COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aspen Technology, Inc. v. Wiederhold,* 2025 BCCA 261

Date: 20250728
Docket: CA50206

Between:

Aspen Technology, Inc.
and Aspentech Canada Corporation

Appellants
(Defendants)

And

David M. Wiederhold

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Abrioux
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated September 18, 2024 (*Wiederhold v. Aspen Technology, Inc.*, 2024 BCSC 1731, Vancouver Docket S231467).

Counsel for the Appellants:	J.L. Koschinsky C.F. Penn
Counsel for the Respondent:	N.T. Mitha, K.C. I. Martinich
Place and Date of Hearing:	Vancouver, British Columbia March 17, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 28, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Donegan

Summary:

The appellants applied to stay the respondent's action in favour of arbitration pursuant to s. 7 of the Arbitration Act. The chambers judge dismissed the application under s. 7(2), finding that the arbitration clause was void and inoperative for several reasons which included that it constituted a post-contractual modification unsupported by fresh consideration; circumvented the provisions of the Employment Standards Act and was therefore contrary to public policy; and was contrary to the "brick wall" principle and unconscionable.

Held: Appeal allowed. The judge erred in law in finding the arbitration clause was void and inoperative. The appellants' application is granted, and the underlying action is stayed in favour of arbitration.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This is an appeal from the order of a chambers judge dismissing the appellants' application to stay the respondent's action in favour of arbitration pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2.

[2] The respondent, David Wiederhold, commenced an action against his employer Aspentech Canada Corporation (ACC) and its parent company Aspen Technology, Inc. (ATI) (collectively, the appellants), seeking to recover approximately $103,000 in unpaid bonuses and commissions he claimed were owed to him according to the annual incentive plan offered to him and the appellants' employees. Mr. Wiederhold remained an employee of ACC at the time of the hearing of the appellants' stay application.

[3] Two incentive plans were in issue: one that was in place from July 1, 2020, to June 30, 2021 (the July Plan) and another issued on September 19, 2020 (the September Plan) which replaced the July Plan. The appellants applied to stay the action pursuant to an arbitration clause found in both plans that required Mr. Wiederhold to bring any claims relating to the plan before an arbitration panel in Boston, Massachusetts. The plans also include a choice of law provision identifying the governing law as that of the State of Delaware.

[4] In reasons for judgment indexed as *Wiederhold v. Aspen Technology, Inc.*, 2024 BCSC 1731, the judge dismissed the application, finding that the arbitration clause was void and inoperative for a number of reasons, including that it:

a) constituted a post-contractual modification unsupported by fresh consideration;

b) circumvented the provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] and was therefore contrary to public policy; and

c) the cost to arbitrate was likely to be disproportionate to the size of the claim and was therefore contrary to the “brick wall” principle.

[5] The appellants challenge the dismissal of their application on several grounds. They say that the judge erred in law and made palpable and overriding errors of fact in determining that the arbitration clause was void and inoperative and in denying the application for a stay. Mr. Wiederhold submits that the judge made no such errors.

[6] For the reasons that follow I would allow the appeal and stay the action in favour of arbitration in Boston, Massachusetts.

Background

[7] ATI is an industrial software company operating in 22 countries worldwide, including in Canada through its subsidiary, ACC. Mr. Wiederhold is an executive employee of ACC based in Vancouver.

[8] Mr. Wiederhold began working for ACC in 2008. The letter of offer that he signed as his initial contract of employment on July 15, 2008, provided that in addition to his base salary he would be entitled to participate in the employer’s 2008 Sales Account Manager incentive plan, in accordance with its terms. The letter added that the employer “reserve[d] the right to modify and/or amend its incentive and bonus plans from time to time in its sole discretion and/or in accordance with business needs with or without prior notice to employees”: at paras. 7–9.

[9] Shortly after commencing his employment, and in July of each successive fiscal year, Mr. Wiederhold, along with other participating employees, was presented with the annual incentive plan terms. He signed each revised plan document when requested to do so. Each iteration of the incentive plan included:

a) a severability clause, which provided that any term or condition that was determined to be unenforceable would have no effect on any other term or condition;

b) a dispute resolution clause, which provided that any legal action brought in support of any claim pursuant to the plan would be resolved exclusively by arbitration, in accordance with the commercial arbitration rules, before a three-arbitrator panel in Boston, Massachusetts, with all costs shared equally between the employer and Mr. Wiederhold; and

c) a choice of law clause, which provided that the governing law for any claim raised under the plan would be the law of the State of Delaware, "without regard to its conflicts of law provisions".

[10] In September 2020, the appellants withdrew the July Plan that Mr. Wiederhold had signed in July of that year and substituted a new set of terms—the September Plan. Among other changes, the September Plan reduced the bonuses and commissions to which Mr. Wiederhold would be entitled in that fiscal year. Mr. Wiederhold refused to accept the terms of the September Plan, but his commissions and bonuses were calculated in accordance with that plan in any event. When Mr. Wiederhold sought to be paid commissions on sales he had arranged in August and September of 2020 in accordance with the formula set out in the July Plan, he was informed the new formula contained in the September Plan would apply: at paras. 13–14.

[11] Mr. Wiederhold commenced the underlying action on March 14, 2023, seeking damages of $103,067.60—the difference between his entitlement under the July Plan and the actual compensation he received in respect of six sales between August 2020 and June 2021, calculated according to the September Plan.

[12] The appellants then applied to stay the British Columbia action in favour of arbitration, relying on the arbitration clause in the incentive plans.

The Reasons for Judgment

[13] The chambers judge first referred to s. 7 of the *Arbitration Act* which provides:

> **7(1)** If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.
>
> **(2)** In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[14] The judge was satisfied that the arbitration clause in each iteration of the incentive plan applied, on its face, to the dispute in issue. The question, then, was whether Mr. Wiederhold could establish that the arbitration agreement was "void, inoperative or incapable of being performed": *Arbitration Act*, *s.* 7(2).

[15] Mr. Wiederhold raised four arguments in contesting the appellants' application which the judge summarized as follows:

> [19] … Mr. Wiederhold argues that [the arbitration clause] should not be enforced, and the defendants' application for a stay should be dismissed on the basis that the clause is "void, inoperative or incapable of being performed" for the following reasons:
>
> a) Mr. Wiederhold received no fresh consideration in exchange for its imposition after he was hired, rendering it unenforceable;
>
> b) it is contrary to public policy, insofar as it purports to deprive Mr. Wiederhold of the protection of mandatory provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*], namely, his entitlement to "wages";
>
> c) it is unconscionable, particularly in view of the disproportionate cost to Mr. Wiederhold of pursuing arbitration as stipulated, relative to the size of his claim (as a result, he says, if this court does not hear his claim, no one will); and
>
> d) it is coupled with a forum selection clause that is itself unenforceable.

[16] The judge set out the applicable legal framework for an application under s. 7(1). He noted the principle underlying an application under s. 7(1), the so-called "competence-competence" principle, according to which a challenge to an arbitrator's jurisdiction should ordinarily be decided in the first instance by the arbitral

tribunal itself. However, he noted this Court's recent decision in *Spark Event Rentals Ltd. v. Google LLC*, 2024 BCCA 148, which summarized the "two distinct but potentially complementary approaches to displacing the competence-competence principle": *Spark Event Rentals* at para. 12. Mr. Wiederhold relied on both of these approaches—the "*Dell* framework" (named for *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34) and the "brick wall" framework: at paras. 23–24 (established in *Uber Technologies Inc. v. Heller*, 2020 SCC 16).

[17] The judge observed that, under the *Dell* framework, challenges to an arbitrator's jurisdiction that raise questions of mixed fact and law—as all of Mr. Wiederhold's challenges did—can be resolved by the court and not deferred to the adjudicator only if the court can decide the issues "on a superficial review of the record, in the sense that the facts are either evident on the face of the record or undisputed by the parties": at para. 23.

[18] The judge held that under the other approach, the "brick wall" framework, the "preliminary question" was whether, on a limited assessment of the evidence, Mr. Wiederhold had demonstrated a real prospect that in the circumstances of the case, if the court did not determine the jurisdictional challenge and deferred the question to the arbitrator, that would as a practical matter prevent the issue from being resolved at all: at para. 24.

[19] The judge applied these two frameworks in considering Mr. Wiederhold's challenges to the arbitration clause. He concluded that the arbitration clause was void for want of fresh consideration, void for reasons of public policy, and there was a real prospect that giving effect to the clause would effectively prevent Mr. Wiederhold from bringing his jurisdictional challenge. For these reasons, he concluded that the arbitration clause was void and inoperative and refused the appellants' application for a stay. He did not address the fourth challenge Mr. Wiederhold raised to the forum selection clause, and that question is not before us on this appeal.

[20] I review the judge's reasoning on each of these points in more detail below.

On Appeal

[21] The issues on appeal are whether the judge erred in concluding:

a) the arbitration clause was unenforceable for want of fresh consideration;

b) the arbitration clause was unenforceable as being contrary to public policy; and

c) the application should be dismissed under the "brick wall" framework.

Standard of Review

[22] As this Court recently held, the validity of an arbitration clause will ordinarily be a question of mixed fact and law reviewable on a standard of palpable and overriding error: *Williams v. Amazon.com Inc.*, 2023 BCCA 314 at paras. 57–60; *Housen v. Nikolaisen*, 2002 SCC 33. This includes a judge's assessment of unconscionability and public policy: *Williams* at para. 60.

[23] Palpable and overriding error is a highly deferential standard of review. A palpable error is one that is obvious. An overriding error is one that goes to the very outcome of the case: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2016 BCCA 479, at para. 18, quoting from *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38.

[24] Where a question of contractual interpretation—or any question of mixed fact and law—discloses an extricable error of law, these are reviewable on the correctness standard. As this Court recently explained in *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Development Ltd.*, 2025 BCCA 73:

> [40] An extricable question of law has been described as one about "… what the correct legal test is …": *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at para. 43. Conversely, mixed questions involve the *application* of a legal standard to a set of facts: *Teal Cedar* at para. 43. Since questions of mixed fact and law necessarily involve legal standards, courts should "… exercise caution in identifying extricable questions of law …", a principle that is also consistent with the deference that appellate courts generally ought to apply regarding findings of fact: *Teal Cedar* at para. 45.

[25] The appellants contend that the judge's analysis on each of the issues on appeal is tainted by extricable legal errors that warrant correctness review, as well

as palpable and overriding factual errors that are subject to deference. I will address these points as they arise.

Issue #1: Whether the judge erred in concluding that the arbitration clause was unenforceable for want of fresh consideration

The Reasons for Judgment

[26] Applying the *Dell* framework, the judge determined that he could resolve the question of whether the arbitration clause was void for want of consideration on a superficial review of the record before him, and that, accordingly, the issue need not be deferred to the arbitrator.

[27] The judge found that Mr. Wiederhold was entitled to participate in the incentive plan on the terms of his original employment contract, but that this contract was silent on the question of dispute resolution mechanisms. He found that the arbitration and choice of law clauses in the plans were imposed at a later date. He held that "restrictive terms added to an employment contract after the employee has already begun working must be supported by fresh consideration to be enforceable": at para. 29.

[28] The appellants made two arguments on this point before the judge. First, they submitted that the arbitration clause *was* supported by fresh consideration, as Mr. Wiederhold was given an opportunity to earn a mid-year achievement bonus for the first time in 2021. Alternatively, they argued that no fresh consideration was required, because the employment contract explicitly stipulated that the defendants could modify the terms of the incentive plans as they wished.

[29] The judge rejected both arguments. He found that Mr. Wiederhold was already entitled to participate in the incentive plan as it might be revised, including the mid-year bonus added in 2021, so this was not fresh consideration for the arbitration clause. He accordingly held that the arbitration clause was unenforceable for want of fresh consideration.

The Positions of the Parties

[30] The appellants say that the judge erred in failing to recognize that the original employment contract granted them the right to modify the terms of the incentive plan without fresh consideration. They say the case law has affirmed an employer's right to unilaterally modify agreements where "an express or implied term" in the employment contract gives the employer the right to make such a change: citing *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 37.

[31] In response, Mr. Wiederhold submits that the judge properly concluded that the addition of the arbitration clause was a restrictive change to the employment contract unenforceable without fresh consideration. Relying on *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235, he argues that the provision reserving the right to modify or amend the incentive plans from time to time did not permit the company to add an arbitration clause or to change the law of the contract.

Discussion

[32] Respectfully, I am of the view that the judge erred in concluding that the presence of the arbitration clause in the plan constituted a change to the employment contract. The arbitration clause was part of the terms of the incentive plan from the outset of Mr. Wiederhold's employment, and all its terms were explicitly contemplated in his letter of offer. The arbitration clause did not change or amend the employment contract, or the plan; it was simply part of the plan Mr. Wiederhold agreed he would be entitled to participate in.

[33] Mr. Wiederhold's employment agreement, executed in 2008, contained the following clause respecting participation in an incentive plan:

> You will be eligible to participate in the FY '08 Sales Account Manager incentive plan, in accordance with the terms of such plan. Your annualized target incentive amount is $68,687.37 CDN prorated from your date of hire. You will receive more information about this plan from your manager after your start date. Please note that [Aspentech] reserves the right to modify and/or amend its incentive and bonus plans from time to time in its sole discretion and/or in accordance with business needs with or without prior notice to employees.
>
> [Emphasis added.]

[34] In my view, the arguments of both parties—both before the judge below and on appeal—concerning the appellants' reserved right to amend the terms of the plans from time to time miss the point. The arbitration clause was not added to the incentive plan after Mr. Wiederhold had begun his employment. It was a term of the incentive plan from the beginning.

[35] The key passage from the clause above is the one that provides that Mr. Wiederhold is entitled to participate in the incentive plan "in accordance with the terms of such plan". Among these terms of the plan—at the time, in 2008, that Mr. Wiederhold signed his letter of offer—were the arbitration and choice of law clauses at issue on this appeal. As such, there was no change or amendment to the terms of Mr. Wiederhold's employment that could require fresh consideration. The terms of the plan, including the arbitration clause, were contemplated in the bargain between the parties that was formed when Mr. Wiederhold signed his letter of offer in July, 2008.

[36] The critical question was whether the arbitration clause was part of the "terms of such plan" which were explicitly referenced in Mr. Wiederhold's employment contract. If it was, then there was no post-contractual modification at all, and fresh consideration was not required. The judge's reasons disclose no engagement with the interpretation of this part of the employment contract. In fairness, it is not clear that the relevance of this contractual language was brought to his attention by the appellants. Nevertheless, it is well-established that a contract must be interpreted in light of all of its terms: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 47. Furthermore, a failure to consider a relevant factor in the interpretation of a contractual provision is an extricable error of law: *Sattva* at para. 53.

[37] In my view, reading the excerpted portion of the letter of offer above as a whole, the only possible interpretation is that all the terms of the incentive plan as of 2008—including the arbitration clause—were contemplated by the bargain between the parties. Mr. Wiederhold was offered the opportunity to participate in the incentive plan *on its terms*. These terms included terms that were beneficial to him (for

example, entitlements to commission and bonuses) and terms that were for the benefit of the employer, including the arbitration and choice of law clauses.

[38] If a copy of the plan had been shown to Mr. Wiederhold when he signed the letter of offer on July 15, 2008, there could be no question that he was bound by the arbitration clause: it would have been known to him at the time he accepted the contract and would form part of the parties' bargain. However, it is immaterial that the specific terms of the plan were not communicated to Mr. Wiederhold until after he had already signed his letter of offer. The letter of offer was clear that he would receive "more information about this plan" soon, and, in fact, he did, as he was provided with the full terms and conditions of the incentive plan, including the arbitration clause, shortly after he signed the letter containing the offer. That was part of what he agreed to—participating in the plan *on its terms*—when he signed his letter of offer on July 15, 2008, which was confirmed when he signed another document setting out the terms of the 2008 incentive plan soon after.

[39] In my view, therefore, the judge made an error of law in focusing on the provision of the letter of offer that reserved to the appellants the right to modify the terms of the plan, while ignoring the legally relevant question of whether the arbitration clause was, at the time Mr. Wiederhold signed his letter of offer, a term of the incentive plan. Given his finding of fact that the arbitration clause was present in every iteration of the plan signed by Mr. Wiederhold, from the first plan in 2008 to the last plan in 2020, it was an error of law to conclude that fresh consideration was required to make the arbitration clause enforceable.

[40] The situation would be different if the arbitration clause in the incentive plan had purported to require that any dispute about the employment relationship be referred to arbitration. Then it would not be a term of the *plan*, but a term of the contract imposed after the letter of offer had been signed. This might well require fresh consideration. Because the arbitration clause only requires that disputes about the plan itself be referred to arbitration, it is, in my view, properly understood to be one of the terms of that plan which Mr. Wiederhold had already agreed would govern his participation in the incentive plan when he signed his letter of offer.

[41] To recap, reading the relevant terms of the contract as a whole, it is clear that the arbitration clause was one of the terms contemplated by the initial bargain between the parties. As such, it is unnecessary to have recourse to the employer's reserved right to modify the terms of the plan. That provision is a question for the arbitrator, concerning the merits of the dispute between the parties—in other words, whether the appellants were entitled to unilaterally reduce Mr. Wiederhold's entitlement to commissions and bonuses under the July Plan by imposing the September Plan without his agreement. That question is not material to the application under s. 7 of the *Arbitration Act*, the only relevant issue being whether the arbitration clause itself is enforceable. The judge decided that it was not, and as I have explained, that conclusion was the result of a legal error.

[42] Accordingly, I would accede to this ground of appeal.

Issue #2: Whether the judge erred in concluding that the arbitration clause was contrary to public policy and therefore unenforceable

The Reasons for Judgment

[43] The chambers judge found that a superficial review of the record also permitted him to determine that the arbitration clause was contrary to public policy and therefore unenforceable. Mr. Wiederhold had argued that the combined effect of the incentive plan's arbitration, choice of law, and forum selection clauses of the incentive plan was to strip him of the mandatory statutory protection afforded in British Columbia by the *ESA*.

[44] In response to this argument, the appellants submitted expert evidence on the law of Delaware, the jurisdiction identified in the incentive plan's choice of law provision. The expert's opinion was that an arbitrator applying Delaware law would apply the provisions of the *ESA* notwithstanding the choice of law clause.

[45] The judge rejected the evidence on the basis that the expert had not turned her mind to the provision of the choice of law clause that provided for the application of the law of Delaware "without regard for its conflicts of law provisions". He found that the expert's opinion rested entirely on Delaware's conflicts of law jurisprudence, and that "there is no opinion before me as to the effect of the choice of law clause

that actually applies in this case". As a result, he found that, under Delaware law, "the *ESA* would be ignored and the severability clause would be of no assistance to Mr. Wiederhold": at para. 35. He concluded that the substantive effect of the impugned clauses was an unenforceable circumvention of the *ESA*'s mandatory provisions, and he declined to give effect to the arbitration clause on that basis.

The Position of the Parties

[46] The appellants submit that the judge made a palpable and overriding error in interpreting the expert evidence on Delaware law. They further argue that, even if the judge was entitled to disregard the expert's opinion, he erred in concluding, without evidence and apparently on his own interpretation of Delaware law, that the *ESA* would be ignored. Finally, they say that the judge should have applied the severability provision in the incentive plan to excise the choice of law clause, rather than finding the arbitration clause unenforceable.

[47] Mr. Wiederhold says the judge was entitled to reject the expert opinion evidence as irrelevant, and made no reviewable error in doing so. He submits the judge did not purport to interpret Delaware law himself, but instead simply concluded that the *ESA* would be ignored as the logical consequence of the terms of the contract itself. He says there was no error in failing to apply the severability clause, as, in the absence of any evidence of Delaware law, there was no evidence of specific illegality. Furthermore, he says that severance was not available to the judge on the application to stay; he could only stay the action or dismiss the application. He could not sever the choice of law clause and then submit the severed contract to arbitration.

Discussion

[48] The judge's interpretation of the expert report is a finding of fact entitled to appellate deference. However, in my view, whether or not it was open to the judge to disregard the expert's opinion evidence for the reasons given, this does not assist Mr. Wiederhold on the public policy issue.

[49] The judge found that the choice of law clause, and particularly the provision that said Delaware law would apply "without regard to its conflicts of law provisions", would cause the *ESA* to be ignored by the arbitrator, and used that finding to conclude that the arbitration clause was unenforceable for circumventing the *ESA.*

[50] Since the judge had determined that the arbitration clause applied to the dispute, the question whether the arbitration clause was "void, inoperative or incapable of being performed" was to be referred to the arbitrator for determination unless the question could be clearly answered with a superficial regard to the record: *Spark Event Rentals* at paras. 15–18, 41 and 47.

[51] In that the judge had also decided to disregard the expert's opinion, there was no evidence on the record about how the mandatory provisions of the *ESA* would be treated under Delaware law. There was thus no basis for the judge to conclude that the arbitration clause was contrary to public policy in that it would deprive Mr. Wiederhold of the benefit of the mandatory provisions of the *ESA*. It is well-established that "[f]or the purpose of applying foreign law, a BC court must rely on the evidence of an expert competent to explain and interpret the foreign law": *Friedl v. Friedl*, 2009 BCCA 314 at para. 20.

[52] While there may be limited circumstances in which a judge, supplied with foreign legal sources, may draw a conclusion on the application of foreign law without expert evidence, this would require more than a superficial regard to the record: *Friedl* at para. 21, *Tak v. British Columbia (Securities Commission)*, 2023 BCCA 76 at para. 68.

[53] In other words, it was not possible, having only a superficial regard to the record, to determine that the arbitration clause was contrary to public policy. In my view, therefore, while the judge correctly instructed himself on the governing *Dell* framework, he failed to apply it to this issue once he had determined that the expert report did not assist him. As a matter of law, it was not open to him to simply assume, without any evidence of Delaware law, that the impugned terms of the plan were void for reasons of public policy. Moreover, to engage with the legal sources from Delaware provided by the expert in order to draw his own conclusions would be

to move beyond the "superficial regard to the record" permitted under the *Dell* framework.

[54] In short, if the judge made a finding on the application of foreign law in the absence of evidence, this was a reviewable error. If he purported to draw his own conclusions from the evidence of Delaware law before him, without the assistance of expert evidence, this was an error of law because he failed to apply the *Dell* framework: *Touvongsa v. Lahouri*, 2024 BCCA 405 at paras. 26–28.

[55] In either event, I would accede to this second ground of appeal.

Issue #3: Whether the judge erred in his unconscionability and "brick wall" analysis

The Reasons for Judgment

[56] The judge's basis for his conclusion on this final issue is the subject of some dispute between the parties. He began with the observation that "[a] bargain will be set aside as unconscionable where there was an inequality of bargaining power resulting in an improvident bargain": at para. 37, citing *Uber*. He also referred to Mr. Wiederhold's submission that the arbitration clause in issue was unconscionable, for essentially the same reasons given by the majority of the Supreme Court of Canada in *Uber*.

[57] He then noted the appellants' submission that Mr. Wiederhold had not met the *Dell* or brick wall frameworks on the unconscionability question. The remainder of his analysis focused on the cost of arbitrating the dispute.

[58] The judge discussed the parties' "wildly divergent estimates as to the cost of arbitrating": at para. 40. He concluded that the true cost fell somewhere between the parties' estimates, "but closer to the low end of Mr. Wiederhold's postulated range", meaning somewhere in the vicinity of CDN $35,000: at para. 45. In particular, he found that "a mandatory up-front filing fee of approximately CDN $11,000, or over 10% of the claim", would be required to commence the arbitration process: at para. 44.

[59] On this basis, he found that the cost of resolving even the preliminary jurisdictional question would likely be disproportionate to the total value of Mr. Wiederhold's claim. He concluded as follows:

> [46] Accordingly, I find that Mr. Wiederhold has shown that there is a real prospect that requiring him to make his jurisdictional challenge in the manner contemplated by the arbitration clause would effectively prevent that challenge from being resolved at all. I therefore refuse the defendants' application for a stay on that basis as well.
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> [Emphasis added.]

The Position of the Parties

[60] The appellants submit that the judge erred in finding that the brick wall framework provided a stand-alone basis to reject their application. They say he found that the brick wall framework applied and then treated that as the end of the analysis, rejecting their application on that basis.

[61] Mr. Wiederhold says the judge made no errors in his analysis and his findings are entitled to deference on appeal, as they are based in his interpretation of the contract. He argues that the judge did not rely solely on the brick wall framework, but simply applied *Uber*, and made a finding that the arbitration clause was void because it was unconscionable.

Discussion

[62] I agree with the appellants' interpretation of the judge's reasons on this point. As I read the judge's analysis, while he did instruct himself on the unconscionability doctrine as articulated by the majority of the Supreme Court of Canada in *Uber*, he made no finding of fact that the arbitration clause was unconscionable. His ultimate conclusion seems to have rested on the preliminary question arising under the brick wall framework.

[63] As noted above, at the outset of his reasons, the judge correctly instructed himself on the brick wall framework which exists in recognition of the fact that the presumption underlying the competence-competence principle—that if the court does not decide an issue, the arbitrator will—is sometimes unfounded in the particular circumstances of the case. This can occur where, for example, the costs of

arbitrating are particularly high relative to the value of the claim, but the framework applies to any circumstances "that effectively insulate the arbitration agreement from meaningful challenge": *Spark Event Rentals* at paras. 20–21, citing *Uber* at paras. 39, 44–46.

[64] However, a finding that circumstances may "effectively insulate the arbitration agreement from meaningful challenge" is not the end of the analysis under the brick wall framework. It is only the first step, which permits the judge to displace the competence-competence principle and undertake a thorough analysis of the merits of the jurisdictional challenge at first instance. This is what distinguishes the brick wall framework from the *Dell* framework: *Spark Event Rentals* at paras. 23–24.

[65] In my view, it is unnecessary to consider or decide if the judge made a reviewable error in concluding that, because the costs of arbitrating were disproportionate to the value of Mr. Wiederhold's claim, a "brick wall" existed on the facts of this case. Instead, the judge erred in law in failing to move beyond the first, threshold stage of the brick wall framework and actually engage with the jurisdictional question. He made no finding of unconscionability; the basis for his conclusion on this issue is stated unambiguously at para. 46 of his reasons, and it was simply that there was "a real prospect that requiring [Mr. Wiederhold] to make his jurisdictional challenge in the manner contemplated by the arbitration clause would effectively prevent that challenge from being resolved at all".

[66] As the Court held in *Uber*, a contractual clause may be invalid where it is unconscionable. Unconscionability involves both inequality of bargaining power, and improvidence in the bargain struck: *Uber* at para. 79. The judge noted this requirement at para. 37 of his reasons, but did not go on to apply the *Uber* framework to the facts before him. He did not consider if there was an inequality of bargaining power, or whether the bargain struck was improvident; in short, he did not make a finding of unconscionability which could have invalidated the arbitration clause and justified dismissing the appellants' application. Instead, he stopped at the first, threshold stage of the brick wall framework. This was an error of law.

[67] Mr. Wiederhold submits that even if there was no explicit finding of unconscionability in the judge's reasons, there was an ample basis on the record for the judge to conclude that the arbitration clause was unconscionable, and that the judge was aware of Mr. Wiederhold's submissions on this point.

[68] In my view, there is no basis on the record or in the reasons to conclude that the judge tacitly found that the arbitration clause was unconscionable. A finding of unconscionability is a finding of fact: *Williams* at para. 60. It requires a nuanced assessment of the position of the parties at the time the contract was entered into, and a factual analysis of whether the bargain was improvident.

[69] I do not accept Mr. Wiederhold's submission that the facts of this case are essentially the same as the facts before the Court in *Uber*. There are clear and important differences on the face of the record: for example, unlike in *Uber*, Mr. Wiederhold's employment contract was not a standard form contract. He is also a far more sophisticated party than Mr. Heller was in *Uber*, and has significantly greater resources available to him. As such, the arbitration clause here is far less of an obviously insurmountable impediment to him than the clause in *Uber* was to Mr. Heller and the others in his position.

[70] I would also not find the arbitration clause to be unconscionable in that there was no evidence in the record that would support such a finding.

[71] I would accede to this ground of appeal.

Conclusion

[72] Section 7(2) of the *Arbitration Act* is clear. When an application is properly brought under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[73] The judge found that the arbitration clause applied to the dispute, as required under s. 7(1). It was therefore for Mr. Wiederhold to establish that the arbitration clause was void, inoperable or incapable of being performed. The judge accepted

his arguments on all three issues raised. Respectfully, as I have explained, he made errors of law on each issue. There was no proper basis for him to conclude that the arbitration clause was void, inoperative or incapable of being performed, and the application should have been granted.

Disposition

[74] I would allow the appeal and stay the underlying action in favour of arbitration.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Donegan"