BCF Class Action NetLetter

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BCF LLP is a full-service business law firm that represents a wide range of corporate and institutional clients. In order to better serve these clients, BCF has a Class Action Defence Group composed of seasoned practitioners who specialize in complex commercial matters, media relations, and crisis management.

Monthly issues are published on the first day of each month.

HIGHLIGHTS

* In the July 2020 edition of the BCF Class Action NetLetter, you will find the following three articles.
* The first article analyses the recent judgment rendered by a majority of the Supreme Court of Canada at the pre-authorization (certification) stage in *Uber Technologies v. Heller*. The author addresses the consequences and newly created uncertainties of this majority judgment, not only with respect to arbitration clauses and the enforcement of civil and commercial contracts, but more specifically to class actions in Canada.
* The second article looks at the procedural challenges at the certification/authorization stage of environmental class actions. The author posits that although such proceedings have been infrequent and mostly unsuccessful in common law Canada, a climate change action founded on a breach of s. 7 of the *Canadian Charter of Rights and Freedoms* would probably meet the test for certification of a class action.
* The third article discusses lawyer advertising in the class action setting and focuses on the investigative efforts of entrepreneurial class counsel prior to the filing of proceedings as means of facilitating access to justice.
* Please note that the views expressed in the BCF Class Action NetLetter are those of the authors only and do not constitute advice of any kind.
* If you have any comments, wish to advise us of a recent class action case or issue, or would like to submit an article for publication, please feel free to contact the BCF Class Action NetLetter at one of the e-mail addresses below.
* Wishing you and yours safety, good health, and happy reading., Shaun E. Finn, Co-Leader of the Class Action Defence Group, Partner, BCF, Business Law, shaun.finn@bcf.ca, Carle Jane Evans, Lawyer, BCF, Business Law, carlejane.evans@bcf.ca, Audrée Anne Barry, Lawyer, BCF, Business Law, audree-anne.barry@bcf.ca

COMMENTARY

***Uber v. Heller*: Class Actions in the Crossfire, by Simon V. Potter, Ad. E.**[1]

In the immediate wake of the June 26, 2020, judgment of the Supreme Court of Canada in *Uber Technologies v. Heller*[2] ("*Uber*") considerable attention has been paid to what this judgment means for arbitration, for

arbitration clauses, and for what has so far been the governing rule of primary deference to arbitrators on the question of their own jurisdiction.

The judgment is grounded, for seven of the nine judges, on an expanded view of unconscionability[3] and of the circumstances in which Canadian courts can set aside "improvident bargains", and it may be that this also will generate uncertainty in a variety of areas outside the context of arbitration clauses.

The judgment is rendered, though, in the context of a putative class action and we should be paying attention also to what a sizeable majority has just said about class actions in Canada.[4] This article explores what may turn out to be a series of consequences and newly created uncertainties, at least some of them unintended but nevertheless inescapable.

In summary, it is likely that the majority, in its desire to react to "an arbitration agreement which makes it impossible for one party to arbitrate", which it saw as a "classic case of unconscionability",[5] has made a variety of assumptions, some implicit but many explicit, which will now challenge many of Canada's carefully nourished views of what a Canadian class action is, how it operates, and how it comes to bind not only defendants and a representative plaintiff but, as well, a whole class of plaintiffs.

I. The Class Action of Mr. Heller

This class action was first proposed by proceedings filed in 2017. Mr. Heller makes a variety of claims all of which the *Uber* majority sees as hinging on applicability of Ontario's *Employment Standards Act, 2000*, S.O. 2000 c. 41 ("ESA"). "The essence of Mr. Heller's position is that he is an employee within the meaning of the *ESA*."[6]

Faced with an arbitration agreement between the parties, the courts and eventually the Supreme Court of Canada had to decide whether the claim should be handled by Ontario's courts or by the designated arbitration process.

II. Prejudging the Issues of the Class Action

A decision as to whether a particular contractual clause, here a clause by which the parties agree to refer their disputes to mediation and arbitration, is unconscionable does not necessarily require that a decision first be made as to whether the contract or the dispute[7] is essentially commercial[8] or not, or as to whether they are "fundamentally about labour and employment" or about an independent contractor signing on for piecework.

Even if the class action had reached the stage of certification or authorization of the class action, a court, including the Supreme Court of Canada, would certainly have taken pains to leave this decision to the judge deciding which issues to certify and for which definition of class, and then to the judge hearing the post-certification action on the merits.

Here, though, even though at a stage well before certification, indeed at a stage at which it was decided that the application for certification should not be stayed but allowed to move forward, the majority has allowed itself to prejudge these issues, at least in part.[9] Both the issue as to the categorization of the contractual relationship, at the very heart of the putative action, and the issue whether any Uber driver in Ontario is bound to respect his or her promise to submit to arbitration.

Though the majority properly says[10] that it is careful to look only at the dispute itself, not at the actual factual nature of the contractual relationship, to come to the conclusion that what is at stake is whether Mr. Heller is an employee,[11] it has essentially decided that the dispute is therefore not about whether Mr. Heller (and presumably the other members of the proposed class) signed on to become an independent contractor, as the contract actually says.[12] If it were about that, the majority's own logic would have the ICAA apply.[13]

The purpose of this article is not to say that either of these conclusions was necessarily wrong, but it is to point out that we have witnessed, in a matter having to do principally with choosing whether to have a dispute settled by arbitration or by domestic class action, a pre-certification prejudging of how one of the issues central to the class action should eventually be decided.

It is likely that the majority had in mind to call this dispute non- commercial out of a desire to avoid its extraction of Mr. Heller from arbitration having wider repercussions in a clearly commercial context,[14] but there are two things to say about this. Firstly, it is not only in non-commercial matters that an arbitration clause can be found in an adhesion contract, or in a contract in which one party has a greater bargaining power than the other: unconscionability can be found in commercial contexts, too.[15] Secondly, and more importantly for the purposes of this article, even to posit that the majority sought to limit the downstream ramifications of its decision by camping it in the narrow sphere of uncommerciality is recognition that the majority did in effect make the finding.

The normal order of things would have been to allow a certification judge to decide whether the action presented essentially an employment law question or a commercial issue as to an independent contractor's rights and recourses as a licensee of a computer program. Class counsel can surely now be counted on to argue to the Ontario courts, pre- and post-certification, that it has already been decided that the ESA applies.

Even if the Ontario courts muster the courage to say that it has not been decided, the class has already won one issue and Uber has lost it, on a class-wide basis: the issue whether Mr. Heller or any member of the class is bound by the arbitration clause twice[16] agreed to.

III. Presuming that Certification or Authorization should be Granted

Indeed, it is difficult to conclude otherwise than that the majority has not only instructed lower courts to rule this way on this central issue if ever the class action is certified, but that it has also taken for granted that there will be certification.

A first-instance judge will now be extremely hard-pressed to decide that Mr. Heller's claim should not be certified, or should be allowed to proceed only as an individual claim,[17] or that he should be left to revert to the unconscionable arbitration.

That is, the majority appears clearly to have presumed, pre- certification, that there should be a class action to determine Mr. Heller's claim.

IV. Presuming that Mr. Heller's Recourse Must be by a Class Action Before Ontario Courts

On several occasions, the majority examines what is seen as the high cost of Mr. Heller's pursuing his individual claim before the contractually imposed ICC, and the cumulative of costs of other Ontario Uber drivers also filing their arbitration claims, to the presumably less unconscionable cost of pursuing a class action in Ontario.

The concurring judgment of Brown J. is similar to the extent that he sees the matter as one of access to justice, the cost of the ICC arbitration, in particular the up-front filing fee, being so prohibitive that it amounts to a denial of access to justice. His conclusion is also a factual one, in that he finds that the clause makes the "enforcement of law practically impossible", if not because it "expressly blocks access to a resolution" at least because it "has the ultimate effect of doing so".[18]

These conclusions are reached without any consideration[19] of

a) Any arbitrator's power to make awards, including interim awards, in relation to costs, including filing fees;

b) The likely comparative costs of running a class action which puts at stake hundreds of millions of dollars[20] of a carefully thought-out business plan;

c) The availability to Mr. Heller of the benefits of contingency fee arrangements generally applicable in class actions and certainly available in arbitrations;

d) The availability of third-party funding whether of the arbitration or of the class action;

e) Whether in light of these solutions for litigation financing, the filing fee was indeed an "insurmountable precondition (or) total barrier to court access", either in absolute terms or in comparison to the costs and other barriers to the bringing of a class action, or whether the fee might as well have been a "brick wall" just as would have been "an upfront payment of 10 billion dollars";[21]

f) The possibility of a class action involving Mr. Heller's claims being handled by way of an arbitration;[22]

g) The fact that most arbitration institutions, including the ICC, have adopted simplified, accelerated[23] and cheaper procedures for lower-value claims;

h) The fact that arbitrators have discretion to make procedural orders required to hasten and simplify the cases before them, and to avoid their becoming disproportionately costly;[24]

i) Whether the filing fee is "warranted in light of the parties' relationship and the timely resolution that arbitration can provide";[25] and

j) The fact that an arbitrator, even if the seat of the arbitration is Amsterdam (as is the case here[26]), can hold hearings wherever appears the most convenient and proportional.

Now, it may be that exploring these aspects of a finding of unconscionability, or of effective denial of access to justice, would have sufficiently complicated the issue of jurisdiction to require "referring the question to the arbitrator out of respect for the competence-competence principle".[27] It does seem to the reader that the majority avoided anything which would exceed "only superficial consideration of the documentary evidence in the record".[28] But this only indicates that the majority found a "superficial consideration"[29] sufficient to warrant an essentially factual finding that it would be unconscionable to require proceeding as the parties had agreed rather than as Ontario class action law permits.

In dissent, Côté J. writes that the majority could not decide what it did "without usurping the role of the arbitral tribunal".[30] It must also be that the majority has usurped the role of the certifying judge.

V. A Finding of Unconscionability Going Well Beyond the Arbitration Clause

Though the immediate question before the Court was whether to defer to the arbitrator according to the arbitration agreement, or to permit the representative plaintiff to proceed through the Ontario courts, and though the issue of unconscionability was decided by the majority in large part on the basis of what was seen as disproportionate burden arising from the arbitration clause, the unconscionability was also found on parameters which will surely go the class action court's assessment of the overall contract at issue.

The majority has found that there was, as a matter of fact, an inequality of bargaining power at the time of contract. This is one of two criteria which must be met, according the majority,[31] for a finding of unconscionability. It is not conceivable that this inequality of bargaining power would be found to have existed in relation to the arbitration clause but not to all the other clauses of the adhesion contract. As the majority wrote, with its own emphasis: "Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made."[32]

The Court's decision of Mr. Heller's comparative weakness in the contracting process relies exclusively on factors which would apply to his whole class.[33] The contract was standard form, a contract of adhesion. There is a "significant gulf in sophistication between" an Uber driver and "a large multinational corporation". It would be a "rare fellow" who would read the whole contract or, with that reading, "suspect that behind an innocuous reference to mediation ... followed by arbitration ... there lay a US$14,500 hurdle to relief."

The only other criterion of unconscionability is that the bargain be found to have been "*per se* unreasonable"[34] or, simply, "improvident".[35] That improvidence can be found in any clause which turns out unduly to advantage or enrich the presumably stronger party[36] when seen in the context at the time of contracting.[37] It is not an

exercise of "exact science" but "inherently contextual".[38] That said, the US$14,500 filing fee is found to be a "clear" "improvidence".[39]

Further, finding the manifestly unfair bargain can be enough for the court to find that it must have resulted from unequal bargaining power.[40] Criterion number two is itself the answer to criterion number one,[41] and there is no need to find that the unfairness or the improvidence is "gross" or that it results from an intention to take undue advantage.[42]

Brown J. is surely on solid ground to write that the majority has concluded "by vastly expanding the scope of the (unconscionability) doctrine's application and removing any meaningful restraint" and "drastically expanding the doctrine's reach without providing any meaningful guidance as to its application",[43] and that " their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount."[44]

This will be so whether in the presence of an arbitration clause or not, and whether the issue arises in the context of a class action or not,[45] but it is clear that the expansion of the doctrine here, in a class action, opens the door to many more disputes pre-certification and, as here, to more pre-certification judicial determinations of fact.

It is impossible in all this light to conclude otherwise but that the majority has decided - prior to certification or discovery or trial - that the inequality of arms and the improvidence existed for all the drivers who twice clicked "I agree" to the contract with Uber. Though the majority stresses that the unconscionability can be found in relation to the arbitration clause, separately from the contract as a whole,[46] half the "duality"[47] will now surely be considered settled fact in the yet to be certified class action and the other half can be met with a showing of undue advantage or enrichment. Brown J. fears not that it is unlikely that the finding of unconscionability can be constrained only to the arbitration clause but that it is in law impossible: "Unlike public policy considerations that target a specific contractual provision, unconscionability's substantive inquiry must consider the entire bargain...."[48]

Legally permissible or not, effectively constrained or not to the arbitration clause, the majority's embarking on this "substantive inquiry" and deciding it on the basis of a superficial review of whatever few facts appear on the record, runs counter to many decades of jurisprudence to the effect that the first-instance court is a gatekeeper essential to the integrity of the class action and, then, an essential fact-finder on the merits.

VI. An Openness to Other Pre-certification Determinations

The majority decided that it was not necessary to rule whether the arbitration agreement between Uber and Mr. Heller was void as having "the effect of contracting out of mandatory protections in the *ESA*", but only because the majority had concluded the arbitration agreement was invalid because unconscionable.[49]

This is an indication that the majority, had it not reached a whole- class determination that the arbitration clause was unconscionable and not binding, would have proceeded to decide whether the arbitration agreement illegally side-stepped mandatory protections in the *ESA* and was therefore void. That is, if the majority had not stepped into the arbitrator's competence to decide his or her own jurisdiction one way, it would have done it another way.

This issue, whether the agreement does or does not seek to avoid, or succeed in avoiding, statutory requirements mandatory in an Ontario employment context, is complex and factually dense. Deciding that issue would not only involve pre-empting the arbitrator as to the effect of contractually agreed choice of law provisions and as to an arbitrator's power[50] to apply mandatory provisions of any particular jurisdiction notwithstanding the general choice of law, but also require pre-judging the question whether the contract truly does impose results incompatible with the Ontario statute.

This would necessarily demand coming to a landing on the issue whether Mr. Heller is, whatever his contract says, an employee within the meaning of that statute. This is not only a factually laden inquiry, but is also an inquiry leading to one of the very conclusions Mr. Heller seeks on the merits.

It is noteworthy that the majority did not decline to embark on this inquiry because it would have been incompatible with what we have until now understood a class action to be, but because another solution was found which itself puts into question our understandings about the proper working of a class action, of class action certification, and of trial and eventual class-wide judgment.

VII. The Broad Swath

The majority took pains to narrow the ambit of its finding here, stressing what it found to be the non-commercial nature of the dispute before it, and stressing that this should be considered one of those rare, "abnormal" cases in which deference to the arbitrator should not be the rule.

However, any class action plaintiff, whether raising a commercial dispute or not, will now have the benefit of an additional argument on which to argue invalidity of a contract and to do so on a class-wide basis.

Class action plaintiffs will clearly have the benefit of at least bringing to court actions which would normally have been left to arbitration, waiting for the application to suspend the action in favour of the arbitration proceedings, and then arguing that the arbitration clause should not apply.

Even in areas not having to do with arbitration, those plaintiffs will have additional grounds on which to raise matters of unconscionability, and perhaps even to get rulings (as to at least one of the dual criteria of unconscionability) before certification, let alone before trial. If Brown J. is right, that the majority has paved the road towards judgments now being rendered on the basis of "unreasoned intuition and *ad hoc* judicial moralism",[51] class action plaintiffs will feel that they have little to lose in taking pre-certification or pre-trial chances at seeing which way the wind blows.

Any class action relying on, or seeking to avoid, an adhesion contract,[52] whether it be in a commercial matter or not, whether with individuals as signatories or corporations, will be especially susceptible to plaintiff strategies such as these.

Defendants in class actions, concomitantly, have reason to think twice before invoking arbitration clauses or indeed any other agreement to avoid normal recourse to the courts, for fear that doing so will result in pre-certification findings that the agreement is partially or even wholly "unconscionable".

VIII. Conclusion

Many (not all, but many) of these troubling uncertainties for the future would have been avoided by the majority's adopting the approach of Brown J., clearly and forcefully designed to dissuade drafters of adhesion arbitration agreements from loading the dice,[53] but we are faced with a judgment of seven out of nine judges which will have consequences for much more than arbitration agreements and much more than the competence-competence principle.
Their judgment will affect the enforcement of civil and commercial contracts, and will, for good or ill, affect the way in which class actions reach certification and, eventually, trial.

Using Class Actions To Québecmate Change, by Jasminka Kalajdzic[54]

Climate justice activists are increasingly looking to litigation to produce the policy changes that have eluded them in the political process. 'Climate change litigation' is a broad term that refers to strategic litigation before domestic courts and international tribunals, all involving the use of various legal doctrines in order to compel the reduction of greenhouse gas emissions ("**GHGs**") or obtain compensation from those responsible for climate change-related harms.[55] Very little of this litigation, however, has been prosecuted by way of class actions; to date in Canada, only one climate change class action has been attempted, and thus far, unsuccessfully. In *ENvironnement JEUnesse c. Procureur Général du Canada*,[56] the putative class of all residents under the age

of 35 alleged that the Federal Government has violated the section 7 and 15 *Charter* rights of an entire generation by failing to adopt greenhouse gas emission reduction targets sufficient to avoid cataclysmic climate change. The motions court judge denied authorization on the basis that the class definition was arbitrary and impermissibly included minors.[57] The decision is under appeal.

Despite the decision in *ENJEU*, I submit that a climate change action founded on a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*[58] would probably meet the test for certification of a class action. In this brief article, I set out the reasons why.

I. Constitutional Class Actions in Canada

By definition, constitutional challenges involve issues that are common to similarly-situated plaintiffs. They also typically focus on the behaviour of the defendant or the systemic impact of government action. Class actions, however, have been sparingly used to advance constitutional claims. Of the 1,500 or so class actions commenced in Ontario since 1993, only 7% involved cases against the Crown, of which *Charter* claims comprised only a small part.[59] Private law cases make up the vast majority of class actions.

There are many reasons for the paucity of constitutional class actions, but it suffices to focus on two. First, a line of cases starting with an *obiter* comment in *Guimond v Québec (Attorney General)* held that a class action was not appropriate where the main relief sought was a declaration of constitutional invalidity.[60] Courts rejected class actions on this basis, stating that test case litigation would achieve the same ends at less cost and in shorter time.[61] Second, because class action litigation is inherently entrepreneurial, it depends on the willingness of lawyers to take on complex cases, almost always on a contingency fee basis, and to prosecute them against well-resourced defendants, with no guarantee of success. As a result, the size of the potential damage claim is a critical factor for determining which cases class counsel will take on, because the quantum is directly proportionate to the prospective contingency fee. This economic reality means that *Charter* cases, where the availability of any damages is uncertain, have been particularly unattractive.

The Supreme Court's 2010 decision in *Vancouver (City) v Ward* was cause for renewed optimism regarding constitutional class actions because the Court, for the first time, held that compensatory damages may be awarded pursuant to s. 24(1) of the *Charter.*[62] As a result, both the practical economic barriers and the jurisprudential problem in *Guimond* could be overcome, because damages, not constitutional invalidity, would be the primary goal of litigation.

Ward was not a class action. The plaintiff was a lawyer who was unlawfully strip-searched and then ultimately awarded $5,000 under s. 24(1). The Court's recognition of a "distinct remedy of constitutional damages",[63] however, created the financial incentive entrepreneurial class counsel needed to take on a *Charter* class action. In cases where large numbers of people are subject to the same conduct that is ultimately determined to violate their *Charter* rights, constitutional damages, even if individually modest, could be significant in the aggregate, and thus justify the risk and expense of a class action.

Post-*Ward Charter* class actions have not been entirely predictable. In *Thorburn v British Columbia (Public Safety and Solicitor General)*, the B.C. Court of Appeal rejected a proposed class action by individuals who had been strip searched pursuant to a policy at the Vancouver city jail on the basis that the s. 8 *Charter* right is individual in nature and therefore not amenable to class-wide determination.[64] In Ontario, however, *Charter* class actions have fared better. Beginning with the Divisional Court and Court of Appeal's decisions in *Good v Toronto Police Services Board*, a class action on behalf of G20 protestors, several class actions involving alleged *Charter* violations have been certified.[65] In *Good*, the courts confirmed that not all issues of liability have to be capable of class-wide resolution to justify certification; this is consistent with many other class actions involving negligence claims, where only some elements of the cause of action can be evaluated collectively.[66] More importantly, the courts held that *Charter* breaches caused by policies, rules or blanket orders are capable of class treatment, because they focus on the conduct of the defendant: "When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong".[67]

Good and its progeny thus breathe life back into the *Charter* class action as a tool of public interest litigation. More to the point, they create opportunities to structure constitutional climate change litigation as class proceedings.

II. Climate Change Class Actions

Outside of Québec, environmental class actions have been infrequent and mostly unsuccessful.[68] In the common law provinces, litigants often found their claims on negligence, nuisance and trespass and seek the tort measure of damages.[69] From the perspective of class action procedure, tort causes of action force courts to focus on individual aspects of the problem, making certification more difficult.[70] So why would climate change class actions fare any better? The key is in the framing of these cases as constitutional challenges rather than environmental law violations or tort claims. The rights turn in climate change litigation is precisely what makes these cases amenable to collective action.

III. Justiciability

As is well known, to proceed as a class action, a judge must certify (or in Québec, authorize) the proceedings as a class action. In addition to the certification test, a climate change action would likely confront a justiciability argument. The question of whether the Federal Government's actions to combat climate change violate the *Charter* is undoubtedly novel, complex and politically charged. The SCC has determined, however, that as long as an issue has a legal component, and is therefore not a purely political question, the dispute will be considered justiciable.[71] Indeed, in *ENJEU*, Morrison J. rejected the Attorney-General's justiciability arguments because the plaintiffs sought a finding that the failure of Canada to act sufficiently to regulate GHGs was a violation of their *Charter* rights to life, liberty and security of the person.

IV. Cause of Action

A certification motion judge must be satisfied that the pleadings disclose a cause of action. No evidence is admissible on this part of the test. Courts use the same approach as on a motion to strike: assuming all facts pleaded to be true, is it plain and obvious that the plaintiff's claim cannot succeed.[72] This criterion is not a high hurdle. Courts are to take a generous approach and have ruled consistently that the novelty of the cause of action will not militate against the plaintiff.

The central contention in a constitutional climate change action is that the stability of the climate system is profoundly connected to the health and survival of the class. There is scientific consensus about the existence, causes and impacts of climate change (including death, illness, loss of land, food insecurity and psychological injury), and the role of states in generating GHGs. There is also a growing academic literature on the ways in which climate change implicates sections 7 and 15 of the *Charter*. These arguments confirm that, for the purposes of certification, it is "not plain and obvious" that the plaintiff's claim cannot succeed.

V. Identifiable Class

Although the identifiable class criterion is usually not an onerous requirement and few class actions are rejected on this criterion alone, it is what caused the Québec court to refuse to certify *ENJEU*. While Morrison J. did not dispute that Québec youth will suffer greater violations of their rights than older generations, he found the cut-off of 35 years old to be arbitrary.[73] The plaintiffs chose this definition, however, because it corresponded with the definition of youth used by Statistics Canada. In addition, there is a rational connection between the proposed class and the central factual issue in both the s. 7 and s. 15 *Charter* claim: global warming is likely to

reach 1.5[degrees]C above pre-industrial levels between 2030 and 2052 if it continues to increase at the current rate, resulting in extreme temperatures in many regions, increased flooding in coastal regions and greater frequency of droughts in others.

Justice Morrison also disputed the class definition on the basis that class members under the age of 18 are not fully capable of exercising their civil rights, and that their parents, therefore, would have to act on their behalf in the litigation. He concluded that a representative plaintiff does not have the authority to force millions of parents to do so.[74] There are good arguments in support of the plaintiffs' appeal on this basis: the blanket denial of access to the class action device for children is inconsistent with the jurisprudence in the rest of Canada and contrary to the central access to justice objective of class actions. Class actions often include class members who are minors or without capacity.[75] There is nothing in the language of either the Québec *Code of Civil Procedure*[76] or the class proceedings statutes of the common law provinces that excludes minors from class membership. While minors who are named litigants must have litigation guardians in all provinces, there is no precedent for the requirement that guardians must act on behalf of children who are merely class members; after all, class members are not regular plaintiffs and do not have the rights of ordinary litigants. To deny millions of Québecers access to the class action device *because they are children* is contrary to precedent, the access to justice objectives of class actions, and sound public policy.

VI. Common Issues

As previously discussed, some constitutional class actions have foundered on the common issues test because courts concluded that *Charter* rights are inherently individual in nature and that violations and remedies, therefore, cannot be determined on a common basis. Recent successes in the G20 and administrative segregation cases, however, suggest that courts are prepared to find that alleged breaches of s. 7 and other rights raise common issues because they relate to the operational methods and policies of the government.

In some ways, climate change raises quintessentially common issues. The focus of the plaintiffs' claim is solely on the defendant government's conduct. While the impact on class members may vary in degree based on geography, economic status, Indigeneity or health, there is a baseline of harm common to all and represented by *Charter* damages that could be determined in the aggregate.

VII. Preferable Procedure

Although the authorization test in Québec does not include a preferable procedure criterion, Morrison J. found that the proposed class action was unnecessary because its aims could be achieved by way of an individual test case.[77] Plaintiffs have successfully resisted this argument in other class actions on the basis that, unlike in a test case, compensation is available in a class action.[78] The Court of Appeal for Ontario has also held that the combination of remedies - a declaration of a *Charter* violation *and* damages - "would be stronger instruments of behaviour modification."[79]

The question of compensation is complicated, however, by *ENJEU*'s unusual request that the damages awarded not be paid to class members but be used instead for measures to curb global warming.[80] The request, in effect, is for a cy près distribution targeting GHG emissions. A court could either interpret the requested relief as a more explicit form of behaviour modification (thus consistent with *Good*) or proof that declaratory relief, not compensation, is the class members' true objective.

VIII. Representative Plaintiff

The final certification criterion is the determination that there is a suitable representative plaintiff to bring the action on behalf of class members. Youth climate actions consistently rely on a dozen or more plaintiffs who are

diverse and representative of the many communities impacted by climate change: Indigenous, living in coastal regions or drought zones, impacted by wildfires or flooding, and suffering from illnesses caused by extreme heat and polluted air. A similar cross-section of proposed representative plaintiffs represented by capable class counsel would almost certainly satisfy the final component of the certification test.

IX. Why Use Class Actions to Promote Climate Justice?

There are both legal and practical advantages to using class actions. The *legal* advantages relate to the unique provisions of class action statutes that permit the use of statistical evidence and assessment of aggregate damages. The availability of cy près distributions of damages also obviates the need to seek an order requiring the government to make budget allocations, relief that would likely be denied as not justiciable.

There are also distinct *practical* advantages to a class action. These cases are financed by sophisticated lawyers working on contingency fees. Engaging class action specialists widens the pool of lawyers doing public interest work. The evidentiary burden at the certification motion is low, but the benefits of achieving certification can be significant. For one, the mere fact of certification raises public awareness of the case and its claims. Second, certification increases settlement leverage exponentially.
The certification of a climate change action is no guarantee that the case will succeed on the merits. A certified class action faces the same doctrinal and policy challenges as any other form of climate change litigation. But, certification itself is an important victory. It improves the power disparity between citizens and the state and focuses the trial on a set of discrete factual and legal common issues. Successful findings on any one of these issues advances the cause of climate justice.

CAMERON'S CORNER: Lawyer Advertising and Class Actions by Cameron Fiske, Milosevic Fiske LLP[81]

I. A Brief History of Lawyer Advertising

Prior to the 1977 decision of the Supreme Court of the United States ("SCOTUS") in *Bates v. State Bar of Arizona*[82] ("*Bates*"), a case referenced with disdain by the fictional biglaw advocate Chuck McGill in the television crime drama series *Better Call Saul*, lawyer advertising, at least throughout much of America, was generally frowned upon. In fact, lawyers were not permitted to publicly advertise their services. The assumption was that lawyers were supposed to have an established clientele, or that his or her skills would lead potential clients to retain them. Advertising was seen to be beneath advocates. This all changed when two enterprising lawyers formed a legal clinic in order to "provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid".[83]

On February 22, 1976, these same lawyers placed an advertisement in the *Arizona Republic* that spelled out for the public exactly how much each individual routine legal service cost (with an emphasis on how reasonable the pricing was). The State Bar of Arizona, which forbade any form of lawyer advertising, soon commenced disciplinary proceedings against the two lawyers. After failing to show cause as to why the advertisement was not a flagrant breach of the aforementioned ban, the lawyers were suspended for six months. Eventually their appeals and attempts to avoid sanction reached the SCOTUS.[84] The ensuing decision would forever change how lawyers operate. In fact, it would usher in a whole new era that would one day pose several ethical conundrums for the profession as a whole. In this article, the author will endeavour to examine the question of whether or not there are there any limits to advertising and what a lawyer can do or say when attempting to solicit a class action during the investigation stage.

In its 5-4 decision in *Bates*, the SCOTUS held that the ban on lawyer advertising violated the lawyers' First Amendment right to freedom of speech. The Court classified the advertisement as commercial speech that served a significant societal interest by informing the public of the "availability, nature, and prices of products and services," which would allow members of the public to act with clarity in a free market economy.[85] In one of the dissenting opinions, Justice Powell took umbrage with the advertisement's representation that the lawyers

were charging "reasonable" prices.[86] Justice Powell went on to state that "whether a fee is 'very reasonable' is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives - such as 'fair', 'moderate', 'low-cost', or 'lowest in town' - to describe the bargain they offer to the public".[87]

It appears that much of what Justice Powell said in dissent has come true. Lawyers now freely use a wide variety of unprovable adjectives to advertise their skills or services. But is this a bad thing? How else would modest income persons, without connections to bar associations, ever come to even find a lawyer if there was no advertising? Further, why does it appear so unseemly for lawyers to engage in some form of hyperbole so long as the substance of the advertisement is true? Are lawyers not salespersons in some respects? The law is at least as much a business as it is a profession. All of this brings us to the subject of modern-day class actions and the limits of lawyer advertising during the investigation stage. Practitioners must be mindful that, at least in Ontario, Rule 4.2-1 of the *Rules of Professional Conduct* states that a lawyer may market legal services only if the marketing is not misleading and it must be accurate and verifiable.[88] Along these lines, in Québec, in *Sibiga v. Fido Solutions inc.* the Court of Appeal held that "a lawyer-initiated consumer class action is not inherently incompatible with an acceptable solicitor-client relationship, nor does it mean that the client has 'no control' over counsel..."[89]

II. The Scope of Lawyer Advertising During the Investigation Stage of a Class Action

The primary purpose of class actions is to encourage access to justice, judicial economy, and behaviour modification.[90] Advertising is certainly connected to any assessment of the fulfilment of these objectives since so many class actions come via the investigative efforts of entrepreneurial class counsel. In fact, it is not uncommon for lawyers to announce their intention to commence a class action even before a class representative has been found.[91] Such an announcement raises concerns about a defendant being unfairly judged by the public either in the media or prior to certification or trial judgment. On the other hand, such announcements arguably facilitate access to justice as they pre-emptively tip the public off to the prospect of an eventual recovery. Further, such actions could arguably make it easier for class counsel to obtain affidavits with respect to meeting the certification criteria.[92]

The Law Society of Ontario's *Rules of Professional Conduct* do not appear to preclude advertising potential class action claims against intended defendants prior to the issuance of an action (even if public announcements could cause a company to lose investors, or at least, public respect). Rule 7.5-1 makes it clear that lawyers can communicate with the media. Specifically, this Rule states that "provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements." However, lawyers are not allowed to bring the profession into disrepute by making media statements purely for their own self-aggrandizement.[93]

All of this begs the question as to whether or not a lawyer even has a client prior to the issuance of a claim. In contacting the media about a potential class action claim, is the lawyer automatically engaging in self-aggrandizing behaviours or rather is he or she in fact furthering the aims of class actions? After all, this sort of advertising could arguably lead to the identification of a proper class representative or to greater community awareness about a coming class action.

The use of social media may also prove to be critical for class counsel during the investigative stages of a class action. Class counsel might create a Facebook page or Twitter account for the purposes of reaching out and obtaining more detailed information. Town hall forums may also be of assistance to potential class counsel, such as in Aboriginal class actions.[94] Problems may arise if class counsel appear to be instructing or tailoring the evidence of potential affiants via advertisements. It goes without saying that so long as communications and advertisements are truthful and do not run afoul of a general bar not to bring the legal profession into disrepute, such means may well prove to be of assistance in advancing the aims of class actions. In fact, class counsel will have more information at their disposal.

III. Conclusion

Since class actions often involve large sums of money with class counsel working for months, years, or even decades on a contingency basis, it does not come as much of a surprise that plaintiff side lawyers often appear to be more entrepreneurial than other members of the bar. While misleading and deceptive advertising, or long-winded and self-aggrandizing media appearances, do bring the legal profession into disrepute, the fact is that without advertising many class actions could not get off the ground. In the author's view, during the investigation stage of a class action, class counsel should only resort to the use of advertising if it will ultimately advance the aims of the intended class and not unduly harm the reputation of intended defendants. It may well be necessary at some point for law societies to directly create rules of professional conduct that deal with these initial stages, as companies can be harmed by bald assertions made by potential class counsel via advertising or the media.

On the other hand, any sort of complete bar on advertising during the investigation stage would likely not advance the aims of class actions since lawyers may need to educate the public and obtain evidence in order to right a wrong and hold wrongdoers responsible. That tension between what is permissible and what is inappropriate (the image of the proverbial "ambulance chaser" does come to mind) will probably not go away any time soon. Lawyer advertising is here to stay and so too is expanding social media technology. While there will always be limits on unseemly or misleading advertising, we will certainly not be going back to the era longed for by the aforementioned Chuck McGill, who specifically remarked during the fifth episode of *Better Call Saul* that the practice of lawyer advertising "wasn't even allowed until five Supreme Court justices went completely bonkers in *Bates v. State Bar of Arizona*".[95]

Note 1: The author practises as an arbitrator and mediator at www.simonpotter.ca, and offers advice as well in, among others, matters of commercial litigation and class actions, fields in which he has many years of experience. He was a member of the Canadian Bar Association's Task Force on Multi-jurisdictional Class Actions.

Note 2: 2020 SCC 16, https://decisions.scc-csc.ca/scc-csc/scc- csc/en/item/18406/index.do.

Note 3: As had the Ontario Court of Appeal: 2019 ONCA 1, 430 D.L.R. (4th) 410.

Note 4: Brown J. concurs in the result, declaring invalid the mandatory arbitration clause, but on the ground that it undermines the rule of law by in fact foreclosing the very access to legally determined dispute resolution which it advertises. *Uber*, 101-102.

Note 5: This, advanced by the authors Abella and Rowe JJ. at paragraph 4 of the majority judgment, is perhaps a *non-sequitur*, and is certainly an equation which Justice Brown, concurring in the result, preferred to avoid by seeing (though this point had not been advanced by Mr. Heller) a public-order-violating deprivation of access to justice: *Uber* 13, 106.

Note 6: *Uber*, 1, 12.

Note 7: *Uber,* 25.

Note 8: As a general matter or as the term "commercial" should be understood within the context of the International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sch. 5 ("ICAA"), or within that of the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. 1, or under any of its footnotes. See *Uber*, 14, 16, 19, 21, 23.

Note 9: *Uber*, 19.

Note 10: *Uber,* 25.

Note 11: *Uber*, 26.

Note 12: *Uber*, 216, per Côté J. "The Service Agreement expressly states that it does not create an employment relationship. Instead, it is a software licensing agreement, which ... is a type of transaction that is identified as coming within the scope of the UNCITRAL Model Law."

Note 13: See *Uber*, 23 and 24, and references there to language tending strongly in favour of this conclusion.

Note 14: The majority was explicit in calling this an "abnormal" instance where that extraction was necessary, but that was because of the perceived unconscionability, not because of the non-commercial nature of the dispute: *Uber*, 37.

Note 15: As the majority recognizes (*Uber*, 55).

Note 16: *Uber*, 7.

Note 17: There is not a line in the majority assessing the difficulty for Mr. Heller to pursue his Ontario claim as an individual rather than as representative of a class.

Note 18: *Uber*, 113.

Note 19: Côté J., in her dissent, found it impossible to decide the question of unconscionability or the applicability of the *ESA* on the basis of a superficial inquiry. *Uber*, 201, 217.

Note 20: Mr. Heller's claim is for CAN$400,000,000 (*Uber*, 188). An arbitration involving such a claim would see total costs of considerably more than US$14,500. A class action filed in Ontario would cost many, many times that.

Note 21: *Uber*, 114.

Note 22: The ICC rules do not yet entertain this, but other arbitration bodies do handle class actions, and even an ICC ruling on an individual case (or several combined for hearing) can result in a precedent for other claims.

Note 23: The class action proceeding was three years old by the time of the *Uber* pre-certification decision of the Supreme Court of Canada. It will presumably have many years to go before it reaches even a first-instance decision on the merits. Arbitrations exist in part because they are mercifully quicker.

Note 24: The majority writes (42), for example, that "Courts have many ways of preventing the misuse of court processes for improper ends", but never considers that arbitrators also have many tools and discretionary powers to avoid one party abusing the arbitral process.

Note 25: *Uber*, 130.

Note 26: *Uber*, 8.

Note 27: *Uber*, 31.

Note 28: *Uber*, 32, in the majority's discussion of the applicability of the criteria set out in *Dell Computer Corp. V. Union des consommateurs*, [2007] 2 S.C.R. 801, and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531.

Note 29: *Uber*, 32-34, with reference also to *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921.

Note 30: *Uber*, 217.

Note 31: *Uber*, 63.

Note 32: *Uber*, 60, 66.

Note 33: They have nothing to do, for example, with subjective and individual matters such as "the claimant's 'purely cognitive, deliberative or informational capabilities and opportunities'" or with the applicant driver being "seriously volitionally impaired or desperately needy" (*Uber*, 67) or with his "ability to understand or appreciate the significance of the contractual terms" (*Uber*, 68). All of the grounds advanced by Mr. Heller have to do with issues which any Ontario Uber driver might raise (see Côté J. at 28).

Note 34: *Uber*, 63.

Note 35: *Uber*, 60, 62, 64, 65, 73, 79.

Note 36: *Uber*, 74, 76.

Note 37: *Uber*, 75.

Note 38: *Uber*, 78.

Note 39: *Uber*, 94.

Note 40: *Uber*, 79.

Note 41: *Contra*, *per* Brown J.: *Uber* 156.

Note 42: *Uber* 80-85. *Contra*, *per* Brown J.: *Uber* 160-166.

Note 43: *Uber*, 103.

Note 44: *Uber*, 147.

Note 45: As Brown J. writes, "to introduce uncertainty to the enforcement of contracts generally". *Uber*, 103, 154, 170.

Note 46: *Uber*, 96.

Note 47: *Uber*, 63.

Note 48: *Uber*, 172.

Note 49: *Uber*, 99.

Note 50: Duty, according to many authorities in the field of arbitration.

Note 51: *Uber*, 153.

Note 52: Côté, in dissent, writes (*Uber* 257, 266), "In particular, I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts." "I fear that the effect of their approach amounts to a sweeping restriction on arbitration clauses in standard form contracts ...."

Note 53: A lesson which those drafters should take to heart, and which arbitration practitioners should also deliver if they have at heart the integrity of the arbitration process as a legitimate alternative method of resolving disputes. But that is not the point of this article.

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Note 55: Peel, Osofsky & Foerster, Jacqueline Peel, Hari Osofsky and Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41:2 Melbourne UL Rev 793 at 794.

Note 56: 2019 QCCS 2885 ["*ENJEU*"].

Note 57: *Ibid.*

Note 58: *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Note 59: Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019) at 23. The "Crown Liability" category includes negligence claims, institutional abuse cases founded on common law duties, as well as allegations of Charter infringements: Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Consultation Paper* (Toronto: March 2018) at 49.

Note 60: *Guimond v Québec (Attorney General)*, [1996] 3 SCR 347, 138 DLR 4th 647. The SCC later tempered the rule in *Guimond,* by stating that courts have the discretion to allow a class proceeding in lieu of judicial review in *Manuge v Canada,* 2010 SCC 67, a s. 15 *Charter* case by members of the Canadian Forces.

Note 61: *Davis v. Canada (Attorney General),* 2008 NLCA 49; *Roach v. Canada (Attorney General)*, 2009 CanLII 7178 (ON SC).

Note 62: 2010 SCC 27 [*Ward*].

Note 63: *Id.* at para 22.

Note 64: 2013 BCCA 480 at para 42.

Note 65: 2014 ONSC 4583 at para 45 [*Good* (Div Ct)], aff'd 2016 ONCA 250; *Francis v Ontario*, 2020 ONSC 1644; *Brazeau v Canada (Attorney General)*, 2016 ONSC 7836, aff'd 2020 ONCA 184 [*Brazeau*]; *Capital District Health Authority v Murray*, 2017 NSCA 28; *Ewert v Canada (Attorney General)*, 2018 BCSC 147.

Note 66: See e.g. *Cloud v Canada (Attorney General),* 73 OR (3d) 401, [2004] OJ No 4924.

Note 67: *Dennis v. Ontario Lottery and Gaming Corp.*, 2013 ONCA 501 at para 53 [*Dennis*].

Note 68: Christine Kneteman, "Revitalizing Environmental Class Actions: Québecois Lessons for English Canada" (2010) 6:2 *Canadian Class Action Review* 261 at 278.

Note 69: Hailey Laycraft, "Trends in Environmental Class Actions in Canada" (2019) 15:1 Can Class Action Rev 75 at 83-85.

Note 70: It was for this reason that claims for personal injury caused by nickel contamination were abandoned in *Smith v Inco Ltd.,* 2011 ONCA 628. The claim for property damage was certified but ultimately failed at trial. *Smith v Inco Ltd.*, 2010 ONSC 3790.

Note 71: *Reference Re Secession of Québec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 26.

Note 72: *Pro-Sys Consultants Ltd v Microsoft Corp.,* 2013 SCC 57 at para 63. In Québec, there is a different pleadings requirement - that the action bears a "serious colour of right" or "arguable case".

Note 73: *ENJEU, supra* note 56 at para 135.

Note 74: *ENJEU*, supra note 56 at paras 125-136.

Note 75: See eg: *A* c. *Watch Tower Bible and Tract Society of Canada*, 2019 QCCS 729, par. 127-131, 151; *Volkswagen Group Canada Inc.* c. *Association québécoise de lutte contre la pollution atmosphérique*, 2018 QCCA 1034; *LeFrancois v. Guidant Corporation*, 2008 CanLII 15770 (ONSC).

Note 76: *Code of Civil Procedure*, CQLR c C-25.01, articles 571-575.

Note 77: *ENJEU*, *supra* note 56 at paras 141-143.

Note 78: *Canada (Attorney General) v Hislop,* 2007 SCC 10; *Howard Estate v British Columbia*, [1999] BCJ No 585, 32 CPC (4th) 41.

Note 79: *Good* (OCA), *supra* note 65 at para 87.

Note 80: *ENJEU, supra* note 56 at para 3.

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Note 82: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Note 83: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In addition, please see Part I of the decision.

Note 84: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Note 85: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In addition, please see Part II A of the decision.

Note 86: *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In addition, please see Part I A of Powell J.'s dissent.

Note 87: Ibid.

Note 88: https://www.lso.ca/about-lso/legislation-rules/rules-of- professional-conduct.

Note 89: *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 at para. 103 (CanLII).

Note 90: *AIC Limited v. Fischer* [2013] 3 SCR 949 at para. 8.

Note 91: https://www.thecragandcanyon.ca/news/local-news/lawyer- seeking-cornwall-island-residents-for-a-class-action-lawsuit-against- cbsa/wcm/ec39a525-871d-4bc2-9cbf-19ffc3f17551.

Note 92: *Class Proceedings Act*, 1992, S.O. 1992, c. 6 s. 5 (1).

Note 93: Ontario *Rules of Professional Conduct* Rule 7.5-1 Commentary 3 "Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self- aggrandizement". https://www.lso.ca/about-lso/legislation-rules/rules- of-professional-conduct

Note 94: https://www.aptnnews.ca/national-news/akwesasne-mohawks- considering-class-action-against-canada-border-services-agency/.

Note 95: http://apt46.net/2015/03/17/lawyer-ads-werent-legal-until- 1977/.

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