AMERICAN ECHOES IN *TELUS V. WELLMAN*

DISCUSSING *TELUS V. WELLMAN* AND *HELLER V. UBER*

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In *Telus Communications Inc v. Wellman* (*Wellman*), the Supreme Court of Canada held that section 7 of the *Ontario Arbitration Act* does not allow a judge the discretion to refuse to enforce a valid arbitration clause with respect to some plaintiffs when the same arbitration clause is invalid with respect to other plaintiffs. The five-justice majority had the better of the statutory argument. However, the dissenters were right to be concerned about the decision's policy implications. *Wellman* has disturbing echoes of the US class arbitration debacle, in which some companies have been able to use individual arbitration clauses to avoid liability for regulatory violations. However, Ontario has a good chance to avoid such a result, particularly if the Supreme Court of Canada looks more favourably on the Court of Appeal's unconscionability analysis in *Heller v. Uber Technologies Inc* (*Heller*).

I. INTRODUCTION

The Supreme Court of Canada's decision in *Telus v. Wellman*[1] is in line with its previous liberal approach to enforcing arbitration clauses and should put to rest any concerns that *Seidel v. Telus Communications Inc* (*Seidel*)[2] signaled a change in direction towards a more restrictive approach. In a 5-4 decision, the Court held that the *Ontario Arbitration Act* does not give judges the discretion to refuse a stay in favor of arbitration if some claimants, but not others, have the right to pursue their claims in court. The plaintiffs in *Wellman*, a mix of consumer and business customers, brought a class action against Telus for overcharges. All plaintiffs were subject

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[1] *Telus Communications Inc. v. Wellman*, 2019 SCC 19 [*Wellman*].

[2] *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] SCR 531 [*Seidel*].

to an arbitration clause, but consumer class members were entitled to litigate in court. Following Ontario precedent, the lower courts had refused to stay the claims of non-consumer plaintiffs in favor of arbitration, in order to allow all the claimants to proceed as part of one class.[3] The Supreme Court held that it was not open to them to do so.

Wellman, like *Seidel*, raises hard questions about the relationship between arbitration and regulatory enforcement. Some consumer protection measures depend on enforcement through private litigation, and particularly through class actions that bundle together low-value claims. These measures become ineffective if consumers can be forced to arbitrate on an individual basis. In these cases, one cannot help but hear echoes of the heated arbitration debate to the South. There, the US Supreme Court has defended a staunch pro-individual arbitration position that it has read into the *Federal Arbitration Act*. This position has led it into conflict not only with lower courts, but also with arbitrators. The US approach has also empowered arbitration clause drafters, particularly large companies in concentrated industries like telecommunications, to write themselves out of a significant amount of regulatory enforcement.[4] As a result, the use of arbitration clauses, especially in the consumer and employment contracts, has faced popular backlash.

Canada can still avoid ending up in the same situation. The *Ontario Arbitration Act* is more modern than the American *Federal Arbitration Act*, and the policy context is less fraught. A legislative solution to the problems *Wellman* raises is entirely possible. The Ontario Court of Appeal's decision in *Heller* also offers a potential way forward: treating arbitration clauses that seem designed primarily to discourage claims as unconscionable.[5]

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[3] *Telus Communications Inc. v. Wellman*, 2017 ONCA 433, 138 O.R. (3d) 413 at para 97 [*Wellman* ONCA]; *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318 at paras 88-91 [*Wellman* ONSC].

[4] David Noll, "Regulating Arbitration," (2017) 105 Cal L Rev 987, at 989-90.

[5] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 [*Heller*].

II. SYNOPSIS

Wellman is the sort of case for which Ontario's *Class Proceedings Act* was designed, as it involves a large number of factually similar small-value claims that would not be worth pursuing on their own. Telus was sued by mobile customers who entered into plans under which they were charged by the minute between August 2006 and July 2010.[6] These customers claim that Telus made a practice of "rounding up" their phone call length to the nearest minute, effectively reducing the number of minutes they had in their plans. Telus did not alert them to this practice.[7] Around two million Ontario residents may have been affected.[8]

Wellman brought a motion to certify a class. The only problem was that the same contracts that allegedly failed to alert customers to Telus' rounding practices included an arbitration clause that required customers to arbitrate all claims against Telus on an individual basis. Section 8 of the *Consumer Protection Act* renders this clause invalid with respect to consumer plaintiffs, who are guaranteed a right to pursue their claims in court.[9] However, some plaintiffs, no one currently knows how many, fall outside the Act's definition of consumer because they did not purchase their plans for household use.[10]

The Ontario Superior Court rejected Telus' application for a stay of the class proceedings in favor of arbitration for all plaintiffs. Following the Ontario Court of Appeal's earlier interpretation of the *Ontario Arbitration Act* in *Griffin v. Dell Canada*, the judge determined that it would unreasonable to attempt to separate the consumer and non-consumer claims.[11] She therefore decided that all potential class members should be allowed to proceed together in

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[6] *Wellman*, *supra* note at para 13.

[7] *Ibid.*

[8] *Ibid.*

[9] *Consumer Protection Act*, SO 2002, c. 30, Sch. A. ss (1)-(2), (5), 8(1).

[10] *Ibid*, s 1 ("consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes").

[11] *Wellman* ONSC, *supra* note 3 at paras 85-88, citing *Griffin v. Dell Canada*, 2010 ONCA 29 [*Griffin*].

court notwithstanding the arbitration clause. She also certified the class.[12]

Telus appealed the denial of a stay in relation to non-consumer plaintiffs but the Ontario Court of Appeal affirmed the Superior Court's decision that *Griffin* was still good law.[13] The key statutory provision was section 7 of the *Ontario Arbitration Act*, which provides that a court "shall" stay a court proceeding commenced by a party to an arbitration agreement upon application by another party, but establishes several exceptions.[14] Under section 7(5), a court "may stay the proceeding with respect to matters dealt with in the arbitration agreement and allow it to continue with respect to other matters" if it is "reasonable to separate matters dealt with in the agreement from the other matters."[15] The appellate court's approach to the statute relied on two interpretive moves. First, it read the provision allowing it to stay only some matters in favor of arbitration as allowing it to stay no matters, ordering that all matters proceed in court.[16] Next, it analogized a case involving a range of disputes, some inside and some outside the subject matter scope of a valid arbitration clause (i.e., *Griffin*) to one in which some parties were subject to the arbitration clause and others were not.[17]

Writing for a majority of the Supreme Court, Justice Moldaver reversed, holding that section 7(5) could not be read to allow judges the option of refusing a stay entirely when only some plaintiffs were subject to a valid arbitration clause. Instead, the Supreme Court held that section 7(5) permits a court to proceed with some claims at the same time as it stays others if only some claims are covered by an arbitration clause, or else to stay all claims and refer the parties to arbitration.[18] The majority reasoned that section 7(1)'s

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[12] *Ibid* at para 20.

[13] *Wellman* ONCA, *supra* note 3 at paras 71-73.

[14] *Arbitration Act*, SO 1991, c. 17, s 7(1).

[15] *Ibid*, s 7(5)(1)-(2).

[16] *Wellman* ONCA, *supra* note 3 at para 72.

[17] *Ibid* at para 73. The spare reasoning in the opinion mirrors *Griffin*, *supra* note 11 at para 46.

[18] *Wellman*, *supra* note at paras 69-70.

mandatory language does not allow a court to refuse a stay when some plaintiffs are subject to an arbitration clause and other plaintiffs are not.[19] The plaintiffs whose claims are covered by an otherwise valid arbitration clause must arbitrate.

The majority took Wellman and the Court of Appeal to task for playing fast and loose with the *Ontario Arbitration Act*. First, the plain text of the statute made two options available to a judge: staying all proceedings in favor of arbitration, or bifurcating proceedings and adjudicating in court matters not covered by an arbitration clause.[20] The Court of Appeal's purported third option—staying none of the proceedings—was not on the legislative menu.

In addition, Justice Moldaver questioned whether the statute could be read as referring to different parties with identical claims, rather than claims with different subject matters, some arbitrable and some not.[21] On this view, the Court of Appeal's reading of the *Ontario Arbitration Act* was inconsistent with the primary purpose of the Act, which was to enable enforcement of valid agreements to arbitrate without excessive pre-arbitration judicial wrangling.[22] If subsequent experience suggested a new approach, that was not the court's affair: "the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts."[23]

Justices Abella and Karakatsanis co-authored an opinion for the four dissenters in *Wellman*. The dissent was skeptical of the majority's decision to overturn a line of Court of Appeal cases in favor of what they saw as an overly "textualist" interpretation.[24] "[W]ords matter, policy objectives matter, and consequences matter," the dissenters chided. The majority's approach would complicate class actions in situations involving consumer and non-consumer class members, impeding access to justice. This result, the Justices wrote, was "ironic", since "[t]he purpose of the *Arbitration Act*, 1991, was

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[19] *Ibid* at paras 73-74.

[20] *Ibid* at paras 69-70.

[21] *Ibid* at para 100.

[22] *Ibid* at paras 48-55.

[23] *Ibid* at para 79.

[24] *Ibid* at para 125, Abella and Karatasanis, JJ, dissenting.

to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge." The dissenters were also concerned that the majority had overturned a line of cases in Ontario that had consistently treated the statute as allowing judges to stay arbitration with respect to certain claimants if other claimants were allowed to proceed in court.[25]

III. ANALYSIS

In its treatment of the statutory text, the majority's ruling seems sensible enough. One does not want to give judges an excuse to ignore an arbitration clause every time they might otherwise need to bifurcate proceedings, nor does the *Ontario Arbitration Act* allow judges to do so. Yet when it comes to subtext—the policy arguments that flit around the edges of the majority opinion and come into full view in the dissent—*Wellman* is full of eerie American echoes. The access to justice problems *Wellman* raises ought to be addressed by the provincial legislatures and the courts.

The majority had the better of the legal argument. It is difficult to read section 7(5) as granting judges the discretion to keep matters in court when they are subject to valid arbitration clauses, nor would doing so be consistent with promoting arbitration. As Justices Abella and Karakatsanis acknowledge, it would not make sense to send to arbitration matters that the parties did not agree to arbitrate.[26] However, one might sensibly read the words of section 7(5) as allowing the court to choose to stay the matters not subject to an arbitration agreement pending resolution of the arbitration.[27] Given that section 7(5) refers only to "matters", one must take a jump to say that it allows courts to refuse a stay when some *parties* are bound by valid arbitration agreements and some are not.[28]

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[25] *Ibid* at paras 139-42.

[26] *Ibid* at paras 153-54.

[27] *Ibid* at 73.

[28] *Ibid* at 69-70.

Moreover, to read section 7(5) as allowing judges to refuse to enforce an arbitration clause if it does not cover all the matters in the litigation could permit plaintiffs to defeat their arbitration agreements through clever pleading. A plaintiff might raise a set of breach-of-contract claims covered by an arbitration clause, together with a debt claim outside of it, and then try to persuade a court that it is "reasonable" to proceed in court with respect to all of the claims. The result would be to encourage the drafting of arbitration clauses that send all disputes to arbitration, sacrificing the flexibility that is supposed to be one of arbitration's main benefits.

From that angle, the Supreme Court issued a pro-arbitration decision based on clear language in the statute. If the Ontario legislature would like to allow courts greater discretion with respect to stays of certain types arbitrations, the majority have provided it with a guide to how to change the law. This approach seems a far cry from the doctrinal thicket that has grown up on the other side of the Great Lakes.

There, the US Supreme Court has defended a staunch pro-individual arbitration position that has put it into conflict with lower courts, especially state courts, wielding unconscionability doctrine. Relying on a caricature of arbitration as cheap, simple, and individual that does not reflect modern realities, the US Supreme Court has treated class arbitration as somehow suspicious—contrary to the spirit of what "arbitration" is supposed to be.[29] This turn against class arbitration began with striking down an arbitral tribunal's order for class arbitration in *Stolt-Nielsen v. AnimalFeeds* and has continued to the recent decision striking down a court order for class arbitration in *Lamps Plus v. Varela*.[30] The US debate is made particularly difficult by the US Supreme Court's treatment of the *Federal Arbitration Act* as pre-empting state common law and legislation, and by Congressional deadlock. In the United States, companies routinely mandate individualized arbitration in scenarios that might otherwise give rise to class action claims.

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[29] Pamela Bookman, "The Arbitration-Litigation Paradox" (2019) 72 Vand L Rev 1119 at 1150-61.

[30] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

The Supreme Court of Canada's interpretations of various provincial arbitration acts began in the same vein, enforcing arbitration clauses that would deprive consumers of the ability to bring class actions.[31] However, the provinces moved quickly to pass legislation protecting consumers' access to class proceedings. Still, this legislation may be underinclusive. Most business customers are in the same position as consumers when purchasing plans from a Telus, Rogers, or Bell, stuck to adhesive contracts that force them to arbitrate their claims individually and subject them to the same kinds of small charges that violate regulations but do not add up to a large claim.

Although the Supreme Court did not cite a single US case, much of what went on in *Wellman* recalls the US class arbitration debate.[32] Just as the US Supreme Court has not been shy about overruling long-settled state case law in its bid to stamp out class arbitration, the Canadian Supreme Court found itself at odds with lower courts.[33] The majority's reading of the *Arbitration Act*, while comporting with its text, has not been the reading it has been given by the Ontario Court of Appeal.[34] Ontario judges have been willing to stretch the language of section 7(5) because of the policy problems generated by reading it the way the *Wellman* court does.[35] The mix of consumer and non-consumer claims in this and other cases may make it impossible to bring a class action in court, and allowing Telus effectively to draft its way out of class arbitration.

The situation in *Wellman*, in which large numbers of customers were overcharged by what appear to have been small amounts,

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[31] *Dell v. Union des Consommateurs*, 2007 SCC 34, [2007] 2 SCR 801, at paras 108-09, 121.

[32] The US debate was presented for the Court's consideration in some of the factums. AG British Columbia Factum paras 31-34; Telus Communications Reply Factum para 19.

[33] Alyssa King, "Arbitration and the Federal Balance" (2019) 94 Ind LJ (forthcoming) at 8-15, Christopher R. Drahozal, "FAA Preemption After Concepcion" (2014) 35 Berkeley J Emp & Lab L 135 at 164-71; David Horton, "Federal Arbitration Act Preemption, Purposivism, and State Public Policy" (2012) 101 Geo LJ 1217 at 1234-45. For a brief discussion of unconscionability in state contract law see, David Horton, "Unconscionability Wars" (2011) 106 Nw UL Rev 387 at 392-94.

[34] *Griffin*, *supra* note 11 at paras 48-49 (collecting cases).

[35] *Ibid*, at paras 30, 57-58, 60.

seems to be exactly the sort of problem that can be tackled effectively only through group litigation or arbitration. In demanding *individual* arbitration, Telus essentially insulated itself from claims. Its decision to do so is particularly troubling because of its position in the highly concentrated Canadian telecommunications sector, in which companies can quickly copy each other's contractual innovations, including a requirement for individual arbitration. Companies can use their market power to get even large business customers to agree to an arbitration clause that makes most claims uneconomical.

As the *Wellman* majority acknowledged, sorting consumer from non-consumer claims early on in litigation may not be a cheap or easy task.[36] Even when the potential class includes no consumers, the same logic that led the legislature to rule out arbitration in the *Consumer Protection Act* may still apply. One scenario is that of companies with power in two sided markets, in which they have consumer customers on one side and business customers on the other—for example, payment processers like American Express or websites connecting sellers and buyers like Amazon. The average business customer may be just as, if not more, dependant on the middleman as the consumer and just as likely to face terms that seem designed to discourage claims. Contractors and franchisees also commonly face power imbalances in contracting.

Given these realities, the provincial parliament would do well to take up the majority's suggestion that it pass legislation that protects all parties harmed by abusive arbitration agreements, not just consumers.[37] One option would be explicitly to give judges discretion to refuse a stay in favor of arbitration when business and consumer claims are mixed together. A legislature concerned about matters like two-sided markets might need to go even

[36] Wellman, *supra* note at paras 77-79. If, on remand, the Superior Court does attempt to sort the plaintiffs in this way, it might look to a recent settlement of a class action by Uber drivers in the United States, in which the claims administrator will have to sort drivers who opted out of arbitration from those who did not, may provide a model for how such a process would work. *O'Connor v. Uber Techs., Inc.,* No. 13-CV-03826-EMC, 2019 WL 1437101, at *2 (N.D. Cal. Mar. 29, 2019).

[37] Wellman, *supra* note at para 89.

further, protecting access to group litigation or arbitration for all claims that cannot be brought on an individual basis.

The majority also gestured to an alternative approach that may hold more promise: the use of the doctrine of unconscionability. Justice Moldaver took the view that that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with through the doctrine of unconscionability," citing the Ontario Court of Appeal's decision in *Heller v. Uber*.[38]

Heller was argued before the Supreme Court in November. The Justices' questions suggested that they were not entirely convinced by the Court of Appeal's approach to arbitral competence or the question of whether Ontario employment law applied.[39] However, the decision's approach to unconscionability is more defensible. The Court of Appeal held that the clause at issue was unconscionable and therefore unenforceable under either the *Ontario Arbitration Act* or the *International Arbitration Act*, focusing on the unfairness of the specified arbitration proceeding and Uber's evident intention in drafting the clause to make it difficult for drivers to claim against it.[40] Under *Dell Computer Corporation v. Union des Consommateurs*, any but the most facially obvious unconscionable arbitration clauses should go to the arbitrator.[41] In close cases, the mandatory language in section 7(1) of the *Ontario Arbitration Act* suggests that courts may default to ordering arbitration while standing ready to hear challenges to any award. At that later point, a record of how the arbitration was conducted will exist. *Heller*, however, is not a close case.

The arbitration clause at issue sent Canadian plaintiffs to International Chamber of Commerce (ICC)-administered arbitration

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[38] *Ibid* at para 85.

[39] Uber Technologies, Inc. v Heller, Webcast of the hearing on Nov. 6, 2019 available at https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38534&id=2019/2019-11-06--38534&date=2019-11-06.

[40] *Heller*, *supra* note 5 at para 68.

[41] *Dell Computer Corporation v. Union des Consommateurs et al.* 2007 SCC 34, [2007] 2 S.C.R 801, at paras 84-86.

in the Netherlands.[42] Before the Supreme Court, Uber suggested that it would agree to arbitration in another location, as ICC rules allow,[43] but most drivers reading the contract would not know of this possibility. The costs of arbitration were prohibitive for a solo plaintiff[44] and ICC rules do not contemplate a class proceeding in which one plaintiff may serve as class representative.[45] Uber was much better able to bear the costs of arbitration and inform itself about the relevant foreign law. The plaintiff, an UberEats driver, was clearly in a weaker bargaining position.[46]

The extreme nature of Uber's arbitration clause becomes clear if it is contrasted with the clause Uber drafted for its contracts with US drivers. In cases across the United States, Uber drivers have sought unsuccessfully to avoid an arbitration clause that requires arbitration under California law through JAMS.[47] JAMS has offices throughout the United States and Uber is also responsible for most fees associated with the arbitrations.[48] The law is more familiar, the forum is closer, and the fees for drivers are dramatically lower. More recent versions of Uber's contracts allow drivers to opt out of

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[42] *Heller*, *supra* note 5 at para 68.

[43] Uber Technologies, Inc. v Heller, Webcast of the hearing on Nov. 6, 2019 available at https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38534&id=2019/2019-11-06--38534&date=2019-11-06.

[44] *Ibid.*

[45] ICC Rules arts. 7, 9 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

[46] *Heller*, *supra* note 5 at para 68.

[47] For various US rulings that the clause is not unconscionable see *Davis v. Uber Techs., Inc.*, No. CV 16-6122, 2017 WL 3167807, at *3 (E.D. Pa. July 25, 2017) (collecting cases from Arizona, Florida, Maryland, New Jersey, and Texas); *Mohamed v. Uber Techs.*, Inc., 848 F.3d 1201, 1211-12 (9th Cir. 2016) (overruling lower court's finding of unconscionability in California-based litigation); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 890 (N.D. Ill. 2016).

[48] Joel Rosenblatt, "Uber Gambled on Driver Arbitration and Might Have Come Up the Loser'" *L.A. Times* (May 8, 2019), https://www.latimes.com/business/ la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html.

arbitration, although that option must be chosen each time the app presents drivers with a new agreement.[49]

Even if Uber were to use its US clause in Canada, choosing the law of a common law jurisdiction, reducing travel to JAMS's Canadian office in Toronto, and lowering costs, the clause might still inhibit access to justice. The ban on class arbitration presents the bigger problem.[50] Multiple empirical studies from the United States show that plaintiffs required to file individual claims did so in relatively low numbers compared to the number of potential claimants.[51] The most recent and extensive study, by Andrea Cann Chandrasekher and David Horton, also suggests that arbitration was particularly unfriendly to self-represented litigants.[52] Represented parties may replicate a class action of sorts by filing identical pleadings in arbitration, as one group of Uber drivers in the US has done.[53] Nevertheless, arbitration clauses banning aggregation in scenarios in which plaintiffs might be expected to have relatively low-value claims, like the clause at issue in *Wellman*, should be treated with suspicion. Their goal may not be to facilitate arbitration, but to avoid it. Preventing arbitrators from ordering class proceedings may thus deny access to justice while failing to promote the use of arbitration.

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[49] For a full reprinting of the clause see *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 519–20 (E.D.N.Y. 2017).

[50] As Telus and several of its supporters pointed out, some arbitration providers, including JAMS offer class arbitration procedures. Telus Communications Inc. Reply Factum at para 17; Canadian Federal of Independent Business, Factum at para 16. However, Wellman, like Heller, could not take advantage of such procedures.

[51] See for example, Andrea Cann Chandrasekher and David Horton, "Arbitration Nation: Data from Four Providers" (2019) 109 Cal L Rev (forthcoming) at 53; Consumer Financial Protection Bureau, *Arbitration Study* §§ 5.2.1, 6.2.1 (2015) (numbers of consumer financial claims filed in arbitration and numbers of claims filed in US federal court from the beginning of 2010 to the end of 2012); Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 Yale LJ 2804 at 2814–15.

[52] *Ibid* at 54, 58.

[53] Rosenblatt, *supra* note 47.

IV. CONCLUSION

Telus Technologies Inc v. Wellman was right on the law, but the result is terrible policy. *Wellman* demonstrates that even businesses may be in a position similar to consumers when contracting with large companies in concentrated markets. Like consumers, they may have no real choice but to arbitrate and to do so on an individual basis. Like consumers, they may find themselves unable to make contract or regulatory claims as a result. The majority in *Wellman* suggested two ways to avoid these impacts. First, the province can legislate. Second, plaintiffs like the business customers in *Wellman* might argue that their arbitration agreements are unconscionable. The Supreme Court now has an opportunity to consider the latter approach in *Uber v. Heller*.

Few would want at return to the era in which common law courts jealously guarded their jurisdiction. One can be in favor of strong protections for arbitration agreements and still maintain a healthy skepticism of the motives of a company that demands individualized arbitration, especially where such a requirement is standard across a concentrated industry and many of the likely claims against the company would be of low value. In its zeal to stamp out hostility to arbitration the US Supreme Court has endorsed agreements that predictably depress the number of arbitrations that actually occur. The Supreme Court of Canada can take a better, more measured approach that distinguishes support for arbitration as a dispute resolution mechanism from support for arbitration clauses as a dispute avoidance mechanism.