Citation: Pokornik v SkipTheDishes Restaurant Services Inc, 2024 MBCA 3
Date: 20240112
Docket: AI22-30-09856

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***J. T. Curry***,
	)	***A. Quinn*** *and*
CHARLEEN POKORNIK	)	***B. Brown***
	)	*for the Appellant*
	)	
(Plaintiff) Respondent	)	***P. D. Edwards***,
	)	***S. Lombardi***,
- and -	)	***E. L. M. Edwards*** *and*
	)	***C. Smith***
SKIPTHEDISHES RESTAURANT SERVICES INC.	)	*for the Respondent*
	)	
	)	*Appeal heard:*
	)	***May 30, 2023***
(Defendant) Appellant	)	
	)	*Judgment delivered:*
	)	***January 12, 2024***

On appeal from 2022 MBKB 178

STEEL JA

[1] This is an appeal from a decision of the motion judge dismissing the defendant's, SkipTheDishes Restaurant Services Inc. (Skip), motion for a stay of proceedings in favour of arbitration. The dismissal allows the plaintiff to pursue her claim against Skip by way of a class action in the courts, as opposed to being bound by an agreement to proceed to arbitration.

[2] Although I have found that the motion judge erred in his analysis of section 7(1) of *The Arbitration Act*, CCSM c A120 [the *Act*], I accept that he made a finding of unconscionability under section 7(2)(b) of the *Act*. Section 7(6) of the *Act* bars appeals to this Court when such a finding is made; consequently, this Court is without jurisdiction to hear the appeal. For the reasons that follow, I would quash the appeal with costs.

FACTS

[3] Skip is a technology company headquartered in Winnipeg with operations in more than 100 cities across Canada. It is owned by a publicly traded European company. It provides a platform that connects vendors, couriers, and consumers for online ordering and/or delivery of food and beverages (the Skip platform). Through the Skip platform, food and beverage orders are delivered by individuals who contract to drive as couriers. Each courier is required to sign a courier agreement to access and provide services through the Skip platform. Beginning in 2014, the plaintiff worked for Skip occasionally as a courier.

[4] The courier agreement in force when the plaintiff began driving as a courier for Skip (the 2014 Agreement) included the following clause:

> . . .
> . . . [Skip] may amend this Agreement from time to time. Amendments will be effective upon [Skip] posting the updated Agreement at this location. Your continued provision of the Services after such posting constitutes your consent to be bound by this Agreement, as amended. This Agreement represents the full and final understandings between the parties, and supersedes any and all previous understandings, commitments, and agreements, oral or written, pertaining to the Services. . . .
> . . .

The plaintiff accepted the 2014 Agreement when she began working for Skip. That agreement did not contain a requirement for arbitration or class action waiver.

[5] In 2018, Skip amended the 2014 Agreement to include mandatory arbitration for all disputes and to exclude class actions (the 2018 Agreement). This was emailed to all couriers, who had to accept it by a specific date to continue to provide services through the Skip platform. The notice email included a link to an electronic copy of the 2018 Agreement.

[6] Articles 17-18 and 20-22 of the 2018 Agreement set out the new framework for dispute resolution. A copy of these articles is attached as an Appendix to these reasons. Article 17 defines the meaning of a "[d]ispute" as:

> . . . including any dispute or controversy arising out of or relating to this Agreement . . . or in respect of any legal relationship associated with or derived from this Agreement, including this Agreement's . . . validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any party to this Agreement".

[7] Article 18 requires unresolved disputes to be submitted to arbitration in accordance with the Arbitration Rules of the ADR Institute of Canada.[1] Article 20 designates "the seat of the arbitration" as Ontario, or another location agreed to by the parties. Skip confirmed that it is prepared to agree that the seat of the arbitration be Winnipeg, Manitoba, where Skip is headquartered and the plaintiff resides. Article 21 states that Skip will pay

[1] ADR Institute of Canada, "ADRIC: Arbitration Rules" (1 December 2016), online (pdf): <adric.ca/wp-content/uploads/2017/08/2016_ARBITRATION_RULES_Booklet_2016_Aug2017.pdf>.

the reasonable arbitration costs and Article 22 provides that disputes will be resolved on an individual, not class, basis.

[8] Article 25 states that amendments to the agreement will be posted and that "[y]our continued provision of the Services after such posting constitutes your consent to be bound by this Agreement, as amended." Article 26 states that the 2018 Agreement replaces and supersedes any previous agreement between the courier and Skip, and it governs the legal relationship and all legal issues between the parties, including "any [d]ispute arising from or related to this Agreement or any previous agreement between You and us."

[9] On July 4, 2018, the plaintiff was contacted by her current lawyers about becoming the representative plaintiff in a class action against Skip and she agreed, retaining the lawyers on a contingency basis. On July 25, 2018, the class action lawsuit was filed and served. On July 30, 2018, she emailed Skip, in accordance with the legal advice that she had received. In response, Skip advised her that she could not continue to work unless she accepted the 2018 Agreement. On July 31, 2018, she again emailed Skip, in accordance with the legal advice, to say that she did not agree with the terms of the 2018 Agreement and that she was accepting under protest so that she could continue to get shifts. Skip did not reply. After accepting, the plaintiff worked four more shifts in 2018 and 2019.

[10] In the main action, the plaintiff asked for a declaration that she was an employee of Skip and not an independent contractor, that Skip had breached the terms of applicable employment standards legislation and for damages. She also applied for an order that the claim proceed as a class action

and filed a motion for certification. Skip's position is that the plaintiff was an independent contractor, not an employee, and that she was not entitled to employment benefits. At a 2019 case management conference, the action was put in abeyance pending the release of the Supreme Court of Canada's decision in *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber* SCC].

[11] In 2020, Skip filed a motion for a stay of the action pursuant to section 7(1) of the *Act*, arguing that the plaintiff's claim was subject to an arbitration agreement that required that disputes be resolved by arbitration (the motion). Its position was that the Court had no jurisdiction to hear the action because, pursuant to section 7(1) of the *Act*, the action must be stayed in favour of arbitration with the issue of jurisdiction determined by an arbitrator, not by a judge.

[12] The plaintiff never relied on the Skip platform for a regular income or to meet her living expenses. She had other sources of income and worked very sporadically for Skip, earning only $9,177.90 from Skip in four years.

THE MOTION JUDGE

[13] The motion judge determined that the plaintiff's action did not fall within section 7(1) of the *Act* because there was no arbitration agreement in place when the proceeding was commenced. He held that the action was brought pursuant to the 2014 Agreement. He dismissed the motion.

[14] The motion judge determined that the 2014 Agreement governed instead of the 2018 Agreement for two reasons. First, Skip unilaterally imposed the arbitration provisions in the 2018 Agreement that it relied upon for the motion after this action had been filed and served and these provisions

were not retroactive. He held that the terms of article 26 of the 2018 Agreement did not apply "retroactively" to pre-existing actions (at para 29).

[15] Second, the motion judge held that the 2018 Agreement did not apply because the plaintiff never accepted its terms. She sent an email to a Help Centre representative employed by Skip saying that she did not agree with the amendments but was going to click "Agree" so that she could continue to work for Skip. He further held that Skip acquiesced to the plaintiff's position when it failed to reply to this email.

[16] The motion judge also found that, if he was wrong in his section 7(1) analysis, meaning the 2018 Agreement and the arbitration clause contained within it did apply, he would have stayed the proceeding under section 7(2)(b) of the *Act* because the arbitration clause was unconscionable and unsupported by consideration.

[17] As to unconscionability, the motion judge held that there was an inequality of bargaining power because the plaintiff was powerless to negotiate any of the terms of the 2018 Agreement. It was an improvident bargain because it eliminated her ability to access the courts and precluded class proceedings, which provided Skip with an unfair advantage.

[18] The motion judge also found a lack of consideration. The ability to provide courier services on competitors' platforms existed under the 2014 Agreement and was not fresh consideration. The arbitration clause itself was not fresh consideration because the removal of a right to use or participate in a class action is not a benefit to a party.

[19] Skip appeals the motion judge's decision on several grounds, as follows:

1. the motion judge erred in undertaking an inquiry under section 7 of the *Act*, instead of referring the matter to arbitration;

2. the motion judge erred by finding that the 2018 Agreement did not govern the parties' relationship; and

3. if the 2018 Agreement is applicable, the motion judge erred in his application of section 7(2).

RELEVANT STATUOTRY PROVISIONS

[20] The relevant provisions of the *Act* read (at sections 6-7, 17(1)):

COURT INTERVENTION

Court intervention limited
6 Subject to subsection 5.1(3), no court may intervene in matters governed by this Act, except for the following purposes, as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Stay
7(1) Subject to subsection (2), if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the

agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Refusal to stay
7(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Manitoba law;

(d) the motion was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

Arbitration during motion
7(3) An arbitration of the matter in dispute may be commenced and continued while the motion is before the court.

No arbitration if stay refused
7(4) If the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

Partial stay
7(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

No appeal
7(6) There is no appeal from the court's decision under this section.

JURISDICTION OF ARBITRAL TRIBUNAL

Ruling on jurisdiction and objections
17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

DECISION

Standard of Review

[21] What is this Court's standard of review when reviewing section 7 matters? In *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Wellman*], the majority held that "[t]he issue on appeal is one of statutory interpretation and is therefore properly characterized as a question of law [citations omitted]. As such, the standard of review is correctness" (at para 30). Although the Supreme Court did not address the question of standard of review in *Uber* SCC, in that case, the Ontario Court of Appeal held that the standard of review was correctness for two reasons (see *Heller v Uber Technologies Inc*, 2019 ONCA 1 at para 19 [*Uber* CA]). First, the central questions raised related to the proper application of arbitration legislation, which were questions of law. Second, the contract in question was a standard form contract with ramifications beyond the case at bar which, according to *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 46 [*Ledcor*], attracted the correctness standard (see *Uber*

CA at para 19; see also *Abbey Resources Corp v Andjelic Land Inc*, 2020 SKCA 125 at para 27; and *Chrysler Canada Inc v Eastwood Chrysler Dodge Ltd et al*, 2010 MBCA 75 at para 25 [*Chrysler*]).

[22] In *Hopkins v Ventura Custom Homes Ltd*, 2013 MBCA 67 [*Hopkins*], Beard JA agreed that the interpretation of the arbitration provisions of an agreement is reviewed on a standard of correctness with respect to section 7(1), but that the standard of review with respect to section 7(2)(b) is dependent on the nature of the question.

[23] Normally, given that this case deals with a standard form contract, the principles arising from *Ledcor* would prevail. In this context, this would mean the correctness standard should be applied to decisions under sections 7(1) and 7(2). See also *Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 [*Pearce*], where the Court held that, although contractual interpretation usually involves mixed fact and law, in a standard form contract the factual matrix is much less important and so the interpretation may be a pure question of law reviewable on a standard of correctness (at para 82). However, in this case, as in *Williams v Amazon.com Inc*, 2023 BCCA 314 [*Williams*], leave to appeal to SCC requested, the factual matrix specific to the parties can be of significance where issues of unconscionability and public policy are involved. Therefore, "a finding that an arbitration agreement is neither unconscionable nor contrary to public policy for the purpose of s. 15(2) of the *Arbitration Act* [*Arbitration Act*, RSBC 1996, c 55 (since repealed)] is properly treated as a matter of mixed fact and law. As such, it is reviewable for palpable and overriding error" (*ibid* at para 60).

Did the Motion Judge Err in Undertaking an Inquiry Under Section 7 of the *Act*, Instead of Referring the Matter to Arbitration? Did the Motion Judge Have Jurisdiction Under Section 7(1) of the *Act* to Determine the Question of Jurisdiction or Did Section 17(1) Apply and the Question of Jurisdiction Should Have Been Determined by an Arbitrator?

[24] Section 7(1) of the *Act* is mandatory. The court does not have discretion to deny a motion to stay in favour of arbitration. Section 7(1) provides that, when a party to an arbitration agreement commences a proceeding in respect of a dispute and the parties have agreed to submit to arbitration, the court must stay the proceeding in favour of arbitration, unless one of the prescribed exceptions in section 7(2) of the *Act* applies. The use of the word "shall" (at section 7(1)) represents a clear policy choice favouring the enforcement of arbitration agreements. The onus under section 7(1) of the *Act* lies with the party seeking the stay.

[25] In *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Peace River*], the Supreme Court clarified the two-part test to impose a stay of proceedings in favour of arbitration. This mirrors the test enunciated by this Court in *Hopkins*. The court must first determine if the moving party has established an arguable case that the court proceedings are "in respect of a matter in dispute to be submitted to arbitration under the agreement" (the *Act* at section 7(1)). In short, the court must first decide if there was an agreement to arbitrate (see *Goberdhan v Knights of Columbus*, 2023 ONCA 327 at para 14). If the answer is no, then the court will not grant a stay.

[26] The standard of proof under section 7(1) for an arguable case is lower than the usual civil standard. A moving party needs only to establish

an arguable case that the prerequisites are met to engage the mandatory stay provision. In undertaking this analysis, the court should adopt a broad and liberal approach to the interpretation of arbitration agreements (see *Wardrop v Ericsson Canada Inc*, 2021 MBQB 183 [*Wardrop*]). If an arbitration clause is capable of two meanings, one of which provides for arbitration of the dispute in question, courts should favor that interpretation (*ibid* at para 27; and *Hopkins* at para 62).

[27] Turning to the second part of the test, if the dispute is covered by an arbitration clause, then a stay will follow unless the opposing party can establish, on a balance of probabilities, that one of the exceptions in section 7(2) is present (see *Peace River* at para 89). If one of the exceptions is present, then the court may but need not refuse to stay the court proceedings (see *Wardrop* at para 95).

[28] On its face, section 7(6) would appear to preclude this appeal. However, the parties have agreed that an appeal is permissible under section 7(1) of the *Act* where, as here, the stay was refused because the Court held that there was no agreement to arbitrate. I agree.

[29] Some decisions made under section 7 are subject to appeal despite section 7(6). It is important to determine the exact nature of both the question under appeal and the underlying dispute to determine the applicability of section 7(6), and whether there is jurisdiction to entertain an appeal (see *Hopkins* at para 48). Where the decision to refuse a stay is based on a finding that there is no arbitration agreement, or the dispute in question does not fall within the agreement, then the decision to refuse a stay is not made under the *Act*. Therefore, in such circumstances, an appeal is <u>not</u> barred by section 7(6)

(see Alexander M Gay, Alexandre Kaufman & James Plotkin, *Arbitration Legislation of Ontario: A Commentary*, 4th ed (Toronto: Carswell, 2023) at 254; see also *Toronto Standard Condominium Corporation No 1628 v Toronto Standard Condominium Corporation No 1636*, 2020 ONCA 612 [*Toronto Standard*]; and *Ontario Medical Assn v Willis Canada Inc*, 2013 ONCA 745). (Later in these reasons, I will return to the issue of section 7(6), and whether that section eliminates the jurisdiction of this Court to review decisions under section 7(2) and whether in fact they are decisions at all or simply *obiter*.)

[30] Skip argues that the motion judge should not have undertaken an analysis of which agreement governed because the competence-competence principle required this comprehensive inquiry to be first made by an arbitrator. The competence-competence principle holds that arbitrators have the power to rule on their own jurisdiction and should be given the first opportunity to do so. It reflects the presumption "that the parties intended an arbitrator to determine the validity and scope of their agreement" (*Peace River* at para 41; see also paras 38-40). In Manitoba, this principle is codified in section 17(1) of the *Act*. It expressly empowers an arbitrator to rule on their own jurisdiction and to hear challenges to the existence or validity of the arbitration agreement.

[31] *Rogers Wireless Inc v Muroff*, 2007 SCC 35 [*Rogers Wireless*] and *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 [*Dell*] reaffirmed the general principle that, normally, challenges to the jurisdiction of an arbitrator must first be referred to the arbitrator, unless they involve pure questions of law or questions of mixed fact and law that can be determined by a superficial review of the evidence on the record (*Rogers Wireless* at

para 11). Where the analysis involves a question of mixed fact and law, a court should only conduct a superficial review and decide the issue where "the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Uber* SCC at para 36). Where questions of fact alone are in dispute, a court should normally refer the case to arbitration (*ibid* at para 32; and *Dell* at para 85; see also *Dalimpex Ltd v Janicki*, 2003 CanLII 34234 at para 22 (ONCA)).

[32] Skip argues that the issue of whether the 2018 Agreement applied was a question of mixed fact and law, which required more than a superficial consideration of the evidence. Skip submits that the motion judge purported to undertake a superficial review of the record, but his analysis went beyond undisputed facts or facts evident on the face of the record. According to Skip, given section 7(6) of the *Act* and the competence-competence principle, this analysis should first have been made by an arbitrator.

[33] I disagree. The decision as to which agreement governed was a question of law or at least a question of mixed fact and law, where "the necessary legal conclusions can be drawn from facts that are . . . evident on the face of the record" (*Uber* SCC at para 36). The record and evidence filed allows for a decision based on the applicable legal principles and the language of the standard form contracts. It should be noted that, when arguing that this Court should decide the case *de novo*, Skip acknowledged that "the record is complete, and the evidence relied upon was a paper record." See also *Uber* SCC at paras 44-46.

Did the Motion Judge Err by Finding that the 2018 Agreement Did Not Govern the Parties' Relationship?

[34] The motion judge held that there was no arbitration agreement in place when this action was commenced because, at that time, the 2014 Agreement governed. He held that the 2018 Agreement did not apply retroactively since the action was commenced before the coming into force of that agreement and, that there was no new consideration for it. Moreover, he held that the plaintiff did not accept the terms of the 2018 Agreement. Therefore, he concluded that section 7(1) did not apply.

[35] Skip submits that the motion judge erred by applying the wrong legal test to the question of contract formation. Contract formation requires an objective manifestation of an offer and an objective manifestation of acceptance (see *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 at paras 35-37 [*Ethiopian Orthodox*]). In *Ethiopian Orthodox*, the Supreme Court stated: "The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound" (at para 37).

[36] The 2014 Agreement contained three relevant provisions. It stated that Skip may alter the terms on which it will continue to offer its platform to the plaintiff; that Skip will give notice of the new terms; and that continued provision of services after such notice would constitute her consent to be bound by them. Article 26 of the 2018 Agreement states that:

> . . . this Agreement replaces and supersedes any previous agreement between You and us, and governs the legal relationship

> and all legal issues between You and us, including but not limited to any Dispute arising from or related to this Agreement or any previous agreement between You and us.

[37] To reiterate, a "[d]ispute" is defined in article 17 as including the "negotiation, validity, existence, breach, termination, construction or application" of the 2018 Agreement. The plaintiff continued to use the Skip platform after the 2018 Agreement came into force, and the evidence indicates that she was well aware of the timing of the amendments and their contents.

[38] Another important feature of this case is the presence of article 11 in the 2014 Agreement, which the plaintiff agrees governed her relationship with Skip. In article 11, the parties agreed that Skip could amend the 2014 Agreement from time to time and that the plaintiff's continued provision of services afterwards constituted her consent to be bound by the amendments.

[39] Clauses of this nature have become increasingly common in our society with respect to standard form contracts. It is common these days for users to be notified of changes and given the opportunity to discontinue the use of the service or else accept the changes by means of continued use. There are strong commercial efficacy reasons for enforcing these types of reasonable variations.[2]

[40] I acknowledge that the plaintiff also sent an email to Skip stating, "I do not agree". However, in resolving any question of contract formation, the motion judge was required to ask whether the plaintiff's conduct with respect

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[2] Section 19 of *The Electronic Commerce and Information Act*, CCSM c E55, confirms that the offer and acceptance of contracts may be expressed by electronic documents or acts ("such as touching a computer screen [or] clicking on a computer screen" that are intended to electronically communicate the offer or acceptance (at section 19(1)(b))).

to the 2018 Agreement demonstrated an objective outward manifestation of assent. He gave decisive weight to the plaintiff's communication of her subjective position that she did not agree with the amendments. It was an error to rely solely on the plaintiff's email communications to Skip's Help Centre of her subjective intentions as to whether she accepted the terms of the 2018 Agreement. By the terms of article 11 of the 2014 Agreement, continued services after amendments constitutes consent to the amendments. The plaintiff clicked "I Agree" in the Skip platform and continued to perform deliveries after the 2014 Agreement was amended, which was a clear objective manifestation of assent. She is therefore bound by the changes because she agreed in the 2014 Agreement that she would be. Her motives or subjective agenda in saying that she agreed under protest were irrelevant in determining whether a contract was formed. The fact is that she did click "I Agree". Under both the 2014 Agreement and the 2018 Agreement, she was bound by the amendments.

[41] The motion judge also found that there was no consideration to support the 2018 Agreement; in particular, no fresh consideration given to support the new arbitration clause and the class action waiver.

[42] Generally speaking, contractual variations must be supported by fresh consideration; however, the performance of services may constitute fresh consideration (see Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Toronto: LexisNexis, 2022) at 642; and GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 549). For example, in *Kanitz v Rogers Cable Inc*, 2002 CanLII 49415 (ONSC) [*Kanitz*], the user agreement included an amendment clause. Like the case at bar, that case involved the interplay between arbitration legislation

and class proceedings legislation. The agreement in that case (as in this case) stated that the continued use of Rogers' services constituted acceptance of any such amendments. Rogers Cable amended the user agreement to add an arbitration clause. The Court found that the plaintiffs were deemed to have accepted the amendments because they continued to use Rogers Cable's service after being provided with notice of them. The arbitration clause was thus enforced, and a stay of proceedings was ordered.

[43] More recently, in *Difederico v Amazon.com, Inc*, 2023 FCA 165 [*Difederico*], leave to appeal to SCC requested, Amazon brought a motion for a stay of proceedings on the grounds that the parties were subject to an arbitration agreement. As in the case at bar, Amazon made changes to the governing agreement after court proceedings had begun. One of the appellants continued to make purchases through Amazon.ca even after instituting her proposed class action. Ultimately, the judge found that the 2022 arbitration agreement was binding and enforceable. The Federal Court of Appeal dismissed the appeal.

[44] Continued access to the Skip platform would constitute consideration to support the 2018 Agreement. Relying on both *Kanitz* and *Difederico*, I find it was open to Skip to vary the terms of the 2014 Agreement and the plaintiff's continued use of the Skip platform, after receiving notice of these changes, created a binding contract incorporating the amended provisions.

[45] Besides the fact that the plaintiff continued to use the Skip platform, she also received benefits for the 2018 Agreement, such as a new, seven-day notice for termination.

[46] The filing of the statement of claim a day before the 2018 Agreement was scheduled to take effect is not relevant to whether the 2014 Agreement or the 2018 Agreement applies in this case. Pleadings are simply documents that contain the allegations of one party against another. They do not crystalize the legal rights or obligations of the parties. Instead, "the rights of the parties must depend upon the facts proved and not upon the claim made in the writ" (*Bucke (Township) v New Liskeard Heat & Power Co*, 1909 CarswellOnt 588 at 2 (Div Ct)).

[47] In summary, I find that the motion judge erred in finding that the 2014 Agreement prevailed and in denying a stay under section 7(1) of the *Act*. However, that does not end the matter.

If the 2018 Agreement is Applicable, Did the Motion Judge Err in His Application of Section 7(2)? Are All or Any Appeals Barred by Section 7(6) of the *Act*?

[48] In the motion judge's decision, he stated that there were two issues in this case (at para 20):

> . . .
> 1) Pursuant to s. 7(1) of the ***Act***, which agreement governs the relationship between the parties, the [2014 Agreement] or the [2018 Agreement]?
>
> 2) If the arbitration clauses of the [2018 Agreement] apply, should this Court refuse to stay the proceeding because the arbitration agreement is invalid by virtue of either unconscionability or lack of consideration, or on the basis of public policy, or because the agreement is contrary to the ***Code*** [*The Employment Standards Code*, CCSM c E110], or because

> the matter in dispute is a proper one for default or summary judgment?
>
> [emphasis in original]

[49] Although the motion judge denied the stay based on section 7(1), he went on to address the second issue. He stated (at para 32):

> If I am wrong in my analysis under s. 7(1) of the ***Act*** and the [2018 Agreement] applies and the arbitration agreement contained within the [2018 Agreement] is binding on the parties, I find that the [2018 Agreement] is invalid on grounds of unconscionability and because of an absence of consideration. . . .
>
> [emphasis in original]

[50] In his conclusion, the motion judge wrote (at paras 45-46):

> I find that [Skip] has not met its onus under s. 7(1) of the ***Act*** to satisfy me that this Court should stay this action.
>
> I further find that the arbitration clause contained in the [2018 Agreement] is invalid under s. 7(2)(b) of the ***Act*** because it is unconscionable and because it is also invalid for want of consideration.
>
> [emphasis in original]

[51] There is a different standard for proving that an exception exists under section 7(2). The onus is on the plaintiff to show, on a balance of probabilities, that one of the limited exceptions is present (see *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, 2023 ONCA 260 at para 29). Cases dealing with section 7(2)(b) have done so in the context of whether the arbitration clause is invalid from a traditional contractual perspective. Those perspectives include whether the clause is *void ab initio*,

arose due to fraud, whether there was a lack of capacity or whether the contract was unconscionable etc. The exceptions are all situations "where it would be either unfair or impractical to refer the matter to arbitration" (*Wellman* at para 65).

[52] In *Kints v Kints*, 1998 CarswellOnt 3188 (Ct J (GD)), Heeney J wrote (at para 13):

> . . . Subsection 7(2)(2) permits the Court to refuse a stay where "the arbitration agreement is invalid". In this case, no attack has been made on the essential validity of the contract. It was in writing, duly executed by the parties, and there are no allegations of undue influence or fraud or anything of that nature. . . .

See also *Ilta Grain Inc v Western Grain Cleaning*, 2013 SKQB 5.

[53] If any of the exceptions in section 7(2) apply, then the court has the discretion of whether or not to grant a stay (see *Uber* CA at para 26).

Obiter Versus Alternative Grounds

[54] Skip submits that the motion judge's comments with respect to section 7(2)(b) were *obiter*. As such, it argues in favor of this Court conducting a *de novo* assessment pursuant to section 26(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*], as opposed to returning the issue to the Court below. For this purpose, Skip argues that the record is complete, and the evidence relied upon was a paper record.

[55] In support of this proposition, it cites *Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 at paras 80-81. That case was about prematurity in the professional discipline context and I do not see its relevance to this case. In

that case, an engineer facing a disciplinary hearing for professional incompetence tried to prohibit the hearing on jurisdictional grounds and because of a reasonable apprehension of bias. He was unsuccessful. In that case, this Court gave its decision pursuant to section 26(1) of the *CA Act*, rather than sending the matter back to the application judge. However, there was no question that the application judge had made a decision, it was simply a decision made in error. Here, the issue is whether the reasons of the motion judge with respect to section 7(2) of the *Act* are part of his decision or simply an *obiter* comment.

[56] This determination is important because section 7(6) of the *Act* states: "There is no appeal from the court's decision under this section."

[57] As I will explain, I find that the decision of the motion judge was an alternative finding and not *obiter*. The issue in front of the motion judge was whether the dispute should be permitted to proceed in court or be referred to arbitration. This question required the motion judge to consider a two-part test under section 7 of the *Act*; was there an arbitration clause (see section 7(1)) and, if there was an arbitration clause, was it valid? The fact that the motion judge could have, had he chosen to do so, stopped his decision after finding that there was no applicable arbitration clause, does not make the rest of his reasons *obiter* simply because he chose to make a determination under section 7(2). Determinations by courts are commonly made on more than a single ground.

[58] The Ontario Court of Appeal recently reviewed Canadian jurisprudence on this point in *Catalyst Capital Group Inc v VimpelCom Ltd*,

2019 ONCA 354, leave to appeal to SCC refused, 38746 (14 November 2019) (at para 32):

> Canadian courts have consistently rejected the argument that a judicial finding is merely dictum or collateral because there was another sufficient basis for the judge's decision. In *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516, [1909] S.C.J. No. 19, the Supreme Court rejected the argument that a judicial finding that is "a distinct and sufficient ground for its decision (is) a mere dictum because there is another ground upon which, standing alone, the case might have been determined": p. 534 S.C.R., *per* Duff J. (Fitzpatrick C.J.C. concurring), pp. 539-40 S.C.R., *per* Anglin J., quoting *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179 (P.C.), at p. 184. More recently, the Federal Court of Appeal held that a judge's finding on one necessary element of a claim gave rise to issue estoppel even though the judge had earlier in his reasons reached a conclusion on another element that was sufficient to dispose of the claim: *Pharmascience Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 506, 2007 FCA 140, 282 D.L.R. (4th) 145, at paras. 34-35.

[59] There are many cases that discuss the nature of *obiter* findings versus alternative grounds for decision. For example, in *Johannesson v West St Paul (Rural Municipality)*, 1950 CanLII 473 (MBCA), rev'd [1952] 1 SCR 292, this Court commented that a particular statement in a Privy Council case was clearly "not *obiter*. It was one of the grounds given for the decision" (at p 865).

[60] In *R v Kiss*, 2018 ONCA 184, Paciocco JA, writing for the Court, observed, "[i]n *Hill* [*R v Hill*, 2015 ONCA 616], Doherty J.A., writing for the court, relied on the principle I just described to finally dispose of a ground of appeal. The holding is not *obiter* simply because the appeal was successful on another issue" (at para 44).

[61] More recently, in *Glegg v Glass*, 2020 ONCA 833, Brown JA, writing for the Court, found that "the application judge's conclusion on solicitor-client privilege was not *obiter*. His reasons are clear that it was a discrete basis on which he dismissed the application as contrary to public policy" (at para 57).

[62] I find that the reasons given by the motion judge with respect to section 7(2) are not *obiter* but alternative grounds for decision. Consequently, section 7(6) comes into play.

Is This Appeal Barred Because of Section 7(6) of the *Act*?

[63] The motion judge was quite clear as to his findings on the invalidity of the 2018 Agreement based on unconscionability. As indicated later in these reasons (as an *obiter* comment), the jurisprudence with respect to arbitration agreements and class action waivers in non-consumer situations is still developing after the decision of the Supreme Court in *Uber* SCC. Had it been necessary for me to do so, I would have found that the motion judge did not err in finding that, on a balance of probabilities, the plaintiff had proven her case under section 7(2)(b).

[64] However, it is unnecessary for me to make a final decision on this point, as section 7(6) bars an appeal in this case. The authorities seem to indicate that section 7(6) does not allow an appeal of the motion judge's decision that there was an arbitration clause in effect, but that it was invalid (see *SNC-SNAM, GP, a partnership between SNC-Lavalin Inc and*

Snamprogetti Canada Inc and Snamprogetti Canada Inc v Opron Maritimes Construction Ltd et al, 2011 NBCA 60 at para 40).

[65] Section 7(6) has not been the subject of much jurisprudence. The previous Manitoba cases on this point did not decide this issue. In *Bloomer Hotel Corp et al v Boehm Hotel Corp et al*, 2009 MBCA 68, this Court did not mention section 7(6). In *Chrysler*, the motions judge did not address section 7(2) in his decision. I am aware that in *Hopkins*, this Court held that section 7(6) did not bar the appeal in that case. However, in that case, this Court concluded that the motion judge never made a finding that the agreement or the arbitration clause were invalid under section 7(2). Analyzing the motion judge's reasons, Beard JA concluded that (at paras 95-96):

> Thus, it is clear that, while the motion judge said that he was invoking s. 7(2)(b), he did not find that the criterion in s. 7(2)(b) was met. That being the case, s. 7(6) is not engaged to prevent this court from considering this aspect of his decision on appeal.
>
> Given that the motion judge did not find that either the Agreement, or the arbitration clauses, was invalid, he clearly misdirected himself as to the interpretation of s. 7(2)(b) of the *Act* and, thereby, committed an error of law. As a result, no deference is owed to his decision.

[66] Ultimately, the appeal in *Hopkins* was allowed and a stay under section 7(1) was granted (*ibid* at para 101).

[67] This is an important point of distinction between the case at bar and *Hopkins*. In the case at bar, the motion judge did, in fact, make a finding that at least one of the exceptions listed in section 7(2) was met.

[68] The Ontario and Manitoba statutory regimes for arbitration are similar. In Ontario, as in Manitoba, there has been little consideration of the statutory bar to appeal when the decision to refuse a stay arises as a result of invalidity, as opposed to the dispute falling outside of the arbitration agreement. In *MDG Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656, there was no discussion of the bar to the appeal. In *Haas v Gunasekaram*, 2016 ONCA 744, the Court observed that section 7(6) "does not preclude an appeal from an order refusing to grant a stay on the ground that the matter is not a proper subject for arbitration" (at para 3, n 1). And see *Ismail v First York Holdings Inc*, 2023 ONCA 332, which found that a decision to refuse a stay is not made under the Act where it is based on a finding that there is no arbitration agreement "and therefore an appeal is not barred by section 7(6)" (at para 25).

[69] In general, the cases do not seem to distinguish between a situation under section 7(1), where the dispute in question is not covered by an arbitration agreement, and a situation under section 7(2)(b), where the arbitration agreement is invalid because of fraud, unconscionability or a similar reason.

[70] With respect to section 7(1), it is clear that the *Act* will not apply if there is no arbitration clause, or the dispute is not covered by the arbitration clause. In those circumstances, the prohibition against an appeal in section 7(6) is not applicable (see *Huras v Primerica Financial Services Ltd*, 2000 CanLII 16892 at para 10 (ONCA); see also *Toronto Standard* at para 47; and *Mantini v Smith Lyons LLP*, 2003 CanLII 20875 at para 16 (ONCA), leave to appeal to SCC refused, 29893 (4 March 2004)).

[71] However, there must be a distinction between section 7(1) and section 7(2)(b). Validity and application are not synonymous. Each section must be given a different interpretation in accordance with the rules of statutory interpretation. It is a well-known principle of statutory interpretation that no legislative provision should be interpreted so as to render it repetitive. Every provision of a statute should be interpreted as having a meaning, a function and a distinct idea (see Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 208, 211; and *R v Proulx*, 2000 SCC 5 at para 28). In *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19, the Supreme Court stated: "There is a presumption that the legislature 'avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain'" (at para 40). As well, the two sections "ought to remain analytically distinct" because the burden of proof shifts between them (*Peace River* at para 77).

[72] In the case at bar, the motion judge erred in his decision with respect to section 7(1). The dispute in question is covered by the 2018 Agreement, which contains an arbitration clause. However, he made alternative findings under section 7(2)(b) with respect to the validity of that clause, which is a different analysis than the one conducted in section 7(1).

[73] In summary, the only decisions relating to section 7 of the *Act* that can be appealed, in light of section 7(6), are findings that the dispute is not governed by an arbitration clause under section 7(1). Such a decision ousts the application of the *Act* completely. A decision granting a stay pursuant to section 7(1) cannot be appealed. A refusal to grant a stay pursuant to section 7(2) cannot be appealed (see *Paulpillai Estate v Yusuf*, 2020 ONCA 655 at paras 46-48).

[74] The motion judge's findings regarding section 7(2) are alternative grounds for his decision. Consequently, the section 7(6) bar operates, and the appeal should be quashed. This supports the policy behind the *Act*, to prevent lengthy preliminary disputes regarding forum and jurisdiction, which simply increase costs and delay resolution.

Unconscionability

[75] Although it is not necessary for me to do so, I would also say that, similar to *Uber* SCC, the motion judge was able to come to a decision that the 2018 Agreement was unconscionable based on a superficial review of the record under the *Dell* framework (see para 33; *Uber* SCC at paras 32, 37; and *Dell*). The question of unconscionability did not have to be decided in this forum on a final basis. This was only a preliminary motion on the question of jurisdiction. The plaintiff merely had to show, on a balance of probabilities, that she fell within one of the exceptions contained in section 7(2), taking into account that, in a motion to stay a proceeding, the court presumes that the plaintiff can prove that which she pleads. Thus, the court normally proceeds on the basis that the plaintiff's allegations are true or at least capable of being proven (see *Uber* CA at para 27; and *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 8).

[76] Although the justice system was initially skeptical of arbitration as a dispute resolution system, it was soon accepted as an effective system and the resulting legislation emphasized deference to arbitration. Especially in commercial disputes, arbitration was recognized as providing a simpler,

faster, less expensive and less formal process for resolving disputes thereby minimizing costly and time-consuming court procedures.[3]

[77] However, with the rise in standard form contracts and the inclusion of mandatory arbitration clauses in those contracts, the assumption that arbitration was a joint choice of the parties became illusory. In a standard form contract, the parties do not negotiate terms. The contract is put to the receiving party as a take it or leave it proposition. Consequently, a problem of controlling unfair terms in standard form contracts has arisen.[4]

[78] Many common law jurisdictions (i.e., the UK, Ireland, Australia, and New Zealand) have all legislated controls in this area by adopting legislation protecting consumers from the potential unfairness of standard form contracts. See, for example, Moore, which provides that "a standard form term that is unfair is unenforceable against the form recipient" (at p 556) (footnote omitted). Concerns about the unfairness of mandatory arbitration clauses led the Ontario Legislature to enact the *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, provisions invalidating mandatory arbitration clauses in consumer agreements (see *Griffin v Dell Canada Inc*, 2010 ONCA 29). Similarly, section 11.1 of Quebec's *Consumer Protection Act*, CQLR c P-40.1, prohibits any stipulation that obliges a consumer to refer a dispute to arbitration, as well as any stipulation that attempts to prevent a class action. By virtue of the same section, consumers have the option of agreeing to arbitration after a dispute has arisen. Section 172 of British Columbia's

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[3] See Craig AB Ferris, "Understanding Arbitration Clauses in Class Actions: Have the Sands Shifted Once Again?" (21 September 2007) at 2, online (pdf): <lawsonlundell.com/media/news/175_UnderstandingArbitrationClauses.pdf>.

[4] See Marcus Moore, "Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?" (2022) 55:2 UBC L Rev at 547, online (pdf): <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1734&context=fac_pubs>.

Business Practices and Consumer Protection Act, SBC 2004, c 2, has been interpreted to oust mandatory arbitration clauses but only in relation to claims brought under that particular section (see *Difederico* at para 80; see also Ferris at p 12).

[79] Yet, critics have lamented the fact that there is no overt control, whether legislated or judge-made, of relatively general application for confronting unfairness in standard form contract terms in Canada. However, the jurisprudence took a significant leap in this area with the decision in *Uber* SCC.

[80] In *Uber* SCC, the majority of the Supreme Court found that the arbitration agreement made it practically impossible for one party (Mr. Heller, an Uber driver) to arbitrate. Uber's services agreement included mandatory arbitration and choice of law clauses. The place of arbitration was Amsterdam and the up-front costs to begin an arbitration were equivalent to Mr. Heller's gross annual income from his full-time work as an Uber driver. Under these facts, the Supreme Court was concerned that a stay might result in a situation where the matter would never be resolved. They held that "the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator" (*ibid* at para 44).

[81] The Supreme Court explained that the doctrine of unconscionability has two elements: an inequality of bargaining power; and a resulting improvident transaction. An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. A

bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party (*ibid* at para 74).

[82] By itself, a standard form contract does not establish an inequality of bargaining power (*ibid* at para 88). However, the Supreme Court cautioned that standard form contracts have the potential to enhance the stronger party's advantage at the expense of the weaker party "through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies" (*ibid* at para 89). In conclusion, they found that "[w]hen arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all" (*ibid* at para 97). Thus, the arbitration clause was found to be invalid.

[83] The Supreme Court's decision cleared the way for drivers to pursue a class action against Uber by avoiding the arbitration clause. Yet, more broadly, it is not clear from the Court's decision whether arbitration clauses would always be unenforceable—much less whether other types of clauses that are used to thwart class actions would also be unenforceable. With respect to class action waivers, the Court did not make a blanket statement that standard form terms will be unconscionable wherever they obstruct access to class actions (see Moore at p 574).

[84] There have been several appellate cases that have applied the *Uber* SCC framework. All of them have been situations where the decision was made under section 7(1) to grant a stay—consequently section 7(6) operated to bar an appeal. As well, none of the access to justice concerns that animated *Uber* SCC were present in those cases—the cost of the arbitration was not

prohibitive, and the barriers to arbitration present in *Uber* SCC were not present in these cases (see *Difederico*; and *Irwin v Protiviti*, 2022 ONCA 533).

[85] The inequality of bargaining power analysis from *Uber* SCC seems equally applicable in the case at bar. However, the clauses at issue in this case are not as lopsided as the Uber arbitration clause. As well, the presence of a standard form contract, an arbitration clause and a class proceeding waiver by themselves are not determinative (see *Petty v Niantic Inc*, 2023 BCCA 315, leave to appeal to SCC requested; and *Williams* at para 171). It cannot be that removing access to the courts leads to an improvident bargain as that would mean all mandatory arbitration clauses would lead to a finding of unconscionability. So, in which situations will the practical effect of the arbitration clause preclude resolution altogether for the vast majority of prospective class members and therefore lead to unconscionability?[5]

[86] In the case at bar, the significant factors are the presence of the class action waiver and the nature of the contract. A class action waiver is obviously to the advantage of Skip. Its 2020 Annual Report[6] states that the arbitration provision could "significantly reduc[e] the size of any class action and the related risks" (at p 235).

[87] A case closer to the one at bar, as opposed to a consumer action, is the case of *Pearce*. In that case, the contractual relationship at issue was between unlicensed debt advisors and individuals (facing serious financial

[5] It is not necessary for me to discuss the differences in opinion in *Uber* SCC as to reliance on the doctrine of unconscionability, as opposed to public policy. The motion judge based his decision on unconscionability. But I would note, as did Griffin JA in *Pearce*, that unconscionability and public policy are "doctrinal cousins" (at para 192) and "it is clear there is much overlap in the underlying concerns animating both" (at para 219).
[6] See JUST EAT Takeaway.com, *Annual Report 2020* (Amsterdam: JUST EAT Takeaway.com, 2021), online (pdf): <s3.eu-central-1.amazonaws.com/takeaway-corporatewebsite-dev/just-eat-takeawaycom-annual-report-2020.pdf>.

difficulties) seeking debt restructuring. The lower court judge in that case certified the class action and refused to stay the claims in accordance with the class action waiver contained in the standard form contract.

[88] On appeal, the Court noted that the proposed class members were in vulnerable circumstances, while the appellants were unable to point to any commercial reason for the class action waiver except to possibly impede their customers' right to access justice. The Court stated (*ibid* at paras 232-33):

> The appellants submit that it would be an undue burden on the franchisees, and contrary to their contractual expectations, to be subject to a class action because these types of proceedings are lengthy and expensive and they will face a larger scale of potential liability. Yet they devote no submissions to the burden on them if they were to be sued in 8,200 separate lawsuits. Surely if individual actions were a realistic option for customers of the appellants to pursue, that would be far more complex and burdensome for the appellants to manage and would pose a threat to the appellants in terms of potential liability equal to that of a class proceeding.
>
> The true expectation of the appellants, and reason for their wish to enforce the class action prohibition is obvious: the appellants expect that, if enforced, the clause will protect them from being sued *at all*.
>
> [emphasis in original]

[89] The Court in that case concluded that, similar to *Uber* SCC, "[w]hile on paper it might appear that a pathway to dispute resolution exists, the practical effect of the clause so narrowly defines that pathway as to effectively and practically block access to justice and as such it is unconscionable" (*Pearce* at para 245).

[90] In this action, the disputes likely to arise under the 2018 Agreement would be for relatively small amounts. Although the arbitration provisions state that Skip will pay the reasonable arbitration costs, the plaintiff would still need to pay for the legal representation necessary to successfully advance claims through arbitration—costs that are beyond her financial means and are grossly disproportionate considering the monetary value of her claims. Forcing this action out of the Court and into private arbitration would likely deny the plaintiff and prospective class members access to any dispute resolution.

CONCLUSION

[91] There is a tension between the overarching policy of the *Act* to encourage arbitration and the unconscionability doctrine developed in cases like *Uber* SCC, which seeks to protect more vulnerable contracting parties and collective recourse through vehicles such as class actions.[7]

[92] While freedom of contract is of central importance to Canadian commercial and legal systems, the common law has never treated it as absolute. As a matter of public policy, courts will not enforce contractual terms that, expressly or by their effect, deny access to legally determined independent dispute resolution (see *Uber* SCC at paras 101, 105, 110-15). Although courts have recognized that arbitration can be an acceptable alternative to litigation where it provides for just dispute resolution according

[7] See James Plotkin, "Arbitration's Primacy? The Law Pertaining to Staying Court Proceedings in Favour of Arbitration" (39th Annual Civil Litigation Conference, 2019), online: <canlii.org/en/commentary/doc/2019CanLIIDocs4077>; David T Neave & Jennifer M Spencer, "Class Proceedings: The New Way to Trump Mandatory Arbitration Clauses?" (2005) 63:4 Advocate 495; and Jean R Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?" (2000) 42:1 Wm & Mary L Rev 1.

to law, this is not the case where the practical effect of the arbitration clause would be to preclude resolution altogether. In *Uber* SCC, the Supreme Court stated: "When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all" (at para 97).

[93] The motion judge erred in his analysis of the applicable contract. He erred in finding the plaintiff did not accept the terms of the 2018 Agreement. It is not relevant that the statement of claim was filed a day before the 2018 Agreement took effect, except insofar as it shows that the plaintiff was well aware of the legal import of the impending changes (with assistance from counsel). I find that the 2018 Agreement applies here due to article 11 of the 2014 Agreement, the notice provided of the proposed amendments, the fact that the plaintiff clicked "I Agree" on the Skip platform and the plaintiff's continued use of the Skip platform after the amendments came into force.

[94] However, the motion judge went further in his reasons for decision and denied the stay based on section 7(2)(b) of the *Act*. He held that there was an arbitration agreement, but it was invalid because the plaintiff had shown, on a balance of probabilities, that the 2018 Agreement was unconscionable. Given that decision, section 7(6) operates to prohibit an appeal to this Court.

[95] For the above reasons, this appeal is quashed with costs.

Steel JA

I agree: Cameron JA

I agree: leMaistre JA

APPENDIX

Excerpts from the 2018 Agreement (Articles 17-18 and 20-22):

> 17 If there is any dispute or controversy between (1) You or any of Your Personnel and (2) the Company or any related entity, including any dispute or controversy arising out of or relating to this Agreement, any Services, any interactions or transactions between (1) You or any of Your Personnel and (2) the Company or any related entity, or in respect of any legal relationship associated with or derived from this Agreement, including this Agreement's negotiation, validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any party to this Agreement (each, a "Dispute"), any party will serve any notice on the other party and each party must use good faith efforts to resolve the Dispute informally.
>
> 18 If the Dispute is not resolved after twenty (20) business days of a party serving notice on the other party that there is a Dispute, the parties agree that the Dispute will be finally resolved by confidential arbitration before a single arbitrator in accordance with the Arbitration Rules of the ADR Institute of Canada, Inc. The parties agree that the arbitration will be conducted by the parties on an ad hoc basis and will not be administered by the ADR Institute of Canada, Inc.
>
> 20 If you are a resident of a province other than Quebec, the seat of the arbitration will be Ontario or such other location as agreed to by the parties acting reasonably. The language of the arbitration will be English.
>
> 21 The Company will pay the reasonable arbitration costs. There will be no appeals from any question of fact or law, or any other issue.
>
> 22 The parties will resolve any Dispute on an individual basis. Any claim you may have must be brought individually, in Your

individual capacity and not as a representative plaintiff or class member, and you will not join such claim with claims of any other person or entity, or bring, join or participate in a class action lawsuit, collective or representative proceeding of any kind (existing or future) against the Company or any related entity.