COURT OF APPEAL FOR ONTARIO

CITATION: Davis v. Amazon Canada Fulfillment Services, 2025 ONCA 421
DATE: 20250610
DOCKET: COA-23-CV-1057

Pepall, Paciocco and Sossin JJ.A.

BETWEEN

Denver Davis

Plaintiff (Appellant)

and

Amazon Canada Fulfillment Services, ULC, Amazon.Com, Inc.
and Amazon.com.ca, Inc.

Defendants (Respondents)

Jean-Marc Leclerc and Louis Sokolov, for the appellant

David Di Paolo, Nadia Effendi, Laura M. Wagner, Graham Splawski and Haddon Murray, for the respondents

Heard: February 12, 2025

On appeal from the orders of Justice Paul M. Perell of the Superior Court of Justice, dated June 19, 2023, with reasons reported at 2023 ONSC 3665.

Sossin J.A.:

OVERVIEW

[1] This appeal involves two orders: one staying a proposed class proceeding against Amazon Canada Fulfillment Services, ULC, Amazon.com, Inc., and Amazon.com.ca, Inc. (“Amazon”) in favour of arbitration, and the other dismissing

the motion for certification of the class action against Amazon. The class action claim involved approximately 73,000 class members and sought $200 million in general damages and $50 million in aggravated, exemplary, and punitive damages. Mr. Davis, the putative representative plaintiff for the class action, alleged that Amazon was liable to the class for breach of employment contracts, including the terms of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), and its regulations, and equivalent provincial statutes and regulations across the country; breach of duties of good faith; unjust enrichment; negligence; and a declaration that any agreement excluding the putative class members from the employment law statutes is void and unenforceable.

[2] The motion judge granted the motion to stay for the class members who had signed arbitration agreements and dismissed the motion to certify the class action for the class members who had not signed arbitration agreements.

[3] The appellant raises the issue of how the principles about unconscionability and public policy from *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, apply to an arbitration clause, whose alleged defect involves a class waiver and waiver of collective arbitration. The appeal also raises several questions related to the certification of a class action, including how the common employer doctrine applies where multiple employers hire workers whose work activities are directed and monitored through a mobile phone application of the alleged common employer.

[4] For the reasons that follow, I conclude that the motion judge did not commit a reversible error in his analysis of certification under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), which denied certification to the only group within the class whose appeal is before us. In light of this outcome, it is not necessary to consider whether the motion judge erred in granting a stay under s. 7 of the *Arbitration Act*, 1991, S.O. 1991, c. 17, and I would expressly refrain from doing so. I will describe the motion judge's reasoning in granting the stay, but I should not be taken as endorsing or disapproving of that reasoning or the imposition of a stay. The proper application of the doctrine of unconscionability to contracts of adhesion in the employment context remains for another day.

BACKGROUND

[5] Amazon is an online retailer. The appellant alleges that the putative class members, who deliver goods for Amazon, are all its employees, although the way in which their work relationships are structured falls into various categories.

[6] The motion judge characterized the class action as proceeding with two branches, one involving a class of delivery partners ("DPs"), who were employed directly by Amazon, and one involving a class of driver associates ("DAs") employed by third-party delivery-service partner companies ("DSPs"). He explained the distinction between these two groups as follows, at paras. 3-4:

> In the first branch of his action, Mr. Davis sues Amazon as an "employer" of approximately 16,000 putative class

> members. These workers have a direct contractual worker relationship with Amazon, and they deliver its parcels. These putative class members are known as Delivery Partners (DPs). Mr. Davis is not and has never been a DP. The first branch of the theory of Mr. Davis's proposed class action is that Amazon is an online product retailer that has a part-time workforce of approximately 16,000 DPs with whom Amazon contracts. Mr. Davis's allegation is that these drivers from across the country (actually just British Columbia, Alberta, and Ontario) are employees who have been misclassified as independent contractors, so that Amazon can avoid its statutory and common law obligations as an employer.
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> In the second branch of his action, Mr. Davis sues Amazon as a "common employer" of approximately 57,000 putative class members. These workers have an indirect contractual relationship with Amazon. These putative class members are known as Driver Associates (DAs), and they are workers for Delivery Service Partners (DSPs). The DSPs are logistics companies that are contracted to provide delivery services for Amazon. There were 126 DSPs. Mr. Davis is a former DA. The second branch of the theory of Mr. Davis's proposed class action is that Amazon is an online retailer that has outsourced the delivery of its goods to 126 logistics companies, the DSPs. Mr. Davis alleges that Amazon did this outsourcing to avoid having to comply with Amazon's statutory and common law obligations as a "common employer" of these drivers. Mr. Davis submits that as a common employer, Amazon is jointly and severally liable for the failures of the 126 logistics companies to comply with the employment law of British Columbia, Alberta, Manitoba, Ontario, Québec, and Nova Scotia, which is where the DSPs carry on their businesses.

[7] DSPs (and the DAs they hire) deliver Amazon packages through either Amazon's DSP 1.0 program or its DSP 2.0 program. Depending on which program the DSP participates in, the DSP is required to include certain terms in its contracts

with DAs. Under the DSP 2.0 program, Amazon uses a standard form contract that sets out the terms of employment to be followed by DSPs. All DAs who fall under DSP 2.0 have mutual arbitration agreements in their contracts.

[8] Under DSP 1.0, DSPs enter into Transportation Agreements (and work orders) with Amazon, which set out the terms and conditions under which the DSPs provide services to deliver Amazon packages. The terms and conditions under DSP 1.0 agreements vary. Some DAs under DSP 1.0 signed mutual arbitration agreements as part of their contracts, but an estimated 18,000 DAs did not sign mutual arbitration agreements. Any DAs who signed the April 2021 version of the mutual arbitration agreement have a waiver of s. 7(6) of the *Arbitration Act*.

[9] DPs are recruited by enrolling in Amazon's Flex Program through the Amazon Flex App. Potential DPs download the App to their smartphone and apply to sign up for the Flex Program. When the DPs register, they are required to agree to the Flex Terms of Service, which include an arbitration agreement.

[10] Both DPs and DAs use Amazon's technology, the Flex App, to deliver goods. The App allows them to sign up for or "accept" delivery blocks. After accepting a block, the driver would go to Amazon's warehouse facilities to pick up the goods and follow a detailed route provided by Amazon to make deliveries to a predetermined list of purchasers. The Flex App records the deliveries by scans and photos, and tracks and times the performance of the delivery assignments.

THE SCOPE OF THIS APPEAL IN LIGHT OF S.7(6) OF THE *ARBITRATION ACT*

[11] Section 7(6) of the *Arbitration Act* states that "[t]here is no appeal from the court's decision." It applies where a decision is made under s. 7: *Toronto Standard Condominium Corp. No. 1628 v. Toronto Standard Condominium Corp. No. 1636*, 2020 ONCA 612, 454 D.L.R. (4th) 126, at para. 97.

[12] In this case, pursuant to s. 7 of the *Arbitration Act*, Perell J. permanently stayed the claims of (1) all DPs; (2) all DSP 2.0 DAs; and (3) the claims of DSP 1.0 DAs who signed an arbitration agreement. Some DAs did not sign arbitration agreements and so their claims were not stayed.

[13] Those DAs whose claims were not stayed are not caught by s. 7(6) of the *Arbitration Act*.[1]

[14] DAs who entered into post-April 2021 arbitration agreements have the benefit of a s. 7(6) waiver, and so there is no appeal bar. The standard agreement provides:

> This Agreement and any arbitration hereunder shall be governed by the law of the Province of Ontario including the common law and the *Arbitration Act*, *1991* S.O. 1991, c.17, excluding s. 7(6) thereof, unless the Employee resides in Quebec as of the time the Employee enters into this Agreement, in which case the applicable

[1] The appeal from the certification decision comes to this court because it was transferred from the Divisional Court: 2023 ONCA 634.

> provincial statutes apply, excluding any rule or provision that would preclude an appeal of a judicial decision on a motion to stay arbitration proceedings. [Emphasis added.]

[15] DPs did not have the benefit of a s. 7(6) waiver, and leave to appeal was sought from the SCC, but was denied.[2] Therefore, there is no appeal from the motion judge's imposition of a stay relating to the DP group within the class. Accordingly, the scope of this appeal relates only to the DA group within the class.

[16] As for the DA group, they fall into two categories that are relevant: first, the DAs who had an arbitration agreement and agreed to a waiver of s. 7(6), and second, the DAs who had no arbitration agreement. The first category of DAs engages the stay issue, and then, if successful, the certification issue. The second category of DAs engages only the certification issue. As a result, if the respondents prevail on the appeal of the certification issue, they will be successful on the whole appeal.

DECISION BELOW

[17] The certification motion was heard May 9 to 11, 2023. On June 19, 2023, the motion judge released his reasons staying the action against Amazon as an

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[2] In his factum, the appellant argues that this court has jurisdiction in relation to the claims of DPs who are British Columbia residents, on the basis that there is no s.7(6) equivalent in the British Columbia *Arbitration Act*. However, this national class action was commenced in Ontario and s.7(6) of the Ontario *Arbitration Act* precludes this court from taking jurisdiction, irrespective of where a particular group of class members reside.

employer or as a co-employer for the DPs and DAs that have signed arbitration agreements.

[18] Notwithstanding the stay, however, the motion judge conducted a certification analysis, which was relevant both for those DAs who had not signed arbitration agreements, and could be relevant for other class members, in light of the contingency that the stay he had imposed could be challenged and set aside. The motion judge thus proceeded to consider certification as if the stays he had ordered were not in place.

[19] On this basis, the motion judge stated that he would have conditionally certified a class action on behalf of the DPs against Amazon (but not the DA class members). The conditions were the appointment of an appropriate representative plaintiff and the amendment of the definition of the class. With respect to the remaining DP action, the motion judge further stated that he would not have certified aggregate or punitive damages as a common issue, nor the claims by the DPs for breach of a duty of good faith, unjust enrichment, or negligence.

(1) The stay of proceedings under s. 7 of the *Arbitration Act*

[20] The motion judge noted that there was no question that the dispute arguably fell within the scope of the arbitration agreements, and that the “battleground” is over whether there are grounds pursuant to unconscionability or public policy to refuse a stay.

[21] On the unconscionability and public policy grounds, the motion judge reviewed the history of the *Uber* litigation, stating that none of the decisions derogated from the principle in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; and *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, that courts must enforce arbitration agreements absent legislative language to the contrary. He distinguished the Supreme Court majority's holding in *Uber* on unconscionability on the basis that the arbitration agreements in this case "do not have the features of time, place, cost, and procedure that were unacceptable in the [*Uber*] case". He characterized the class action waivers included in the arbitration clauses as a "redundancy" because the clauses precluded drivers from taking their disputes to court, and a class action is simply another type of court proceeding subject to the arbitration agreements. The motion judge also rejected the appellant's expert evidence to the effect that all arbitration provisions in the employment context are *per se* disadvantageous.

[22] More specifically, in rejecting the public policy ground to refuse a stay, the motion judge observed that the drivers subject to the arbitration clauses were not precluded from pursuing statutory remedies in statutory forums pursuant to the ESA.

[23] Finally, the motion judge also canvassed the “at will” references in some arbitration clauses. He held that those arbitral clauses, which included this language, were errors that should not be given any operative meaning.

(2) The certification issues

[24] As mentioned above, while the motion judge found that the class action should be stayed pursuant to the *Arbitration Act*, he considered the merits of the certification motion under s. 5 of the CPA, assuming the stay was not in place.

[25] The motion judge found that with modifications to the class definition, the identifiable class criterion had been satisfied.

[26] However, all causes of action advanced on behalf of the DAs failed because they depended on a common employer relationship, which could not be satisfied. He cited *O’Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, 460 D.L.R. (4th) 487, leave to appeal refused, [2021] S.C.C.A. No. 316, as the leading case on the common employer doctrine. He noted that there was no corporate law relationship between Amazon and the 126 logistics companies, and as pleaded they “are not an integrated or seamless group of companies operating together as one business.” Further, the contracts between the DSPs and Amazon disavowed Amazon as the employer. Acknowledging that such written contracts are not determinative, the motion judge nevertheless stated that it is “plain and obvious” that there was no reasonable inference of any intention that Amazon was party to

the employment agreements with the 126 DSPs; the DSPs in a non-homogeneous way were exclusively responsible in the employment relationship with the drivers. The motion judge emphasized that Amazon and the logistics companies are in different businesses, so that the drivers "would not naturally see themselves as being in the retail trade providing goods to consumers".

[27] A second reason why the common employer doctrine was not available, according to the motion judge, was that the 126 logistics companies were not joined as co-defendants. He concluded that the DSPs were necessary parties notwithstanding that they are jointly and severally liable; they were alleged to breach their contracts with the drivers as well as with Amazon; and their payroll data was part of the proposed aggregate damages calculation. However, this second reason why the common employer doctrine was not available "would disappear if Mr. Davis successfully applied to have the DSPs joined as co-defendants or if Amazon joined the DSPs as third parties."

[28] The motion judge confirmed that the action as a whole could not be certified for the DAs due to his conclusion with respect to the common employer doctrine. While not relevant for this appeal, the motion judge found that a modified class action conditionally could have been certified for the DPs who worked directly for Amazon.

[29] With respect to other findings which remain relevant for this appeal, the motion judge also concluded that there was no basis, in fact, that a common issue about a common employer relationship exists with respect to the DAs. The motion judge found that the DAs' direct employers, the DSPs, did not use or manage the use of the Flex App uniformly; and if the common employer doctrine applies between Amazon and the 126 DSPs, there would be 126 discreet common-employer relationships and hence no commonality. In response to the appellant's reliance on *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501, leave to appeal refused, [2012] S.C.C.A. No. 379; and *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, leave to appeal refused, [2012] S.C.C.A. No. 326, the motion judge pointed out that there was no issue in those cases about whether the bank branches were independent entities controlling their own employees. He asserted that the case at bar involves "a diverse forest of legal entities" and was more analogous to *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745.

[30] With respect to aggregate damages, the motion judge concluded that the prerequisites for an aggregate award have not been satisfied for the DAs because liability could not be established on a class-wide basis. Further, in his view, the appellant had not established a viable methodology for quantifying aggregate damages.

[31] Finally, the motion judge found that the proposed class action would not have been the preferable procedure for the DAs.

ISSUES

[32] The appellant argues that the motion judge erred both in granting a stay and in his certification analysis.

[33] With respect to the stay, the appellant argues that precluding any form of collective action makes the arbitration agreement unconscionable.

[34] With respect to certification, the appellant first argues that the motion judge erred in his conclusion that it was “plain and obvious” that the common employer doctrine could not encompass this case.

[35] The appellant also argues that the motion judge erred in finding no common issues, by failing to apply the “some basis in fact standard” and by ignoring the evidence of common control that Amazon exercised over all class members.

[36] Finally, the appellant argues that the motion judge erred by failing to find a common issue with respect to aggregate damages.

[37] In light of the limited scope of the appeal addressed above, I will address only the grounds of appeal relevant to certification of the DAs below.

ANALYSIS

(1) The standard of review

[38] The motion judge's findings of fact and mixed fact and law in the certification analysis are entitled to deference, and are reviewable on a palpable and overriding error standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 28. In particular, the findings of the motion judge as to whether a proposed class action satisfies the "some basis in fact" standard under ss. 5(1)(b)-(e) of the CPA is a contextual exercise entitled to significant deference. Appellate intervention in the class action context generally is limited to matters of general principle and legal errors: see *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] S.C.C.A. No. 15; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 39, leave to appeal refused, [2005] S.C.C.A. No. 50.

(2) The motion judge did not err in his certification analysis

[39] The motion judge framed his certification analysis in the alternative to his main finding that the class action should be stayed pursuant to the *Arbitration Act*. However, for the group of DAs who did not sign arbitration agreements, the motion judge's conclusions on certification constituted a binding, first instance determination of their certification motion.

[40] The threshold for certification is not in dispute. Pursuant to s. 5(1) of the CPA:

> (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[41] The motion judge recognized that the pleadings should be read in a generous and purposive manner so as to give effect to the goals of the Act, including promoting access to justice, encouraging behaviour modification and promoting the efficient use of judicial resources. He also instructed himself properly on the low evidentiary threshold applicable to the certification analysis and that the

moving party must show “some basis in fact” for the certification requirements other than establishing a cause of action.

[42] With respect to establishing a cause of action, the motion judge noted that for this determination, the “plain and obvious” test for disclosing a cause of action from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, applies. Under this standard, a claim will show a reasonable cause of action unless it has a radical defect.

[43] As the motion judge explained, the appellant’s claim with respect to DAs was “doomed to failure” on the basis that the appellant could not establish that Amazon was the common employer for all members of the class action.

[44] For the reasons set out below, this finding disposes of the entire class action, and it is not necessary to consider other findings of the motion judge[3], which either relate only to the DPs, or are not necessary to reach in light of the conclusion that Amazon was not a common employer.

(3) The motion judge did not err in his common employer analysis

[45] In light of the fact that the appellant brought the class action against Amazon, and not the 126 DSP logistics companies who employ the DA group within the class, a key issue in the certification motion was whether Amazon was a “common employer”, together with the DSPs, who owed duties as an employer to the class.

[3] I will also briefly touch upon the motion judge’s finding on preferable procedure.

[46] The motion judge explained his common employer analysis at paras. 158-160 of his reasons:

> The heart of the second branch of Mr. Davis's proposed class action is that Amazon is the "common employer" of approximately 57,000 DAs that have contracted with 126 logistics companies that have contracts with the DAs as employees, independent contractors, or workers from an employment agency (temps). Paragraph 69 of the Statement of Claim pleads: "Amazon and Amazon DSPs should be treated as one employer for the purposes of the ESA and Equivalent Legislation and the Plaintiff and Class members' entitlement to statutory minimum payments under it and their entitlements at common law." As pleaded, Amazon and 126 separate logistics companies are to be treated as one common employer.
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> In its argument about the common issues criterion for certification, Amazon submits that there is no basis in fact for a commonality that Amazon and 126 logistics companies are a common employer; i.e., Mr. Davis's action fails the common issues criterion. As discussed later in these Reasons for Decision, I agree with that submission. Amazon also argues that the premise of a one common employer for the approximately 73,000 putative class members fails the preferable procedure criterion. As discussed later in these Reasons for Decision, I agree with that submission.
>
> Moreover, as I shall now explain, Amazon's argument against a common employer cause of action also succeeds under the cause of action criterion. It succeeds because accepting the facts as they have been pleaded as proven, Mr. Davis's common employer claim is doomed to failure. Reading the Statement of Claim generously, it is plain, obvious, and beyond a reasonable doubt that the putative Class Members alleged to be employed by a logistics company and simultaneously be employed by Amazon cannot succeed. Thus, as I shall

> explain below, the beating heart of this branch of Mr. Davis's proposed class action arrives thrice stillborn.

[47] The key to the motion judge's conclusion was the rejection of the appellant's argument that Amazon was a common employer for the class member drivers.

[48] Relying on this court's decision in *O'Reilly*, the motion judge held that there were two prongs which the appellant had to establish for Amazon to be a common employer for the DAs. First, there must be a significant degree of interrelationship and/or common control between the alleged common employers; and second, the court must assess whether the employee held a reasonable expectation that each of the alleged common employers were parties to the employment arrangement governing the employee at the relevant times.

[49] The motion judge observed that there were 126 distinct DSPs, none of whom were part of the class action, but each of whom employed the putative class members. For some DSPs, Amazon was the only customer for delivery services, while for others, Amazon was one of many large customers.

[50] Applying the threshold for a common employer in *O'Reilly*, the motion judge concluded that Amazon was not a common employer for class members, at para. 173:

> In the immediate case, it may be noted that as pleaded (and as shown by the evidence on the certification motion and the stay motion), Amazon and the 126 autonomous DSP logistics companies are not an integrated or seamless group of companies operating together as one

> business. The 126 autonomous logistics companies are not involved in owning or exercising control over Amazon's online consumer business, and Amazon is only involved in the business of the logistics companies to the extent that it sets performance standards for the delivery of Amazon's goods to consumers. Either way, it cannot be said that Amazon and the 126 autonomous logistics companies were carrying on a singular enterprise. Amazon and each of the 126 autonomous logistics companies were not carrying on business together; they were doing their own respective businesses. It is true that Amazon's contracts with the DSPs affect how the 126 autonomous logistics companies carry out their role as employer, but Amazon's role is different, it is a client of the 126 autonomous logistics companies that demands a level of performance to complete its own business as an online retailer.

[51] The motion judge added that, while not determinative, the employment contracts between the DSPs and drivers expressly excluded Amazon as the employer.

[52] In these circumstances, the motion judge concluded that it was plain and obvious that the written agreements and the other material facts did not reasonably permit the inference that there was an intention that Amazon was a party to the employment agreements between the 126 DSPs and their drivers. Further, he held that it was plain and obvious that Amazon did not undertake, as a matter of contract formation, to fulfill any obligation as an employer to the workers of the 126 DSPs.

[53] The appellant argues that the motion judge erred in this conclusion on the common employer standard, emphasizing the various ways in which their

pleadings asserted Amazon's control (and reiterating that these pleadings are to be taken as true for the purposes of establishing a cause of action pursuant to certification). According to the appellant, this control was achieved by requiring the drivers to use the Amazon Flex App (which all Amazon DSPs and Class Members are required to use in the performance of their job duties).

[54] Rather than focusing on the pleadings, the appellant contends that the motion judge erred by instead considering the record of evidence produced by Amazon with respect to its relationship to the DSPs. As the appellant put it in his factum, "the motions judge's reasons built and tore down a strawman of complexity and diversity involving 126 logistics companies and 57,000 DAs, rather than considering the case that was actually pleaded."

[55] The respondents counter that it was open to the motion judge to consider the contracts incorporated by reference in the statement of claim – between the DAs and the DSPs, and between the DSPs and Amazon – in his analysis under s. 5(1)(a) of the CPA.

[56] The motion judge also concluded that the claim was not properly constituted because the appellant chose not to name the DSPs as defendants. He referred to this fact as a "second corroborating reason" for concluding that the common law employer doctrine is not available to the appellant. The motion judge characterized

the 126 DSPs as “necessary” parties, whose absence is a separate basis to dismiss the claim.

[57] The appellant asserts that no relief was sought against the DSPs, and that the *Rules of Civil Procedure* would permit whatever documentary production may be required from the DSPs as part of the class action against Amazon.

[58] The respondents highlight that the outcome of any class action would necessarily affect the rights and liabilities of the DSPs. At a minimum, they argue, Amazon could only be liable if the DSPs failed to pay all ESA obligations.

[59] In my view, the motion judge’s conclusion on the common employer doctrine was rooted in the pleadings and was open to him to reach on the record. His finding that the pleaded facts could not satisfy the common employer test was a finding of mixed fact and law, which is entitled to deference on appeal: *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 29, leave to appeal refused, [2022] S.C.C.A. No. 407.

[60] The central question arising out of the *O’Reilly* analysis was framed by Zarnett J.A. as follows, at para. 65:

> Whether the related corporations actually undertook to perform those obligations is a question of contractual formation – did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged? Of central relevance to that question is where effective control over the employee resided.

[61] The appellant contends that while there may have been some variance among some of the DSPs in terms of size, structure, and even sophistication, the relationship that Amazon has with DAs, and the level of oversight and control that it exercises over them (largely through the common Flex App), did not materially vary. Even assuming these assertions as true, the motion judge found that the relationship between Amazon and the DSPs – with the former selling goods to its customers, and the latter delivering those goods to its customers – did not constitute an "integrated or seamless" group of companies operating together as one business. "They were not carrying on business together; they were doing their own respective businesses." Again, these findings are entitled to deference.

[62] While the appellant seizes on the motion judge's reference to "the evidence" before him in relation to his common employer findings as an indication that he failed to focus on the pleadings, the entirety of the impugned passage shows otherwise. The phrase the motion judge used was: "as pleaded (and as shown by the evidence on the certification motion and the stay motion)". He had proper regard to the pleadings.

[63] While the motion judge could have been more precise in distinguishing the relevance of the record at the cause of action stage of the analysis (s. 5(1)(a)) and the common issues stage (s. 5(1)(c)), the motion judge properly instructed himself at the outset of his cause of action analysis under s. 5(1)(a), at para. 155, that:

> In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.

[64] As a corollary to the motion judge's conclusion on the common employer issue, the motion judge also rejected the appellant's argument that the use of the Flex App constituted a common issue. The motion judge concluded, at para. 240:

> Indeed, Amazon has established that is no basis in fact that the issue cannot be decided uniformly for the putative Class members. The basis-in-fact evidence is that while 57,000 putative Class members use the Flex App, they can and do use it idiosyncratically and they are directed to use it idiosyncratically by their particular DSP. The basis-in-fact evidence is that some DAs behave consistently and compliantly with the directives of the Flex App, some DAs behave in ways that depart from the directives of the Flex App, or in ways that may or may not comply with their direct employer's contractual arrangement with Amazon. The basis-in-fact evidence is the DSPs, who are the direct employers of the DAs workers: (a) do not use the Flex App uniformly; (b) do not manage the use of the Flex App uniformly; (c) do not monitor the use of the Flex App uniformly, and (d) do not administer the use of the Flex App uniformly. There is no commonality.

[65] The motion judge reiterated that, at para. 243, "The case at bar is one in which there is no commonality as to whether Amazon is a common employer with 126 logistics companies."

[66] Again, I see no error with the motion judge's analysis or conclusion on this question, and thus I would reject this ground of appeal.

[67] I would also add that the motion judge's analysis on preferable procedure, the fourth criterion for certification, is unassailable. As he stated, at para. 280:

> The ambitious action on behalf of the DAs is unmanageable with or without the 126 logistics companies being joined as co-defendants or as third parties brought in by Amazon asserting claims for contribution and indemnity. What Mr. Davis's proposed common employer cause of action attempts to hide is that it is really 126 discrete proposed class actions that have been joined together.

[68] Ultimately, the motion judge considered that whether the DA claims satisfied the preferable procedure criterion was moot because of the absence of a common issue. That said, the inability to satisfy this criterion is also fatal to the appellant's position.

DISPOSITION

[69] As a result of the motion judge's finding that Amazon was not a common employer for the DA group within the class, and that the shared use of the Flex App could not constitute a common issue, the certification motion with respect to that group must fail. So too with the appellant's inability to satisfy the preferable procedure criterion. The fact that the motion judge stated that he would have conditionally certified a class action for the DPs is not relevant for this appeal.

[70] Accordingly, I would dismiss the appeal.

[71] The respondents are entitled to costs in the agreed upon amount of $50,000, all inclusive.

Released: June 10, 2025 “S.E.P.”

“L. Sossin J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. David M. Paciocco J.A.”