ Ibid [126].

deeper dignitary concern by more robustly identifying demonstrably exploitable loopholes.

Judge Coté's insistence on referral, for fidelity to either statute or the *Dell* framework, eschews equitable concern for any meaningful dignitary principles in construing statutes. Her 'superficial' finding of 'commerciality' shrewdly avoids the equally superficial observation that relationships characterised by a person's labour generating capital for a business that has many others doing the same usually constitute employment. An attitude that the statutes, and their emanating framework, enact ironclad authority for forbidding meaningful equitable reasoning to elicit dignitary commitments, recurs in Judge Coté's dissatisfaction with the available evidence to superficially indicate a situation in which the validity question warrants consideration,⁹⁸ refusal to recognise exceptions allowing deliberation deeper than superficial review,⁹⁹ and rigidifying the 'competence-competence' principle.¹⁰⁰ This obscures obvious observations that power dynamics between multinational business giants and people labouring under them for a living may reflect severely in the formulation of their 'agreement' and make validity questions exigent. The majority's equitable reading of legislation, however, that upheld well-established dignitary legal objectives, prevented statute from becoming an instrument of oppression.

⁹⁸ For her, the validity question would require 'testimonial evidence' beyond what can be established from a 'superficial review of the documentary evidence'. Namely, concerning 'Mr Heller's 'financial position, his personal characteristics, the circumstances of the formation of the contract and the amount that would likely be at issue in a dispute to which the Arbitration Clause applies' (*Heller*, [234]). Even if she were prepared to 'consider the testimonial evidence in the record', such would be insufficient to justify exception to the competence-competence principle. She claimed: '[t]he record is simply not sufficient... to conclude with certainty that Mr. Heller was vulnerable throughout the contracting process' because 'there is no evidence that [he] was in a state of necessity or was incapacitated', the 'unlimited amount of time [allowed] to review the agreement', his apparent capability of 'understanding the significance of the Arbitration Clause' and 'considerable sophistication' in his dealings with Uber' [235].

⁹⁹ On the basis that 'there is no evidence in the record regarding the comparative availability of third-party funding for arbitration or litigation' (*Heller*, [236]).

¹⁰⁰ Judge Coté rejects the majority's exception for arbitration agreements deemed "'too costly or otherwise inaccessible'" should be 'created or applied to this case', on the purported basis of fidelity to the statutes and the *Dell* framework (*Heller*, [241] - [247]). Similarly, she rejects Judge Brown's policy-based approach because '[a]ny impediment to access [to the courts] under the [AA] or [ICAA] exists simply because the parties ... must abide by their agreement' (*Heller*, [254]).

VI UPHOLDING DIGNITY THROUGH UNCONSCIONABILITY

Following the plurality's and Judge Brown's reasoning regarding the competence-competence principle, it was appropriate to decide on the validity question.¹⁰¹ Despite deeming that unanswerable, Judge Coté disputed the bases of invalidity her colleagues asserted.¹⁰² This section affirms the plurality's application of 'unconscionability' in response to a contemporary dignitary issue, but suggests that their judgment could have benefitted from more explicitly conscience-based responses to 'autonomy' and 'commercial certainty' criticisms from their colleagues.

A 'Dignity' and 'e/Equity' in Judgment

The response to the validity question reflects different attitudes towards human dignity and Equity. Judges Abella and Rowe advance a 'people as ends' dignitary understanding through Equitable doctrine. Judge Brown embraces the shallower, but not quite the deeper, conception of dignity with support from equitable (not Equitable) reasoning'. Judge Coté uses language associated with 'formal freedom dignity', while employing a scant, selectively context sensitive, degree of equitable reasoning.

1 Judges Abella and Rowe

The plurality define 'unconscionability' as 'an [E]quitable doctrine' for rescinding 'unfair agreements [resulting] from an inequality of bargaining power'.¹⁰³ It addresses 'serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests'.¹⁰⁴ In such cases, suppositions underpinning freedom of contract 'lose their justificatory authority'.¹⁰⁵ The 'ideal assumptions' of freedom of contract provide a 'good-starting point', but to pretend they always 'align with reality' would contradict 'human experience'.¹⁰⁶ Equitable doctrines, therefore, permit judges to consider 'individual requirements of particular circumstances ... humaniz[ing] and contextualiz[ing]' legal

¹⁰¹ *Heller*, [47] (Abella and Rowe JJ), [125] (Brown J).

¹⁰² *Ibid* [202] (Coté J).

¹⁰³ *Ibid* [54], quoting John D McCamus, *The Law of Contract* (2nd ed, Irwin Law, 2012), 424.

¹⁰⁴ *Ibid* [58]. Their honourable justices notably mention negotiability as part of this paradigm: [56].

¹⁰⁵ *Ibid* [59].

¹⁰⁶ *Ibid* [57], quoting PS Atiyah, *Essays on Contract* (Oxford University Press, 1986), 148.

judgment.¹⁰⁷ The ‘core values’ that base freedom of contract remain intact and effective as courts identify relatively exceptional cases where ‘unfair bargains cannot be linked to fair bargaining’ and justify ‘avoid[ing] the inequitable effects of enforcement’.¹⁰⁸ Unconscionability, unlike other forms of relief for more specific types of problematic contracts, focuses on vulnerability in contracting processes, has the advantage of closing ‘gaps between existing “islands of intervention”’. Courts protect the ‘weak from overreaching by the strong’,¹⁰⁹ by concentrating on this justification for withholding their power to enforce provisions of an ‘agreement’. This reveals the distinction between the Common Law’s and Equity’s protection of human dignity. The Common Law upholds ‘formal freedom’ human dignity through enforcement of contracts.¹¹⁰ Equity’s conscience-based reasoning registers ‘people as ends’ dignitary concerns arising from misused ‘freedom of contract’ dogma as discerned from contexts and circumstances attending interactions between the parties. Its unconscionability doctrine advances ‘people as ends’ dignity by insisting powerful parties engage their capacity for other-regarding (conscience-based), beyond self-interested, reasoning in their dealings.

2 Judge Brown

Judge Brown valorises freedom of contract as ‘a hallmark of a free society’, in securing the individual’s ability ‘to arrange their affairs without fear of overreaching interference by the state’.¹¹¹ He rejects the majority’s application of unconscionability for ‘compound[ing] the uncertainty that already plagues the doctrine, and... introduc[ing] uncertainty to the enforcement of contracts generally’.¹¹² Instead, he reaches the conclusion of invalidity ‘[a]s a matter of public policy’ under which ‘courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law’.¹¹³ This ‘rule of law’ approach conveys dignitary

¹⁰⁷ Ibid [58], quoting Leonard I Rotman, ‘The ‘Fusion’ of Law and Equity? A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters’ (2016) 2 *Canadian Journal of Contemporary and Comparative Law* 497.

¹⁰⁸ *Heller*, [59], citing Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press, 2019), 182.

¹⁰⁹ *Heller*, [61], citing *Hunter Engineering Co v. Syncrude Canada Ltd.*, [1989] 1 SCR 462, 516.

¹¹⁰ It sometimes even accepts internally ‘equitable’ reasoning insofar as it recognises duress as a negation of the consent upon which it is premised by the violation of the innate freedom of security of person, transaction, or property.

¹¹¹ *Heller*, [107].

¹¹² Ibid [103].

¹¹³ Ibid [105].

implications through the concepts and language of the ‘integrity’ of the law and ‘inalienable’ rights that apply ‘irrespective of the value placed on freedom of contract’.¹¹⁴

The court must uphold ‘the rule of law’ through public policy to guarantee stability, predictability, and order for individuals to arrange their lives. Judge Brown’s reasoning reflects the ‘formal freedom dignity’, through the understanding that the ‘legal rights’ embodying this security are ‘meaningless’ without ‘an independent judiciary’ to uphold them; ‘the rule of law’, its ‘legitimacy’, and the common law’s ‘development’ would suffer.¹¹⁵ Recognising arbitration agreements as generally meritorious,¹¹⁶ he denies that they may permissibly preclude resolution.¹¹⁷ For him, ‘there is no value in a contract that cannot be enforced’, and ‘unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak’.¹¹⁸ The basic dignitary rights and rules of law necessitate equitable (but not Equitable) reasoning to protect contract law through public policy to prevent them from self-defeating unenforceability.

The rule of law, for Judge Brown, supports ‘commercial certainty’ ‘because access to justice allows contracting parties to enforce their agreements’.¹¹⁹ Similar logic predicates his fear that the majority’s formulation of ‘unconscionability’ will cause ‘profound uncertainty about the enforceability of contracts’.¹²⁰ The upper threshold of the dignity, and the equitable virtue, that Judge Brown seems to endorse resonates in his phrase: ‘It is the rule of *law*, not the rule of *Uber*’.¹²¹ This acknowledgement aims to prevent rules integral to the legal system from collapsing under their rigidity. The law’s integrity to its ‘formal freedom dignity’ foundation generates his ‘public policy’ reasoning. It refuses entities, like Uber, a complete litigation shield, but leaves them considerable scope to instrumentalise law against their workers through other means, including stipulating an *accessible* body other than a domestic court to adjudicate questions of employee status. Judge Brown’s barriers, to firmly asserting the ‘people as ends’ dignity, through Equity’s

¹¹⁴ Ibid [110], citing *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, 1133.

¹¹⁵ Ibid [111].

¹¹⁶ Ibid, [116].

¹¹⁷ Ibid [121].

¹¹⁸ Ibid [112].

¹¹⁹ Ibid.

¹²⁰ Ibid [161].

¹²¹ Ibid [137].

conscience-based standards, reappear in his criticisms of the plurality's application of unconscionability.

3 Judge Cotê

Judge Cotê prefaces her judgment with determination to recognise only the most abstract understanding of human dignity:

'One of the most important liberties prized by a free people is the liberty to bind oneself by consensual agreement. *Although times change and conventional models of work and business organization change with them, the fundamental conditions for individual liberty in a free and open society do not.* Party autonomy and freedom of contract are the philosophical cornerstones of modern arbitration legislation'.¹²²

She professes:

'The parties... have bound themselves to settle any disputes under it through arbitration. My colleagues... advance competing theories which impugn, to varying degrees, the choice of law that governs the parties' contractual arrangements, the designated seat of arbitration, and the selection of an international arbitral institution's procedural rules. [They] do not impeach the parties' agreement to submit disputes to arbitration, yet they find that the parties commitment to do so is invalid. I cannot reconcile this result with the concepts of party autonomy, freedom of contract, legislative intent, and commercial practicalities'.¹²³

The conception of dignity apparent here, though less concerned with the law's structural integrity than Judge Brown, concerns formal 'liberties' established as rights and rules forming restrictive authorisations of lawful interferences, through public power, into human affairs.

Despite recognising economic change, Judge Cotê rules out considering how these changes tangibly alter the requisite conditions for any meaningful experience of 'individual liberty'. She erases context regarding the impact of power relationships,

¹²² Ibid [177] (citations omitted) (my italics).

¹²³ Ibid [178].

between parties to arbitration agreements, on a working person's 'liberty' and 'autonomy', instead flagging intention to contextualise her reasoning with commercial concerns. Despite recognising the 'formal freedom' human dignity, through its sub-principles of 'party autonomy' and 'freedom of contract' as embedded as Common Law rights (and arbitration legislation) which entail state enforcement through law, Judge Coté is silent on the potential for degradation of the legal system and human dignity when it fails to shield its subjects from attempts to preclude its protection of their own Common Law rights. Much less is she concerned about power dynamics between the parties that enabling one to instrumentalise the other. Disinterest in 'person as ends dignity' is apparent from Judge Coté's confident commerciality categorisation of the relevant relationship, and her, perhaps equitable (in a non-moral sense), promotion of Canada's 'world leadership in arbitration law' as an exigent factor informing her reasoning.¹²⁴

Other than that — having rejected 'unconscionability' both 'public policy' —¹²⁵ the extent of Judge Coté's selective equity in her proposed resolution to the problem of whether an arbitrator would end up resolving the question of its own jurisdiction, conditionally granting the stay motion upon Uber advancing Heller's filing fee.¹²⁶ Despite her own inflexibility towards circumstances undermining the assumption of 'party autonomy' informing entry into the arbitration agreement,¹²⁷ she recognises the need to impose such a condition '[i]n light of Mr. Heller's particular circumstances'... 'to enable him to initiate such proceedings'.¹²⁸ Her insistence on so-called 'legislative intent' obscures the scopes for informed judgement built into the *ICAA* and *AA*,¹²⁹ while she embraces a statutorily prescribed 'generous approach to remedial options',¹³⁰ allowing judges to conditionally stay proceedings on 'terms considered just'.¹³¹ This otherwise uncharacteristic flexibility recurs in Judge Coté insisting that *if* she found invalidity in the arbitration agreement, such would only concern the selection of the ICC rules entailing

¹²⁴ Ibid [210].

¹²⁵ Ibid [237]: she 'fear[s] that the doctrines of unconscionability and public policy are being converted into a form of *ad hoc* judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements'.

¹²⁶ Ibid [199].

¹²⁷ See *Heller*, [257]–[262]. This includes her insistence upon a vulnerability particular to the unconscionability claimant, and rejection in relation to this claim, on the available and considerable evidence, of his particular circumstances concerning understanding and financial means.

¹²⁸ Ibid [324].

¹²⁹ Ibid, [237].

¹³⁰ Ibid [321].

¹³¹ Ibid [321], quoting *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.

the obstructive fee, which can be avoided by ‘blue-pencil severance’.¹³² These alternatives to finding invalidity, says Judge Cotê, uphold the parties’ ‘autonomy’ and ‘commitment’ to arbitration and legislative encouragement thereof.¹³³ Failure to uphold that ‘commitment’ would undermine the ‘certainty upon which commercial entities rely in structuring their global operations’ and ‘be commercially impractical’.¹³⁴ Impeccably, Judge Cotê illustrates how undignifying and inequitable the law’s treatment of its subjects can become when it adopts overly formalistic dignitary reasoning, and accommodates non-dignitary considerations instead of human circumstances and contexts concerning imbalanced power relationships. This attitude informs her rejection of the majority’s understanding of unconscionability.

B Elements

Judges Abella and Rowe’s formulation of unconscionability strengthens, while their colleagues would straitjacket, its ability to uphold human dignity amid contemporary economic conditions. The former assert a two-limb test of ‘inequality of bargaining power’, pertaining to a vulnerability affecting one party and a resulting ‘improvident transaction’ for that party.¹³⁵ They argued that a higher threshold and additional elements would render the doctrine ‘more formalistic and less equity-focused’ and distract from the inquiry into ‘unfair bargains resulting from unfair bargaining’.¹³⁶ Judges Brown and Cotê disagreed, concerning the following elementary matters, on commercial certainty and autonomy bases.¹³⁷ They insist that recognisable inequalities stem from ‘vulnerability *particular* to the claimant’, lest contracts become challengeable for ‘substantive reasonableness’.¹³⁸ They advocated knowledge, by the stronger party, of the particular vulnerability, as a necessary element.¹³⁹ Judge Brown opposed the majority’s rejection of ‘independent legal advice’ as an automatic and sufficient alleviation of a

¹³² Ibid [326]–[336].

¹³³ Ibid [201], [325]. Judge Cotê even claims it would be ‘absurd’ to defeat ‘the parties’ commitment to submit disputes to arbitration’ [336].

¹³⁴ Ibid [336].

¹³⁵ *Heller*, [62], quoting Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis, 2014), 524, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Douez v. Facebook Inc.*, [2017] 1 S.C.R. 751.

¹³⁶ Ibid [82].

¹³⁷ Ibid [257]: Judge Cotê endorses Judge Brown’s formulation of the doctrine.

¹³⁸ Ibid [161]–[163] (Brown J) (my emphasis).

¹³⁹ Ibid [164]–[167] (Brown J), [258]–[259], [287] (Cotê J).

party's vulnerability.¹⁴⁰ He found the majority's contextual approach to 'improvidence' insufficiently precise and inappropriately concerned with distributive justice, arguing that it must be established on the basis of the entire bargain, not just part disadvantageous to the weaker party.¹⁴¹ Judge Coté's only disagreement with Judge Brown regarding unconscionability concerns her view that arbitration clauses merit separate consideration.¹⁴² This struggle between formalism and Equity, characterising the divergence between the judgments on unconscionability, is substantively between commercial interests and human dignity.

C 'Vulnerability'

The plurality asserted that vulnerabilities establishing inequality of bargaining power exist 'when one party cannot adequately protect their interests in the contracting process'.¹⁴³ Previously recognised disadvantages assist in identifying, without exhausting the scope of, potentially qualifying attributes.¹⁴⁴ They are generally classifiable as 'understanding' and 'necessity' cases, respectively concerning: (a) characteristics hindering one's ability to exercise self-interested judgements; or (b) circumstances affecting them such as financial desperation and economic contingencies.¹⁴⁵ 'Understanding' cases concern vulnerabilities in 'appreciat[ing] the full import of the contractual terms'. They could occur 'because of personal vulnerability or... disadvantages specific to the contracting process, such as ... dense or difficult to understand terms'.¹⁴⁶ In 'necessity' cases, the weaker party's dependency on the stronger is such that 'serious consequences would flow from not agreeing to the contract', thereby impairing 'the weaker party's ability to contract freely and autonomously'. Equity

¹⁴⁰ Ibid [167]. Since this is the least discussed element, and in the interests of brevity, only the 'independent legal advice' matter will not receive separate its own discussion in what follows.

¹⁴¹ Ibid [170]–[173].

¹⁴² Ibid, [258] (Coté J).

¹⁴³ Ibid [66].

¹⁴⁴ Ibid [67]. Judges Abella and Rowe list the following examples where vulnerabilities have been recognised, which 'bear little resemblance to the operative assumptions on which the classic contract model is constructed' [58]: 'The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984); the ship captain stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447)'.

¹⁴⁵ *Heller*, [69]–[70] (necessity cases), [71] (understanding cases); [67], citing Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Lexis Nexis, 2014), 525. McInnes labels the two categories as 'personal' and 'circumstantial'.

¹⁴⁶ Ibid [72].

obstructs financially powerful parties from ‘push[ing] the weak to the wall’ by leveraging ‘unfortunate situation[s]’ where the former ‘would accept almost any terms, because the consequences of failing to agree are so dire’.¹⁴⁷ In either context, ‘assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied’.¹⁴⁸ Both categories warrant emphasis in the ‘gig economy’ where workers seeking employment engage on radically uneven playing fields with business giants. They respectively concern their ability to comprehend the impacts of convoluted clauses companies propose *and* financial pressures necessitating acceptance of oppressive conditions.

Obscuring these factors — by restricting the scope of recognisable disadvantage to those peculiarising the claimant from their peers — ignores that severely unequal bargaining power and vulnerability exist proportionately to magnitudes of corporate giants’ market dominance. Judges Brown and Cotê thus dilute unconscionability as a conscience-based doctrine. Distancing ‘unconscionability’ from its moral denotation,¹⁴⁹ Judge Brown insists it solely remedies ‘*procedural* deficiencies’ in contract formation, not ‘substantive unfairness’.¹⁵⁰ Some ‘vulnerability particular to the claimant is required’; none was argued for Heller.¹⁵¹ He finds vulnerability absent where the ‘only procedural deficit [was] the nature of Uber’s contract terms, as ... presented ... through a standard form contract’.¹⁵² If unconscionability applied, ‘*any* party contracting with Uber [could] raise [it] because they were unable to negotiate the contract’s terms’.¹⁵³ He complained (Judge Cotê concurring):¹⁵⁴ ‘this Court has never before accepted that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of unconscionability’.¹⁵⁵ Such an application would apparently threaten ‘freedom of

¹⁴⁷ Ibid [69], quoting *Janet Boustany v. George Pigott Co (Antigua and Barbuda)*, [1993] UKPC 17, 6, quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.*, [1985] 1 W.L.R. 173, 183.

¹⁴⁸ Ibid [72], quoting Rick Bigwood, ‘Antipodean Reflections on the Canadian Unconscionability Doctrine’ (2005) 84 *Canadian Bar Review* 173, 185.

¹⁴⁹ Ibid [150]: ‘... even though in a generic or lay sense, the arbitration agreement at issue in this appeal might well be considered “unconscionable”, it does not follow that it is unconscionable in the specific sense contemplated by the equitable doctrine of that name’.

¹⁵⁰ Ibid [156]–[157].

¹⁵¹ Ibid [161], [175].

¹⁵² Ibid [162].

¹⁵³ Ibid [162].

¹⁵⁴ Ibid [263]: Judge Cotê fears that the majority’s finding — that combined factors of the arbitration agreement taking the form of a clause in a standard form contract and its silence about the cost of proceedings thereunder — amounts to a contention ‘that an arbitration agreement in a standard form contract is itself unconscionable’.

¹⁵⁵ Ibid [162].

contract' and its underlying 'respect [for] individual autonomy', arguing that such contracts do not harm a 'party's ability to bargain effectively from the standpoint of legal autonomy, choice and responsibility'.¹⁵⁶ It would render an 'undisciplined' turn in the development of unconscionability and render 'profound uncertainty' upon enforcement of contracts.¹⁵⁷ Judge Brown's 'public policy' alternative, he claims, direct focuses on substantive injustice, but is limited to a 'rule of law' conception pertaining to limitations upon access to 'legally determined dispute resolution' that are '[un]reasonable between as the parties' or cause 'undue hardship'.¹⁵⁸ Other types of 'hardship' imposed through standard form contracts would likely remain enforceable, along with arrangements that enable 'legally determined dispute resolution' (such as choice of law clauses) selected to avoid protections of the dignity of working people.

Judges Abella and Rowe explain why — especially in terms of the 'understanding' disadvantage but not sufficiently clearly for those of 'necessity' — the unconscionability doctrine holds particular contemporary significance for the advent of nonnegotiable 'standard form contracts' in the labour market. They emphasise that its alertness, to situations when the assumptions underpinning the general rule of freedom of contract depart from reality, must extend to circumstances surrounding these contracts. A void is left unfilled, otherwise, skewing the relationship between 'commercial certainty' and 'fairness' in favour of the former.¹⁵⁹ On one hand, courts recognise standard form contracts as useful in many industries and not *per se* entailing power imbalances.¹⁶⁰ On the other, unconscionability is conceptually suitable for scrutinising such agreements in its attentiveness to the general examination of 'conditions behind consent as ... with any contract' as well as the specific and intensified concerns surrounding 'standard form contracts'. Such contracts may generate and exacerbate transactional vulnerability, especially through deliberate drafting techniques applied 'by one party without input from the other', including inserting 'provisions that are difficult to read or understand'. They may also 'enhance the [stronger party's] advantage ... at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration

¹⁵⁶ Ibid [162], citing Bigwood, 'Antipodean Reflections', 199-200.

¹⁵⁷ Ibid [163].

¹⁵⁸ Ibid [129].

¹⁵⁹ Ibid [86].

¹⁶⁰ Ibid [88].

clauses that violate the adhering party's reasonable expectations by depriving them of remedies'.¹⁶¹

The majority considered *Heller*, therefore, as 'precisely the kind of situation in which [unconscionability] is meant to apply',¹⁶² and confidently found unequal bargaining power. Absence of opportunity to negotiate terms presented in Uber's take-it-or-leave-it offer renders obvious and operative the bargaining inequality between the 'food deliveryman' and the far more sophisticated 'large multinational corporation'. Further, the arbitration clause effectively hides the ICC rules, through which it imposes the \$14,500 filing fee and travel costs, that drivers would have to seek out themselves, and could not reasonably be expected to appreciate even in the unlikely event that one read the entire agreement.¹⁶³ The conscience informing Equity's concern with the power enabling businesses to tender non-negotiable standard form contracts to parties insists that this power be exercised responsibly regarding the dignity of individuals they transact with. Conscionability in this context, therefore, should ameliorate 'business culture', by discouraging legitimate competitiveness from devolving into contests of ruthlessly one-sided contract drafting.¹⁶⁴ This reflects Samet's argument that Equity's conscience establishes moral standards and methods of reasoning for applying them *as well as* a communicative function to market participants that their business will harmonise with private law if they exercise moral reasoning when conducting it.¹⁶⁵ Equity, thereby, promotes business conduct that comports with the dignity of others.

Judges Brown and Cot  reject that lack of clarity in (especially standard form) contractual terms could establish vulnerability. Judge Cot  deflects that such standard would be so 'vague and illusory' and thus 'be open to abuse by a party' in *Heller's* position.¹⁶⁶ She claims that alleged vulnerability concerning *Heller's* limited education and resources would require testimonial evidence — therefore referral to arbitration — and that available testimonial evidence fails to establish unconscionability.¹⁶⁷ She assumes that he 'declined to read' the arbitration clause, rather than not appreciating its implications.

¹⁶¹ Ibid [89].

¹⁶² Ibid [89].

¹⁶³ Ibid [93].

¹⁶⁴ Ibid [91].

¹⁶⁵ Samet (n 21) 63.

¹⁶⁶ *Heller*, [257].

¹⁶⁷ Ibid [261].

Moreover, he demonstrated sophistication in standing up for himself. The record also lacked evidence indicating why he ‘decided’ to drive for Uber.¹⁶⁸ This reasoning denies moral responsibility — to clearly consider and explicate impacts of terms one proposes — that accompanies the power to tender standard form contracts knowing that many parties will depend on the ensuing relationship for a livelihood. It obliterates the reality that few people applying to parties like Uber (especially those economically embattled), regardless of education or sophistication, have expendable time and energy to thoughtfully read every standard form contract they click through, not to mention concealed provisions whose content must be sought elsewhere. Judge Brown emphasises that the plurality’s view that unconscionability may arise from a party’s misunderstanding or unappreciation of a term, ‘suggests that [the arbitration agreement] could have been remedied if the US\$14,500 fee ... was spelled out expressly’.¹⁶⁹ His and Judge Coté’s respective minimisation of economic dominance asserted by Uber over its drivers, warrants *contextual* attention of what constitutes a relevant vulnerability. The plurality could have compellingly accounted for their criticisms by expounding that such a provision, howsoever clearly articulated, would not be rejectable by people whose financial necessity leaves few alternatives but unemployment. They perhaps eschewed this line of reasoning to avoid grappling with Judge Coté’s insistence that insufficient evidence exists surrounding Heller’s financial position and his decision to contract with Uber.

This should be answerable through empirical knowledge that Heller worked fulltime for Uber and that job markets are increasingly challenging for applicants.¹⁷⁰ Not *all* standard form contracts are unconscionable. Provisions therein, imposing conditions clearly leveraging economic desperation afflicting large portions of those entering into them, are oppressive, and surely unconscionable. Knowledge that people seeking to become Uber

¹⁶⁸ Ibid [262].

¹⁶⁹ Ibid [171].

¹⁷⁰ This has been exacerbated by pandemic conditions, which had emerged before the Court handed down its judgment. For instance, in April 2020, 2 million Canadians lost their jobs: ‘Canada lost nearly 2 million jobs in April amid COVID-19 crisis: Statistics Canada’, *CBC* (Web Page, 8 May 2020) <<https://www.cbc.ca/news/business/canada-jobs-april-1.5561001>>. In the same month, the U.S. experienced 20.5 million job losses: ‘U.S. economy lost 20.5 million jobs in April’, *CBC* (Web Page, 8 May 2020) <<https://www.cbc.ca/news/business/united-states-coronavirus-jobs-unemployment-april-1.5561026>>. See also: Brandie Weikle ‘What the COVID-19 employment crisis tells us about the future of work’ *CBC* (Web Page, 29 May 2020) <<https://www.cbc.ca/news/business/covid-19-employment-crisis-recovery-employment-in-2030-1.5588285>>. See also above (n 1).

drivers often accept oppressive conditions out of necessity,¹⁷¹ entails an obligation to heed the call of conscience that proscribes exercising private power to exploit desperation. Although the plurality recognised *necessity*-based vulnerabilities, their application only addressed difficulty in *understanding* contractual provisions. They could have discredited their colleagues' criticisms by drawing attention to the relevant disparity of economic power that could constitute a sufficient disadvantage *notwithstanding understanding deficit*. The 'understanding' category is persuasively applicable in *Heller*, as few people would appreciate the significance of the arbitration clause. However, Judges Brown and Cot e's insistence on a particular 'vulnerability',¹⁷² and their 'freedom of contract' and 'commercial certainty' objections, beg a retort concerning the potential for future cases solely based on arbitrarily exercised economic power. Such a riposte could underscore that their objections do not liberate market players from obligations of conscience to treat people with dignity. They merely advocate a generous scope of 'autonomy' to wield their market power mindlessly of human dignity and contractually secured 'certainty' to avoid legal consequences. Unconscionability cannot be severed from its underpinning interpersonal conscience. While Judges Abella and Rowe commendably activate this to advance human dignity to confront power imbalances characterising gig economy contracts, they could have more explicitly affirmed its applicability when these imbalances are overwhelmingly economic.

D 'Knowledge'

Following Judges Brown's and Cot e's insistence upon particular personal vulnerability, both deem 'knowledge' thereof an indispensable element. Judge Brown, worries that Equity's protection of the vulnerable could threaten 'countervailing interests of commercial certainty and transactional security', thus demanding 'explanation as to why

¹⁷¹ Uber's unconscionable behaviour arguably extends considerably beyond this immediate exploitation of economic disadvantage. See Richard Heeks et al, 'Digital Platforms and Institutional Voids in Developing Countries: The Case of Ride Hailing Markets' (2021) 145 *World Development* 1: Having 'circumvented the state's ability to control labour supply and levels of competition in the market', platform companies including Uber use 'their control over labour supply', to ensure 'a greater supply of drivers than demand from customers to reduce the chance that customers are unable to find, or have to wait excessively for, a driver', which has resulted in compulsion for drivers to expose themselves to greater risks on the job and work extreme hours (8) In some places, this has followed a "bait-and-switch" tactic' of 'luring workers in on expectations of particular levels of income but then making changes (e.g. unilaterally to payment terms) that reduced income" (9).

¹⁷² *Heller*, [162].

the defendant should suffer the consequences of the plaintiff's vulnerability'.¹⁷³ To not require 'knowledge' threatens parties' ability 'to know whether their agreement is enforceable at the time of contracting', and 'is commercially unworkable' because 'parties are left to wonder whether an unknown state of vulnerability will someday open up their agreement to review on the grounds of "fairness"'.¹⁷⁴ Judge Coté adds that Uber could not have known about Heller's education level and financial status, and evidence was lacking concerning Heller's decision-making including 'why he *chose* [Uber] as his primary source of income and not to seek other work'.¹⁷⁵ She disputes the appeal court's finding that sufficient knowledge *was* present, because 'it erred in principle regarding the kind of vulnerability which would be sufficient', which 'tainted its finding [concerning] knowledge'.¹⁷⁶

For Judges Abella and Rowe, a 'knowledge' requirement would wrongly shift unconscionability's focus from protecting the vulnerable to the empowered party's state of mind, 'erod[ing] [its] modern relevance ..., effectively shielding from its reach improvident contracts of adhesion where the parties did not negotiate'. Establishing knowledge is *assistive* in proving unequal bargaining power, but not determinative because the vulnerable party 'is as disadvantaged by inadvertent exploitation as deliberate exploitation'. Therefore, one 'cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power'.¹⁷⁷ This reasoning implicitly recognises the conscience underpinning the doctrine, asking whether a party can conscionably seek *enforcement*. A 'knowledge' requirement, pertaining to particular personal disadvantage, justified by contractual certainty, trivialises the consciousness that parties like Uber have of the power imbalance which they seek to intensify and evince in their conduct in tendering non-negotiable standard form contracts that convolutedly block access to the courts.

Judge Brown and Coté's erasure of widespread economic disadvantage by demanding 'particular' vulnerability, enables their insistence on 'knowledge' of special characteristics — protecting powerful parties from moral responsibility for deliberately

¹⁷³ Ibid [166].

¹⁷⁴ Ibid [166]-[167].

¹⁷⁵ Ibid [288] (emphasis added).

¹⁷⁶ Ibid.

¹⁷⁷ Ibid [85].

drafting contracts to exploit, and entrench, such disadvantage. Judge Coté's complaint about insufficient evidence about the driver's 'choices', displaces a powerful party's moral onus to not design contractual devices that target classes of people who lack meaningful employment *choices*, and are vulnerable to further disempowering contracts. They would humiliate economically embattled workers, by claiming that a party, who instructed lawyers to draft provisions that deliberately seize upon their disadvantage to induce acceptance of terms that will compound it, must not have their commercial certainty undermined.

A common limitation in each judgment is reticence to explicate the relationship between knowledge and good conscience in the context of power dynamics between the parties. The notion of conscience demands emphasis as the capacity for moral reasoning and the basis of Equity's jurisdiction to interfere in contractual arrangements. It explains why requiring 'knowledge' in such cases distracts from the relevant question of whether Uber should be entitled to enforce the agreement against the other party, given the dynamics of their relationship. Insistence that Uber have 'knowledge' of a particular vulnerability, or specific circumstances, affecting an individual driver, undermines the conscience at the heart of unconscionability. The relevant 'knowledge', that should stimulate the conscience of Uber's officials, concerns their own market power, the fact that many people contracting with them have few other choices available, and logical corollaries of their drafting choices upon those people. By emphasising injustices resulting from failure to engage conscience to recognise the dignity of others in the formation of contractual relations, courts can prevent Equity's ability to respond to contemporary abuses of private power from atrophying under the burden of specious demands for 'particular vulnerability' and 'knowledge'.

E *'Improvidence'*

A troubling prospect in measuring 'improvidence' is potential for powerful parties to justify oppressive terms, which themselves might be 'improvident' for less powerful parties, by implicitly relying on the latter's poverty to argue that the overall transaction may have ameliorated their position. This approach would fuel the 'race to the bottom' of callous profit-seekers in instrumentalising workers struggling for employment and income contrarily to the dignity of the latter — whose 'autonomy' means more than

formal freedom to sign contracts out of necessity. This ‘choice’ is often materially between accepting dehumanising labour relationships and dehumanising experiences often accompanying underemployment. Judges Abella and Rowe recognised that oppressive terms, at least those contained in arbitration clauses, are rescindable for unconscionability without deeming the entire agreement unconscionable.¹⁷⁸ Their colleagues’ counterarguments provoke contemplation, however, of how their reasoning could benefit from explicit, conscience-based, explanation of why oppressive aspects of contracts that leverage economic necessity should not be defensible on the effective basis that such desperation might render the contract beneficial.

For the plurality, establishing ‘improvidence’ concerns whether the power imbalance affecting the contracting process manifests in undue advantage *or* disadvantage respectively for stronger and weaker parties. When one’s *necessity* or desperation indicates ‘almost *any* agreement [would] be an improvement’, emphasis is warranted on any undue benefit the other derived.¹⁷⁹ Undue advantage may become apparent only once terms are considered in relation to ‘surrounding circumstances at the time of formation, such as market price, the commercial setting or the positions of the parties’.¹⁸⁰ Moreover, a party’s limitation in *understanding* ‘the meaning and significance of important... terms’ warrants attentiveness for ‘undu[e] disadvantage’ caused by terms outside their appreciation, that ‘unfairly surprise’ them or disregard their ‘reasonable expectation’.¹⁸¹ The elements interact in a mutually indicative manner: as a matter of ‘common sense’, a demonstrably improvident transaction can illuminate the nature and existence of disadvantage that lead to it, and the character of the disadvantage might indicate what constitutes improvidence for that person.¹⁸² The majority’s insistence on ‘fairness’, in assessing improvidence, reflects Equitable conscience:

‘Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are entrusted to “mete out situationally and doctrinally appropriate justice”. Fairness, the foundational premise and goal of equity, is

¹⁷⁸ Ibid [96].

¹⁷⁹ Ibid [76].

¹⁸⁰ Ibid [75].

¹⁸¹ Ibid [77] (citations omitted).

¹⁸² Ibid [79].

inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily framed on the circumstances'.¹⁸³

This open-ended approach to improvidence reflects the moral reasoning required in establishing unequal bargaining power. The plurality identifies the improvidence in Uber's effective extinguishment of Heller's legal rights. Not only is the imposition of filing, travel, and associated costs in excess of a driver's yearly income and disproportionate to any expectable amount an arbitral decision would award; these barriers render all contractual rights 'illusory' and '[e]ffectively ... unenforceable by a driver'.¹⁸⁴ Notwithstanding the accuracy of these observations, the reasoning of the plurality's judgment less emphasises 'necessity and desperation' than the 'understanding and appreciation' side of unconscionability in establishing improvidence — similarly to how they elucidated that desperate circumstances can premise unequal bargaining power while ultimately applying the 'understanding' and 'appreciation' ground.

They highlight Uber's contractual device of obscuring the cost of arbitration from their drivers and difficulties one might face in comprehending that concealed, but in a manner that elides the reasons why a worker might accept such oppressive terms: 'No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it'.¹⁸⁵ Despite having recognised the significance of desperate circumstances in driving people to accept oppressive contractual provisions proposed by financially powerful parties (and that such can suffice to find improvidence),¹⁸⁶ the majority seem to forget that reasonable people are often so desperate for employment that they have little choice but to enter an agreement in hope that the consequences will be less improvident than unemployment.¹⁸⁷ The plurality's judgment could have more accurately added 'if they had a meaningful choice' to the quoted sentence.

¹⁸³ Ibid.

¹⁸⁴ Ibid [95], [97].

¹⁸⁵ Ibid [95].

¹⁸⁶ Ibid [76], [69]: 'When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation'.

¹⁸⁷ Some demographics are more highly represented in the gig economy, especially migrant workers, given differentiated restrictions in available employment opportunities, and are thus more vulnerable to arguments that oppressive conditions are just one part of a contract that was, overall, a lifeline. See, e.g., Neils van Doorn, Fabian Ferrari, Mark Graham, 'Migration and Migrant Labour in the Gig Economy: An Intervention' (Scholarly Paper, June 2020) <<https://ssrn.com/abstract=3622589>>. See also Zwick (n 3).

For the plurality, the obstacle might be having to defend an improvidence finding in circumstances where the agreement might rationally be seen by the weaker party as preferable to rejecting it. Perhaps they were wary of justifying Judge Brown's criticism that 'it is hard to imagine a judicial approach more likely to undermine commercial certainty' than their context-sensitive approach to improvidence.¹⁸⁸ Judge Brown's preference of public policy over unconscionability entails that public policy can more precisely identify the wrong in an arbitration clause that restricts access to justice and is able to "ascertain the existence and the exact limits" of substantive public policy considerations'.¹⁸⁹ He rejects application of unconscionability to individual contractual provisions,¹⁹⁰ criticising the majority for not examining 'the overall exchange of value and assumption of risk between [parties], which may very well justify what appears to be substantial "improvidence" ...'.¹⁹¹ While Heller could not 'negotiate the terms ... he did receive the benefit of working as an Uber driver and receiving an income'; the contract was not 'foisted upon him'.¹⁹² Judge Brown, therefore, accuses the plurality of misapplying unconscionability to an individual term as a 'distributive justice' measure, and failing to recognise the parties' power to make exchanges of equal value.¹⁹³ Judge Coté would require further evidence to establish improvidence because the only evidence concerning Heller's financial position is that he worked full time as an Uber driver,¹⁹⁴ ignoring that fulltime Uber drivers tend to depend on earnings they will receive through the agreement, and rarely have amounts equivalent to their yearly earnings (plus additional expenses) available to instigate overseas arbitration. Further, she rejects any basis for claiming that the fees render unenforceable Heller's rights under the agreement,¹⁹⁵ despite that in ordering a stay of proceedings she stipulates that Uber advance Heller's filing fees to make them potentially enforceable.¹⁹⁶

The chicanery of 'certainty'-based circumscription of recognisable disadvantage recurs in the mirroring position that improvidence cannot be established for parties for whom

¹⁸⁸ *Heller*, [170].

¹⁸⁹ *Ibid* [169].

¹⁹⁰ *Ibid* [171] (citation omitted).

¹⁹¹ *Ibid* [172].

¹⁹² *Ibid*.

¹⁹³ *Ibid* [173], citing Benson, *Justice in Transactions*, 109.

¹⁹⁴ *Ibid* [286].

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* [199], [324].

accepting such provisions might, especially from the time the agreement was made, enhance their financial position. If the standard of good conscience informs unconscionability, courts and businesses can assess ‘improvidence’ from the perspective of whether formulating and tendering contractual terms would survive scrutiny by that moral capacity as to whether they reduce a person to a mere means to an end. Two helpful questions would be, (a) whether a party who had a meaningful choice, would likely accept the proposed terms, and (b) whether the terms are being proposed to parties who likely lack availability of such meaningful choices. While the plurality upholds human dignity by deeming the arbitration agreement unconscionable, they would have better safeguarded it by declaring the incompatibility of conscience with rewarding arguments that implicitly excuse oppressive terms vis-à-vis another party’s likely desperation.

VII POTENTIAL AND LIMITATIONS IN *HELLER*: FROM ‘VULNERABILITY’ TO STRENGTH

Although the Court could have more boldly articulated and advanced the role of Equity’s conscience in applying unconscionability, it upheld standards of human dignity for workers rather than gaslighting them with ‘commercial certainty’ and ‘autonomy’ claims. It resolved the issue of ‘who has authority to decide whether an Uber driver is ... an “employee”’,¹⁹⁷ in a way that preserves potential for unconscionability to address indignities like those mentioned in Part II. Whether the Ontarian court, like Britain’s Supreme Court, decides that Uber’s drivers are legally afforded workplace protections, remains to be determined.

Courts may sometimes uphold human dignity through equitable reading in applying an open-textured statutory provision. This depends on legislative allowance of scope for judges to register dignitary concerns when appropriate. Uber is already lobbying Canadian provinces to introduce legislation to circumvent *Heller*.¹⁹⁸ Furthermore, Courts may, consistently with their capacity as active moral reasoners vested in their Equitable

¹⁹⁷ Ibid [1].

¹⁹⁸ Analysis, ‘Uber is Lobbying Canadian Provinces to Rewrite Labour Laws and Create a New ‘Underclass of Workers’, *PressProgress* (16 March 2021) <<https://pressprogress.ca/uber-is-lobbying-canadian-provinces-to-rewrite-labour-laws-and-create-a-new-underclass-of-workers/>>. See also Tara Deschamps, ‘Uber Canada to shift operations to Canada after Ontario class-action lawsuit’, *Global News* (Web Page, 4 June 2021) <<https://globalnews.ca/news/7978246/uber-canada-operations-move/>>. Furthermore, Uber’s new post-*Heller* contract still includes the previous agreement’s — also potentially unconscionable — clause, forbidding drivers from engaging in collective bargaining or litigation. It also, by default, notwithstanding hidden instructions to opt out, includes a domestic arbitration clause, as the employment status question is still undetermined.

jurisdiction, invoke the court's conscience in disputes between parties — when ordinarily applicable rules and rights, and therefore one party, are threatened with instrumentalisation, by another party. They thereby command parties to act in accordance with their moral capacities, with respect to the other party's human dignity as a moral end and not a mere instrument.

Equity's conscientious capacity — beyond merely equitable reading — enables it to draw into alignment the moral value and moral capacities of the court and both parties who come before it. Simultaneously, it restrains other-disregarding exercises of power and sanctions communal standards that, like in *Heller*, respond to the everchanging conditions in which we live and in which power is concentrated and exercised. The power that Equity restrains, however, remains in the hands of parties wielding it. The vulnerability it identifies, and shields, retains its impact on parties experiencing it. While Equity's conscience can uphold dignity in interactions between disparately empowered parties, if these power relationships are socially unconscionable *in themselves*, then deeper aspirations of dignity and equity must guide our direction in establishing conscionable arrangements of power in society.

Equity's limitations do not render the precedents set by its interventions into the interactions between parties without social impact. In Canada pursuant to *Heller*, although yet to be determined in Australia,¹⁹⁹ and England,²⁰⁰ Equity may compel parties

¹⁹⁹ The Australian doctrine known as unconscionable dealing or unconscionable conduct, 'may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscious advantage is then taken of the opportunity thereby created': *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J). It remains to be determined whether Australia's High Court would recognise a worker's disadvantage relative to a business wielding vast resources and market power as a recognisable disadvantage. As Gardner notes, however, Queensland's Supreme Court recognised, in a decision now before its Court of Appeal, "situational disadvantage and vulnerability" of four coal mining companies relative to a multinational conglomerate they were dealing with: Jodi Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller v Uber Technologies*' (2021) *Modern Law Review* (forthcoming), 10, quoting *Adani Abbot Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd* [2020] QSC 260 (Dalton J). Australia's High Court recently required 'knowledge' of the relevant disability. *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 68 [162], insisting that the doctrine 'requires proof of a predatory state of mind', not 'inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction': [161]. Bigwood provides a persuasive criticism of the High Court's entrenchment of a strict knowledge requirement and emphasis on outright predation: Rick Bigwood, '*Kakavas v Crown Melbourne Ltd* — Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37 *Melbourne University Law Review* 463. It is submitted, here, that it should not be problematic for the Court to deem relationships between workers and gig economy giants as something other than 'an arm's length commercial transaction'.

²⁰⁰ Gardner submits that '[i]n light of the standard required for 'vulnerability' in English unconscionability cases, this aspect of *Heller v Uber* is unlikely to cause any controversy: Jodi Gardner, 'Being Conscious of

to abandon contractual contrivances, that capitalise on the polarity between their own market strength and the deprivation afflicting the surplus population in the labour market, to entrench and compound disempowerment of the latter parties. Vulnerabilities, however, that the Canadian unconscionability doctrine now recognise by virtue of understanding and necessity disadvantages, and the contrasting dominance enjoyed by entities like Uber, remain in place. In such situations, working people must claim their relative position of vulnerability to receive protection. For many proud workers, the experience of disadvantage or vulnerability in a hostile job market is compounded by having to identify oneself as ‘the weaker party’. One might hope for a future where working people and those seeking employment are no longer at the mercy of either immensely powerful private entities or the courts’ willingness to interfere.

David Luban, quoting Friedrich Schiller’s consternation at invocations of human dignity that distract from economic injustices,²⁰¹ advocates for ‘the role that human dignity arguments have come to play in understanding why it would be morally shameful not to clothe the naked adequately’.²⁰² *Heller’s* advancement is preferable to leaving working people legally ‘naked’. A fundamentally dignitary and equitable community, however, is imaginable where opposing poles of economic vulnerability and dominance are replaced with collective empowerment. That aspiration could be pursued through more reformative or transformative goals. Either would require collective efforts beyond litigation.

VIII CONCLUSION

Judges may read statutes equitably, if their texts permit, in accordance with principles upholding human dignity. In private law matters, if statute leaves a court’s Equitable jurisdiction unimpaired, judges may cultivate doctrines embodying good conscience to compel regard for our dignity. Fears concerning ‘commercial certainty’ and ‘autonomy’ might dilute (Judge Brown’s reasoning) or drown (Judge Cotê’s reasoning) judicial

Unconscionability in Modern Times: *Heller v Uber Technologies*’ (2021) *Modern Law Review* (forthcoming), 10, citing *Cresswell v Potter* [1978] 1 WLR 255.

²⁰¹ David Luban, ‘The Inevitability of Conscience: A Response to My Critics’ (2008) 93 *Cornell Law Review* 1437, 1456 quoting (with slight amendment of his own) Friedrich Schiller, *Würde des Menschen* (Musenalmanach, 1797), 32-33: ‘Enough about human dignity, I pray you. Give a man food and a place to live. When you have covered his nakedness, dignity will follow by itself’.

²⁰² Luban (n 201) 1457.

preparedness to confront threats superhuman corporate power poses to human dignity — through arsenals of monetary resources, legal professionals, and contractual devices. This heightens demand for bolder articulation of Equity’s conscientious role in defending a meaningful conception human dignity adaptively in accordance with emerging threats thereto. Equitable insistence on dignified standards, in interactions between parties, accounts for power asymmetries between them. It does not import a deeper experience of human dignity and equity into the economic and social conditions in which parties interact, which create and entrench these asymmetries. Such would require a deeper and broader, reformative, or transformative, theory and practice of conscience levelled at the power dynamics and material conditions governing life and labour.

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