SCC File No. 38534

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V.
and RASIER OPERATIONS B.V.

Appellants
(Respondents)

- and -

DAVID HELLER

Respondent
(Appellant)

FACTUM OF THE APPELLANTS UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. AND RASIER OPERATIONS B.V.

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – CONCISE OVERVIEW AND STATEMENT OF FACTS

1. The question on this appeal is whether a proposed class proceeding against Uber should be stayed in favour of arbitration. It should be.

2. Uber is a global business that facilitates transportation and delivery services through the licensing of its software applications. Drivers enter into licensing agreements that permit them to use the Uber Apps to receive requests for personal transportation services from riders or for food delivery services from restaurants. The arbitration agreements at issue are provisions of licensing agreements entered into between Uber and the respondent. The respondent alleges that these licensing agreements are employment agreements that violate the Ontario *Employment Standards Act, 2000*[1] ("*ESA*") and that the arbitration agreements should therefore not be enforced.

3. Applying principles established by this Court, the motion judge correctly concluded that the parties should be held to their bargain. He rejected the respondent's argument that the *ESA* overrides the parties' freedom to arbitrate. He also found that the respondent failed to meet the high factual and legal hurdle necessary to establish that the arbitration agreements are unconscionable.

4. The Court of Appeal for Ontario reversed the motion judge's decision. In doing so, it made three fundamental errors.

5. ***Error 1 – Competence-competence***. The competence-competence principle requires courts to defer questions of jurisdiction to the arbitrator where there is an arguable or *prima facie* case that the arbitrator has jurisdiction. The Court of Appeal wrongly concluded that competence-competence applies only to challenges to the scope of an arbitration agreement, and not to its validity. The questions the respondent raises regarding the validity of the arbitration agreements are neither questions of law nor questions of mixed fact and law requiring only a superficial consideration of the record. Competence-competence requires that they be deferred to the arbitrator.

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[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41.

6. ***Error 2 – Interpretation of the ESA***. The Court of Appeal wrongly concluded that the *ESA* precludes arbitration. The Ontario legislature has not prohibited arbitration of *ESA* claims. The province's arbitration legislation and numerous decisions of this Court confirm the "very strong legislative direction" to courts to enforce arbitration agreements absent an express legislative override of arbitration.[2] The *ESA* contains no such prohibition. Nor can one be inferred from the circumstances in which the *Act* was enacted and recently amended, or the scope and context of the *Act*. The Court of Appeal's interpretation of the *ESA* is inconsistent with the principles of statutory interpretation and usurps the role of the legislature.

7. ***Error 3 – Unconscionability***. The Court of Appeal erred in determining that the arbitration agreements are unconscionable. The Court of Appeal failed to consider the entire agreement, lowered the threshold for unconscionability, and applied the wrong test. There is in any event no evidence to support a conclusion that the arbitration agreements are unconscionable. In the circumstances, this appeal should be allowed.

Background

Uber and its worldwide business

8. Uber Technologies, Inc., Uber Canada, Inc., Uber B.V., and Rasier Operations B.V., (collectively "Uber") belong to a group of technology companies that invent, develop, license, and operate globally the innovative software applications at issue in this litigation (the "Uber Apps").[3] Through GPS-enabled smartphones, the Uber Apps – the "Rider App", "Driver App", and "UberEATS App"[4] – facilitate requests for personal transportation and food delivery services.[5] The Driver App allows Drivers[6] to receive and respond to requests for rides from

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[2] Motion Judge's Reasons ("MJ Reasons"), para. 77, Appellants' Record ("AR"), Vol. I, Tab 1, p. 14.
[3] Affidavit of Rob van der Woude, affirmed October 16, 2017 ("van der Woude Affidavit"), para. 3, AR, Vol. II, Tab 9, p. 2.
[4] van der Woude Affidavit, paras. 6, 19, AR, Vol. II, Tab 9, pp. 2, 6.
[5] van der Woude Affidavit, paras. 6, 19, AR, Vol. II, Tab 9, pp. 2, 6.
[6] The term Drivers refers to "Driver-Partners" who provide transportation services and "Delivery Partners" who provide food delivery services.

riders and for food delivery services from restaurants.[7] In exchange for the licence to use the Driver App, Uber charges Drivers a fee.[8]

9. Uber B.V., Rasier Operations B.V. ("Rasier"), and Uber Portier B.V. ("Portier") are Dutch entities through which Uber sells lead generation services in Canada. Each is incorporated under the laws of the Netherlands with its head office in Amsterdam. Uber B.V. provides lead generation services to commercially-licensed livery enterprises.[9] Rasier provides ridesharing lead generation services to Drivers.[10] Portier provides delivery lead generation services to Drivers and restaurants through UberEATS.[11] Uber does not itself provide transportation or delivery services.[12]

10. Ridesharing with Uber is available over the internet in more than 600 cities across 77 countries in six continents.[13] UberEATS is available in more than 120 cities across 29 countries.[14] Locally incorporated entities provide support in the various jurisdictions in which Uber operates.[15] Uber Canada, Inc. is a Canadian company that provides marketing and administrative support to Uber B.V. for the Uber Apps in Canada.[16] Uber Technologies, Inc. is incorporated under the laws of Delaware. It does not operate in Canada.[17]

The respondent

11. The respondent David Heller is the proposed representative plaintiff in the underlying proposed class action. He entered into two licensing agreements allowing him to use the Driver App to provide food delivery services. The respondent now alleges that Drivers in Ontario are

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[7] van der Woude Affidavit, para. 8, AR, Vol. II, Tab 9, p. 3.
[8] van der Woude Affidavit, paras. 7-8, AR, Vol. II, Tab 9, p. 3.
[9] van der Woude Affidavit, paras. 30-31, AR, Vol. II, Tab 9, p. 10.
[10] van der Woude Affidavit, para. 32, AR, Vol. II, Tab 9, p. 10. Ridesharing refers to Drivers using their personal vehicles to provide personal transportation services.
[11] van der Woude Affidavit, para. 33, AR, Vol. II, Tab 9, p. 10.
[12] van der Woude Affidavit, para. 5, AR, Vol. II, Tab 9, p. 2.
[13] van der Woude Affidavit, para. 16, AR, Vol. II, Tab 9, p. 5.
[14] van der Woude Affidavit, para. 28, AR, Vol. II, Tab 9, p. 9.
[15] Transcript of the Cross-Examination of Rob van der Woude, November 3, 2017 ("van der Woude Cross-Examination"), qq. 50, 79-81, AR, Vol. III, Tab 11, pp. 18, 26-27.
[16] van der Woude Affidavit, paras. 37-38, AR, Vol. II, Tab 9, p. 11.
[17] van der Woude Affidavit, para. 39, AR, Vol. II, Tab 9, p. 11.

employees of Uber entitled to the minimum benefits and protections under the *ESA*. He seeks, among other things, a declaration that Uber has violated the provisions of the *ESA*, as well as $400 million in damages. The statement of claim is silent on the value of his individual claim.

12. Shortly after the commencement of the respondent's claim, Uber brought a motion to stay the proposed class action on the basis that the respondent and Uber agreed to resolve claims through arbitration.

Driver Licensing Agreements

13. Before use, the Uber Apps must be downloaded and licensed from one of the Dutch entities referred to above.[18] Anyone with a smartphone and internet connection can download the Driver App by creating an Uber account, selecting a unique username, and creating a password.[19] There is no interview process. Once a person has created an Uber account, he or she can sign up to use the Driver App. This can be done over the internet anywhere in the world. Once downloaded and licensed, the Driver App can be used anywhere in the world where the user meets the relevant criteria for driving.[20]

14. Each licensing agreement contains an exclusive arbitration clause (the "Arbitration Agreement") requiring that any disputes, conflicts, or controversies arising out of or broadly in connection with the licensing agreements be resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC").[21]

15. Each licensing agreement states that Drivers are entering into agreements with Rasier or Portier, as the case may be, for the express purpose of accessing and licensing lead generation services.[22] The licensing agreements also each contain a representation that the agreement

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[18] van der Woude Affidavit, paras. 10, 25, 40, 43, AR, Vol. II, Tab 9, pp. 4, 7, 12.
[19] van der Woude Affidavit, para. 54, AR, Vol. II, Tab 9, p. 16.
[20] van der Woude Affidavit, paras. 17-18, AR, Vol. II, Tab 9, p. 6.
[21] See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", s. 15, AR, Vol. II, Tab 9B, p. 47; van der Woude Affidavit, 2016 Portier Agreement, Exhibit "E", s. 15, AR, Vol. II, Tab 9E, p. 123.
[22] See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", preamble, AR, Vol. II, Tab 9B, p. 34; van der Woude Affidavit, 2016 Portier Agreement, Exhibit "E", preamble, AR, Vol. II, Tab 9E, p. 109.

creates a "legal and direct business relationship" and an agreement and acknowledgement that the parties are not in an employment relationship. [23]

16. The licensing agreements provide that Drivers have the right to use the Driver App with no minimum hour requirements, no fixed schedule, and no expectation of exclusivity. Drivers have the right to provide services using any other technology, including that of Uber's competitors like Lyft. They also have the right to take any job or employment opportunity while maintaining the ability to use the App on their own schedule.[24]

17. A Driver who logs onto the Driver App for the first time must review the licensing agreement. At the top of the screen, the App states: "Please review and agree to the documents below." The licensing agreements can be reviewed for as long as a Driver wishes.[25]

18. To enter into the licensing agreement, a Driver must scroll through the entire Agreement and click "YES, I AGREE" twice.[26] Drivers may then access the Driver App, and their agreement is automatically and immediately sent to a "Driver Portal" which they can access at any time through the App.[27]

19. The respondent entered into the 2016 Rasier Agreement and the 2016 Portier Agreement and certain subsequent addenda to these agreements.[28] He admitted that he read and then clicked

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[23] See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", ss. 2.4, 13.1, AR, Vol. II, Tab 9B, pp. 36-37, 45.
[24] See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", s. 2.4, AR, Vol. II, Tab 9B, pp. 36-37.
[25] van der Woude Affidavit, paras. 55-56, AR, Vol. II, Tab 9, p. 16; Answers to Undertakings from the Cross-Examination of Rob van der Woude held November 3, 2017 ("van der Woude Undertakings"), q. 197, AR, Vol. III, Tab 12, p. 96.
[26] van der Woude Affidavit, para. 57, AR, Vol. II, Tab 9, pp. 16-17; MJ Reasons, para. 19, AR, Vol. I, Tab 1, p. 3.
[27] van der Woude Affidavit, para. 58, AR, Vol. II, Tab 9, p. 17.
[28] Transcript from the Cross-Examination of David Heller, held November 3, 2017 ("Heller Cross-Examination"), qq. 75-116, AR, Vol. III, Tab 13, pp. 118-125; Heller Cross-Examination, Uber Portier B.V. Tipping Addendum, Exhibit "2", AR, Vol. III, Tab 13B, p. 165; Heller Cross-Examination, UberEATS Only Addendum – Toronto Region, Exhibit "3", AR, Vol. III, Tab 13C, pp. 167-168; van der Woude Affidavit, paras. 64-65, AR, Vol. II, Tab 9, p. 18; van der Woude Affidavit, Electronic Receipt received by Uber following David Heller's acceptance of agreements, Exhibit "H", AR, Vol. II, Tab 9H, p. 129; van der Woude Affidavit, Screenshot of David Heller's Driver Portal, Exhibit "I", AR, Vol. II, Tab 9I, p. 131.

"Yes, I AGREE" to all of the agreements, and acknowledged having access to the Driver Portal and making use of it, including to view his payment statements.[29]

Dispute Resolution Process

20. Given the enormous number of licensing agreements entered into by Drivers daily around the globe and the millions of Drivers worldwide, applying a uniform approach to dispute resolution ensures consistency, predictability, and efficiency in the management of a huge number of contracts.[30] Drivers may use various mechanisms to resolve disputes with Uber, including through features of the App which connect Drivers to customer support representatives.[31] Dispute resolution mechanisms provided through the App allow complaints to be dealt with in a timely, efficient, and amicable fashion.[32]

21. While most Driver complaints are resolved through the App, Uber may in some circumstances involve its Dutch-based legal team. Ontario Drivers may also visit a local support centre referred to as a Greenlight Hub to resolve disputes.[33]

22. This dispute resolution system is effective. For example, the respondent has raised over 300 complaints through the App, most of which have been resolved within 48 hours.[34] Overall, the "vast majority of all of [Uber's issues] with [its] customers are dealt with in a successful way via the app."[35]

23. Arbitration is the final step in the dispute resolution process. The legal place or seat of an arbitration determines which country's procedural laws will apply to the arbitration. Uber selected Amsterdam as the seat for arbitration because: (i) Uber's services are provided out of

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[29] Heller Cross-Examination, qq. 70-73, 78-81, 108, 110-116, AR, Vol. III, Tab 13, pp. 117-119, 124-125.
[30] van der Woude Affidavit, para. 49, AR, Vol. II, Tab 9, pp. 13-14; van der Woude Cross-Examination, q. 224, AR, Vol. III, Tab 11, p. 77.
[31] van der Woude Cross-Examination, qq. 149-153, AR, Vol. III, Tab 11, pp. 48-49; MJ Reasons, para. 22, AR, Vol. I, Tab 1, p. 4.
[32] van der Woude Cross-Examination, q. 147, AR, Vol. III, Tab 11, p. 48.
[33] MJ Reasons, paras. 22-24, AR, Vol. I, Tab 1, p. 4; van der Woude Undertakings, q. 164, AR, Vol. III, Tab 12, p. 92.
[34] Heller Cross-Examination, qq. 136-139, 179-182, AR, Vol. III, Tab 13, pp. 129, 140.
[35] van der Woude Cross-Examination, q. 147, AR, Vol. III, Tab 11, p. 48.

the Netherlands; (ii) its team, including its legal team, is located there; and (iii) it can centralize dispute resolution for Drivers who operate worldwide.[36] Uber also relies on the Netherlands' long history of using arbitration as a method of dispute resolution, both nationally and internationally.[37] Nevertheless, the applicable ICC Rules permit the parties to physically hold the hearings elsewhere.[38] In this case, Uber offered to arbitrate with the respondent in Ontario.[39]

Decision of the Motion Judge

24. The motion judge granted Uber's motion for a stay in favour of arbitration. He determined that the dispute is both international and commercial, such that the *International Commercial Arbitration Act, 2017* ("*ICAA*"), not Ontario's *Arbitration Act, 1991*, applied. The motion judge concluded, however, that there were no exceptions under either act that warranted a denial of Uber's stay motion.[40]

25. Applying recent decisions of this Court, the motion judge held that courts must enforce arbitration agreements freely entered into, including in contracts of adhesion, and that any restriction on the parties' freedom to arbitrate must be found in legislation.[41] The motion judge concluded that the *ESA* does not restrict arbitration. He determined that the arbitrability of the issue of whether the licensing agreements were employment agreements was a "complex issue of mixed fact and law" (not a legal question of statutory interpretation) for the arbitrator to decide at first instance under the competence-competence principle.[42] The motion judge rejected the

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[36] van der Woude Affidavit, paras. 35-36, 49, AR, Vol. II, Tab 9, pp. 11, 13-14; van der Woude Cross-Examination, q. 209, AR, Vol. III, Tab 11, p. 71.
[37] van der Woude Affidavit, paras. 35-36, 49, AR, Vol. II, Tab 9, pp. 11, 13-14; van der Woude Cross-Examination, q. 209, AR, Vol. III, Tab 11, p. 71.
[38] Gary B. Born, *International Commercial Arbitration*, 2nd ed. (New York: Kluwer Law International, 2014), pp. 1596-1597, Appellants' Book of Authorities ("ABOA"), Tab 7; International Chamber of Commerce, "Rules of Arbitration" (entered into force 1 March 2017), Art. 18(2), ABOA, Tab 12; *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 20.
[39] MJ Reasons, fn. 39, AR, Vol. I, Tab 1, p. 12.
[40] MJ Reasons, paras. 34-35, 45-46, 65, 74, AR, Vol. I, Tab 1, pp. 5, 7, 11, 13.
[41] MJ Reasons, paras. 51, 59, AR, Vol. I, Tab 1, pp. 8-10.
[42] MJ Reasons, paras. 65-66, AR, Vol. I, Tab 1, pp. 11-12.

unconscionability exception because there was no evidence that Uber had preyed upon or taken advantage of the respondent.[43]

Decision of the Court of Appeal for Ontario

26. The Court of Appeal allowed the appeal and set aside the stay. In doing so, it adopted a novel, and incorrect, approach to the enforceability of arbitration agreements. The Court expressly rejected the application of competence-competence to validity challenges.[44]

27. Assuming the pleaded fact that Drivers are employees, the Court held that the *ESA* precluded arbitration because the Arbitration Agreement did not permit complaints to the Minister of Labour under s. 96 of the *ESA*.[45] The Court of Appeal held that this complaint procedure was an "employment standard" that could not be contracted out of or waived.[46] Even though the respondent has not complained to the Minister (and contrary to this Court's decision in *Seidel v. TELUS Communications Inc.*[47]), the Court of Appeal found that the Arbitration Agreement was invalid. The Court weighed various public policy factors, including its views on the benefits of class actions, the complaint procedure under s. 96 of the *ESA* as compared to arbitration, and how disputes regarding worker classification in Ontario should be resolved.[48] The Court of Appeal also concluded that the Arbitration Agreement was unconscionable.[49]

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[43] MJ Reasons, para. 70, AR, Vol. I, Tab 1, p. 12.
[44] CA Reasons, paras. 39-40, AR, Vol. I, Tab 3, p. 40.
[45] CA Reasons, paras. 27-36, 41, AR, Vol. I, Tab 3, pp. 35-38, 40-41.
[46] CA Reasons, paras. 36, 41, AR, Vol. I, Tab 3, pp. 38, 40-41.
[47] The claim was permitted to proceed in court only to the extent that the claim was made under the provision of the legislation that invalidated the arbitration agreement: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras. 9, 31, 35-40.
[48] CA Reasons, paras. 44-45, 49-50, AR, Vol. I, Tab 3, pp. 41-44.
[49] CA Reasons, paras. 62, 68-69, AR, Vol. I, Tab 3, p. 48, 51-52.

PART II – THE ISSUES

28. The issue on this appeal is whether this proposed class proceeding should be stayed in favour of arbitration. It should be. The Court of Appeal committed the following reversible errors:

(a) It wrongly held that the competence-competence principle does not apply to determining the validity of an arbitration agreement.

(b) It usurped the role of the legislature by holding that the *ESA* prohibits arbitration.

(c) It applied the incorrect test for unconscionability and wrongly concluded that the Arbitration Agreement was void as unconscionable.

PART III – STATEMENT OF ARGUMENT

Standard of Review

29. The Court of Appeal's errors concerning the application of competence-competence, whether the *ESA* prohibits arbitration, and the threshold and test for unconscionability were errors of law that attract a standard of correctness.[50] In its application of the factual matrix to the test for unconscionability, the Court of Appeal committed an error of mixed fact and law that attracts a standard of palpable and overriding error.[51]

The *International Commercial Arbitration Act, 2017* Applies

30. The arbitration agreements between the respondent and Rasier and Portier are international commercial arbitration agreements within the meaning of the *ICAA*.

31. The agreements are international.[52] Rasier and Portier's places of business are in the Netherlands, where they are incorporated, where their offices are located, and where they

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[50] *Housen v. Nikolaisen*, 2002 SCC 33, paras. 8, 36.
[51] *Housen v. Nikolaisen*, 2002 SCC 33, para. 36; *Cope v. Hill*, 2007 ABCA 32, para. 10.
[52] *International Commercial Arbitration Act*, *2017*, S.O. 2017, c. 2, Sch. 5, s. 5(3), Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 1(3).

provide lead generation services to Drivers.[53] The respondent's place of business is in Ontario, where he resides and uses the Driver App to provide food delivery services.[54]

32. The agreements are commercial.[55] The respondent's agreements with Rasier and Portier relate to licensing. In exchange for the ability to access Uber's lead generation services for personal transportation and food delivery, the respondent pays a service fee to Rasier and Portier.[56] The respondent acknowledged that he entered into the licensing agreements for the express purpose of licensing Rasier and Portier's lead generation services.[57] Licensing agreements fall within the definition of commercial agreements.[58]

33. The respondent's pleading that he is an Uber employee does not alter the commercial character of the agreement. Courts have applied international commercial arbitration statutes even when one party is making a non-commercial claim if the underlying agreement is commercial in nature.[59]

34. Assuming that the *ICAA* applies, it requires the court to hold the parties to their bargain, refer the dispute to arbitration, and stay this proceeding.[60] A stay pending arbitration is mandatory unless the court finds that the agreement is null and void, inoperative, or incapable of being performed.[61] However, if the *ICAA* does not apply, Ontario's domestic arbitral legislation, the *Arbitration Act, 1991*, does.[62] It also mandates a stay if a party to an arbitration agreement

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[53] See para. 9 above.
[54] Statement of Claim, para. 35, AR, Vol. I, Tab 6, p. 74.
[55] The Analytical Commentary contained in the Report of the Secretary General defines commercial to include licensing relationships, United Nations Commission on International Trade Law, *Report of the Secretary-General,* UNGAOR, 18th Sess., UN Doc. A/CN.9/264 (1985), ABOA, Tab 28; *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, s. 6(3).
[56] See para. 8 above.
[57] See paras. 15, 19 above.
[58] See fn. 55 above.
[59] *United Mexican States v. Metalclad Corp*., 2001 BCSC 664, paras. 44-46, 49.
[60] *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, s. 9, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 8.
[61] *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, s. 9, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 8.
[62] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 2.

commences a proceeding in respect of a matter to be submitted to arbitration under the agreement.[63]

35. Both the *ICAA* and the *Arbitration Act, 1991* permit a court to refuse to stay a proceeding in certain circumstances.[64] Relying on one of these exceptions, the respondent argues that the Arbitration Agreement is invalid. It is his burden to prove that the exception relied on applies.[65] The respondent has failed to meet that burden.

The Competence-competence Principle Applies to Questions of Validity

36. The competence-competence principle provides that "if there is an arguable or *prima facie* case that the arbitrator has jurisdiction, the court should defer the issue of jurisdiction to the arbitrator."[66] A court should depart from the "systematic referral to arbitration" only if the jurisdictional challenge is based solely on a question of law or a question of mixed fact and law that requires only a superficial analysis of the documentary record.[67] Even if one of the exceptions to the competence-competence principle applies, the court will refuse a stay and allow an action to continue in court "only if it is clear the dispute falls outside the arbitration agreement."[68] Subject to limited exceptions, "the decision regarding jurisdiction should initially be left to the arbitrator."[69] This principle applies to questions concerning the validity of the arbitration agreement, not just the scope of the agreement.[70]

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[63] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(1).
[64] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2); *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Arts. 8, 16.
[65] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d), para. 14, 21 B.L.R. (3d) 104 (Sup. Ct).
[66] *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, para. 68, citing *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; See also *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, para. 34.
[67] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, paras. 84-86; *Seidel v. TELUS Communications Inc*., 2011 SCC 15, paras. 4, 28-30.
[68] *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), para. 21, citing *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 43 C.P.R. (3d) 390 (B.C. C.A.).
[69] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 11.
[70] *Seidel v. TELUS Communications Inc*., 2011 SCC 15, paras. 28-30.

37. In this case, the respondent's challenges to the Arbitration Agreement are not questions of law and cannot be resolved on a superficial review of the record. The competence-competence principle thus requires that the arbitrator must first resolve the challenges. The Court of Appeal avoided the application of the competence-competence principle by holding that the principle did not apply to challenges to the validity of an arbitration agreement. This conclusion disregards the purposes of the principle and is unsupported in law.

Acceptance of competence-competence principle in Canadian law

38. The competence-competence principle is consistently applied by courts across Canada.[71] This Court has endorsed the principle on numerous occasions.[72] Reserving jurisdictional questions for the arbitrator at first instance reduces delays, minimizes duplicative fact-finding that might be required were a court and an arbitrator both to consider jurisdiction, and decreases the expense involved for parties in filing extensive factual evidence before the court to support or rebut any challenge to the arbitrator's jurisdiction.[73] The widespread adoption of the competence-competence principle reflects the broad consensus that it furthers the benefits of arbitration as a timely, efficient, and cost-effective dispute resolution mechanism.[74]

39. In *TELUS Communications Inc. v. Wellman* ("*Wellman*"), this Court explained that one of the purposes of modern Canadian arbitration legislation, which provides for arbitrators to rule on their own jurisdiction, is to rebut the historical view that only courts were capable of granting remedies for legal disputes.[75] The underlying philosophy of the legislation, as cited by this Court,

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[71] See e.g. *Ciano Trading & Services C.T. v. Skylink Aviation Inc.*, 2015 ONCA 89; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379; *Epcor Power L.P. v. Petrobank Energy & Resources Ltd.*, 2010 ABCA 378.
[72] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, paras. 84-86; *Seidel v. TELUS Communications Inc*., 2011 SCC 15, paras. 28-30.
[73] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, paras. 84-86.
[74] On the benefits of arbitration, see e.g. Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed. (New York: Kluwer Law International, 2001), pp. 9-11, ABOA, Tab 8; *South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd.*, 2018 BCCA 468, paras. 17-18; *Mungo v. Saverino*, [1995] O.J. No. 3021 (WL), para. 71, ABOA, Tab 2; *Legislative Assembly of Ontario Debates*, No. 7 (27 March 1991) at 245 (Howard Hampton), ABOA, Tab 13; *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3384 (Howard Hampton), ABOA, Tab 14; *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3386 (Charles Harnick), ABOA, Tab 15.
[75] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, paras. 48-49.

is entrenching "the primacy of arbitration proceedings over judicial proceedings once the parties have entered into an agreement, by directing the court, generally, not to intervene."[76] Respecting competence-competence is consistent with these purposes.

Acceptance of competence-competence principle internationally

40. The competence-competence principle has been adopted by a majority of international arbitral regimes.[77] It is considered a universally-recognized principle of international arbitration law.[78] Adherence to the competence-competence principle is integral to Canada maintaining its reputation as a jurisdiction that welcomes arbitration.[79] "An interpretation that enhances rather than undermines the confidence of the international community in Ontario as a venue for such arbitral proceedings is clearly one that is in keeping with the intentions of the Legislature."[80]

Competence-competence applies to validity challenges

41. Competence-competence applies to jurisdictional challenges to both an arbitration agreement's scope and validity. There is no principled reason to treat validity and scope challenges differently in applying competence-competence. The Court of Appeal erred in law by holding that competence-competence does not apply to challenges to the validity of an arbitration agreement.[81]

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[76] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 49, citing *Ontario Hydro v. Denison Mines Ltd.*, 1992 Carswell Ont 3497 (Gen. Div.) (WL), ABOA, Tab 4.
[77] Kenneth McEwan, Ludmila Herbst, *Commercial Arbitration in Canada*, looseleaf (Toronto: Thomson Reuters, 2017), pp. 5-7, ABOA, Tab 22; Gary B. Born, *International Commercial Arbitration*, 2nd ed. (New York: Kluwer Law International, 2014), p. 1051, ABOA, Tab 7.
[78] Gary B. Born, *International Commercial Arbitration*, 2nd ed. (New York: Kluwer Law International, 2014), p. 1051, ABOA, Tab 7.
[79] Ryan Cookson, Tamryn Jacobson, Julie Rosenthal, "Court of Appeal Invalidates Uber's Arbitration Clause" (15 January 2019), ABOA, Tab 9; Mira Novek, "The Court of Appeal Affirms that the Competence-Competence Principle Applies to Ontario's *Arbitration Act, 1991*" (27 December 2013), ABOA, Tab 23. On Canada as an "arbitration-friendly state", see Uniform Law Conference of Canada, "International Commercial Arbitration – Report of the Working Group (2012), paras. 4-5, ABOA, Tab 27.
[80] *The Russian Federation v. Luxtona Limited*, 2018 ONSC 2419, para. 30.
[81] CA Reasons, paras. 39-40, AR, Vol. I, Tab 3, p. 40.

42. The *ICAA* and the *Arbitration Act, 1991* expressly extend the ability of arbitrators to rule on their own jurisdiction to challenges to the validity of an arbitration agreement. Article 16 of Schedule 2 of the *ICAA* stipulates that "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[82] Section 17 of the *Arbitration Act, 1991* provides that 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."[83] (Emphasis added.)

43. This Court has held that competence-competence applies to validity challenges. In *Dell Computer Corp. v. Union des consommateurs*, this Court determined that "an arbitrator has jurisdiction to assess the validity and applicability of an arbitration clause and that, although there are exceptions, the decision regarding jurisdiction should initially be left to the arbitrator."[84] In *Seidel v. TELUS Communications Inc.* ("*Seidel*"), this Court was faced with a challenge to the validity of an arbitration agreement between TELUS Communications Inc. and one of its customers. The majority affirmed that the competence-competence principle applied. However, given the nature of the validity challenge in that case – a pure question of law – the principle was not violated in having the court evaluate the challenge at first instance rather than referring the dispute to the arbitrator.[85] Courts across Canada have similarly respected competence-competence in considering objections to the validity of an arbitration agreement.[86]

The Court of Appeal erred in assuming an employment relationship

44. The Court of Appeal started its analysis below by presuming that the respondent can prove what he pleads – that he is an employee of Uber. In doing so, it relied on the fact that the majority in *Seidel* took the plaintiff's complaints that TELUS had breached the *Business Practices and Consumer Protection Act*[87] ("*BPCPA*") as capable of proof. However, in *Seidel*,

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[82] *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 16(1).
[83] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 17 (Emphasis added).
[84] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 11.
[85] *Seidel v. TELUS Communications Inc*., 2011 SCC 15, paras. 28-30.
[86] *Frey v. BCE Inc.*, 2008 SKQB 79, para. 11; *Sum Trade Corp. v. Agricom International Inc*., 2018 BCCA 379, paras. 36-37; *Wheeler v. Hwang*, 2007 NLTD 145 (CanLII), paras. 6, 8, 25.
[87] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

this Court did not consider whether a claim should be taken as capable of proof when it is brought under a statute, the applicability of which is itself in dispute.

45. The respondent's jurisdictional challenge is therefore different than that presented by the plaintiff in *Seidel*. There was no controversy in *Seidel* as to the plaintiff's status as a consumer or the application of the *BPCPA* to her dispute with TELUS. This Court specifically relied on the undisputed nature of these facts in finding that competence-competence was not violated by its consideration of the plaintiff's jurisdictional challenge because "whether or not s. 172 of the *BPCPA* has the legal effect claimed for it by the plaintiff was a question of law to be determined on undisputed facts"[88] (emphasis added). In contrast, the respondent's status as an employee and the application of the *ESA* are central issues in his case against Uber.

46. The Court of Appeal's approach creates potential mischief. It offers parties the ability to "obstruct the process by manipulating procedural rules" to sidestep the application of competence-competence and renege on their agreements to arbitrate.[89] A party to an arbitration agreement could deliberately frame its cause of action under a statute that prohibits arbitration to avoid its agreement even if the dispute is not in fact governed by that statute. For this reason, courts have cautioned against the blind acceptance of assumptions.[90]

47. This Court's recent decision in *Wellman* offers an example.[91] To avoid its agreement to arbitrate, a business customer could plead its case as a consumer claim, which would be subject to Ontario's *Consumer Protection Act, 2002*[92] ("*CPA*") and therefore not arbitrable. Following the Court of Appeal's approach in this case, a court could rely on the pleading and assume that the *CPA* governed the business customer's dispute with TELUS. The court could then consider whether to stay the action without violating the competence-competence principle because whether the *CPA* precludes arbitration would be a pure question of law.

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[88] *Seidel v. TELUS Communications Inc*., 2011 SCC 15, para. 30.
[89] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 84.
[90] *Nazarinia Holdings Inc. v. 2049080 Ontario Inc*., 2010 ONSC 1766, paras. 32-33; *IMG Canada Ltd. v. Melitta Canada Inc*., 18 B.L.R. (3d) 78 (O.N. S.C.), para. 20.
[91] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.
[92] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A.

48. The Court of Appeal also erred in analogizing its approach to other preliminary procedural motions. Unlike these motions, the competence-competence principle has gained wide acceptance as the appropriate model to determine the jurisdiction of arbitrators.[93] In the face of clear judicial preference for competence-competence, there is no basis for the court to make assumptions that undermine its application.

The respondent's challenges must first be resolved by the arbitrator

49. Competence-competence requires that the respondent's jurisdictional challenges to the Arbitration Agreement be determined by the court if they are based solely on a question of law or on a question of mixed fact and law that requires only a superficial analysis of the documentary record.[94] The onus is on the respondent to demonstrate that his challenge to the Arbitration Agreement should not at first instance be referred to the arbitrator.[95]

50. There is no dispute that the respondent's claim falls within the scope of the Arbitration Agreement. Instead, the respondent has argued against staying the proceeding on the grounds that the Arbitration Agreement is invalid for two independent reasons: (1) his claim is governed by the *ESA* and the *ESA* prohibits arbitration; and (2) the Arbitration Agreement is unconscionable. Neither of these is a question of law or a question of mixed fact and law requiring only a superficial consideration of the documentary record. This Court should therefore defer the issue of jurisdiction to the arbitrator.

51. The respondent's challenge to the validity of the Arbitration Agreement on the grounds that the *ESA* prohibits arbitration is not solely a question of law. It is a question of statutory interpretation that is not precluded by the competence-competence principle. However, as the motion judge found, before considering whether the *ESA* prohibits arbitration, the respondent's challenge requires a threshold determination that the *ESA* applies to his claim.[96] This

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[93] See e.g. *Seidel v. TELUS Communications Inc*., 2011 SCC 15, paras. 28-29; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 84.
[94] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, paras. 84-85.
[95] *Kanitz v. Rogers Cable Inc.*, [2002] O.J. No. 665 (S.C.J.), para. 14.
[96] MJ Reasons, paras. 58, 65, AR, Vol. I, Tab 1, pp. 10-11.

determination depends on the complex and disputed question of the respondent's status as an employee, the resolution of which requires a detailed review and consideration of the facts.[97]

52. The respondent's assertion that the Arbitration Agreement is unconscionable also requires a fact-intensive analysis that should be done first by the arbitrator. Similar to other challenges to arbitration clauses, whether the Arbitration Agreement is unconscionable is a "probing factual inquiry".[98] This requires more than a superficial examination of the documentary evidence. For this reason, Canadian courts have determined that unconscionability challenges are subject to competence-competence.[99]

53. The affidavit evidence filed by the parties demonstrates that the "factual matrix" of the agreement, the consideration of which is required by this Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*[100], is disputed. The evidence is conflicting or incomplete on a number of issues central to the unconscionability analysis, including: the size of the respondent's claim, the "likely" size of disputes between Drivers and Uber, the effectiveness of Uber's internal dispute resolution mechanisms, the cost of arbitration as compared to pursuit of a class proceeding, the rationale for the choice of arbitration as a dispute resolution mechanism, the location of the arbitration hearing, and whether, under the law of the Netherlands, the arbitrator would apply Ontario employment law.

54. The Court of Appeal went well beyond a superficial consideration of the evidentiary record in determining that the Arbitration Agreement is unconscionable. It reached conclusions about disputed factual evidence on a range of issues including: the likely size of a dispute for which the Arbitration Agreement would be invoked, the impact of the financial costs of arbitration and whether Drivers would pursue it, and whether the arbitration was to be physically conducted in the Netherlands.[101] To permit a court to engage in this degree of factual

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[97] See e.g. *King v. Merrill Lynch Canada Inc.*, [2006] O.J. No. 1257, para. 20.
[98] *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, para. 15; See also *Greer v. Babey*, 2016 SKCA 45, para. 30.
[99] *Briones v. National Money*, 2013 MBQB 168, para. 51; *Wheeler v. Hwang*, 2007 NLTD 145 (CanLII), para. 25.
[100] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 50.
[101] CA Reasons, paras. 58-59, 68, AR, Vol. I, Tab 3, pp. 46-47, 50-52.

consideration would significantly undermine the application of competence-competence, especially for jurisdictional challenges based on the validity of the agreements.

55. In sum, the competence-competence principle must apply to this case. Neither of the respondent's challenges to the arbitrator's jurisdiction meets the criteria for exception from this principle. This Court should reverse the Court of Appeal's decision and reinstate the decision of the motion judge referring the respondent's jurisdictional challenges to the arbitrator.

The *ESA* Does Not Preclude Arbitration

56. Even if this Court should determine the validity of the Arbitration Agreement under the *ESA* instead of referring the question to the arbitrator and even if the *ESA* applies to the respondent's claim – neither of which propositions Uber accepts – the Arbitration Agreement should still be enforced. The Ontario legislature has not chosen to prohibit arbitration of *ESA* claims.

57. Recent jurisprudence of this Court and courts across Canada recognizes that "legislation has been introduced to support arbitration…and the resolution of disputes outside court proceedings where parties have agreed to arbitrate their disputes."[102] The "trend in the case law and legislation … [is] to accept and even encourage the use of civil and commercial arbitration."[103] The decision to restrict parties' freedom to choose arbitration has been left to the legislatures.[104] This Court has made clear that, absent legislation to the contrary, courts must enforce arbitration agreements, including in contracts of adhesion.[105]

58. The respondent argues that arbitration is prohibited under the *ESA*. The Court must therefore determine whether there is "express legislative language" in the *ESA* to preclude arbitration.[106] Applying the modern approach to statutory interpretation, the Court must read the

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[102] *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, paras. 66-67; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 54, quoting *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, para. 38.
[103] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 54, quoting *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, para. 38.
[104] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 2.
[105] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 2.
[106] *Murphy v. Amway Canada Corporation*, 2013 FCA 38, paras. 17, 60.

words of an act ". . .in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament."[107] The exercise must also respect and be "consistent with the policy choices made by the legislature in the *Arbitration Act* itself and in other relevant statutes."[108]

59. There is no express prohibition on arbitration in the *ESA*. Considering the absence of any express language precluding arbitration, the respondent's argument and the Court of Appeal's reasoning that the legislature intended to oust arbitration of *ESA* claims requires several inferential leaps. It "comes down to inferring as a matter of statutory interpretation … legislative language to contradict the directive found in s. 7(1) of the *Arbitration Act*."[109] This approach is inconsistent with the principle of statutory interpretation which provides that "the ordinary meaning is presumed to be the meaning intended by the legislature, and in the absence of a reason to reject it, it should be adopted by the court."[110]

60. There is no legislative intention to prohibit arbitration contained in the *ESA*. Given the circumstances in which the *ESA* was enacted and recently amended, as well as the scope and context of the *Act*, the absence of an express prohibition on arbitration indicates that the legislature did not intend to oust arbitration of *ESA* claims. This conclusion is consistent with the principle of implied exclusion, the plain and ordinary meaning of ss. 5 and 96 to 98 of the *Act*, and the purposes and objects of the *Act*.

The principle of implied exclusion infers no legislative intention to prohibit arbitration

61. The principle of implied exclusion provides that:

> [A]n intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be

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[107] E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 87, ABOA, Tab 10; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 26.
[108] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 47.
[109] *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400, para. 85.
[110] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), p. 59, ABOA, Tab 25.

> expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful.[111]

62. In the context of the *ESA*, there are significant reasons to expect that if the legislature intended to prohibit arbitration of claims under the *Act*, it would have done so expressly. These reasons include:

(a) the legislature's endorsement of arbitration as a dispute resolution mechanism in the *Arbitration Act, 1991* and the *ICAA*;

(b) express consideration of arbitration as a dispute resolution mechanism in the *ESA*;

(c) repeated judicial endorsement of the use of arbitration for *ESA* claims;

(d) judicial calls for the legislature to expressly act to resolve any tension between arbitration legislation and other competing policy objectives; and

(e) related statutes that expressly prohibit arbitration.

63. In the above circumstances, the absence of an express prohibition against arbitration in the *ESA* is meaningful. This is particularly so given that Ontario recently undertook an expansive review and reform of the *ESA* following the "Changing Workplaces Review."[112] The Review assessed the need for legislative reform to address the changing nature of the workforce and the workplace, and changes in the prevalence and characteristics of standard employment relationships.[113] Subsequent legislative reform arising from the Review culminated in the passage of the *Fair Workplaces, Better Jobs Act, 2017*.[114] The Review specifically considered the "gig economy" and referred to Uber directly.[115] Neither the Review's recommendations nor the subsequent amendments to the *ESA* restrict arbitration in any way.

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[111] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), p. 154, ABOA, Tab 25; See also *University Health Network v. Ontario (Minister of Finance)* (2001), 151 O.A.C. 286, paras. 31-32, 208 D.L.R. (4th) 459 (C.A.).
[112] Ontario, Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", S.C. Michael Mitchell & John C. Murray, ABOA, Tab 24.
[113] Ontario, Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", S.C. Michael Mitchell & John C. Murray, pp. 19-20, ABOA, Tab 24.
[114] S.O. 2017, c. 22.
[115] Ontario, Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", S.C. Michael Mitchell & John C. Murray, p. 54, ABOA, Tab 24.

64. ***In amending the ESA, the legislature was aware of the support for arbitration in Ontario***. In enacting legislation, legislatures are presumed to be aware of the operation of other legislation.[116] As a result, in amending the *ESA* following the introduction of the *Arbitration Act, 1991* and the *ICAA*, the legislature would have been aware of the mandatory stay provisions in each act.[117] The legislature would also have been aware of the purposes of Ontario's arbitration legislation, which include improving access to justice by making it "easier for people to submit private disputes to resolution by arbitration", holding parties to their bargains to arbitrate (and encouraging such bargains), and limiting court intervention in matters governed by arbitration agreements.[118] This Court recently confirmed that the legislative purpose of the mandatory stay in s. 7(1) of the *Arbitration Act, 1991* was designed to limit judicial interference with parties' freedom to enter into arbitration agreements.[119]

65. Given the legislative support for arbitration as a dispute resolution mechanism in Ontario, had the legislature intended to limit the use of arbitration for certain classes of parties, it would have done so expressly. The legislature's silence in the *ESA* with respect to prohibiting arbitration of claims by non-unionized employees in the face of legislative support for and encouragement of arbitration, indicates that the legislature intended to permit arbitration of *ESA* claims. This interpretation is consistent with the purposes and effective functioning of Ontario's

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[116] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014), pp. 416-419, 422, ABOA, Tab 26; See also *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, para. 30.

[117] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014), pp. 416-419, 422, ABOA, Tab 26; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, para. 30. The *ESA* has been amended multiple times (including in 2005, 2010, and 2015) since the introduction of the original *ICAA* and the *Arbitration Act, 1991* in 1990 and 1991 respectively.

[118] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, paras. 48-54, 111; *Legislative Assembly of Ontario Debates*, No. 7 (27 March 1991) at 256 (Howard Hampton), ABOA, Tab 13; *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3384 (Howard Hampton), ABOA, Tab 14; *Legislative Assembly of Ontario Debates*, No. 22 (23 November 2005) at 1094 (Michael Bryant), ABOA, Tab 20, citing to *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3386 (Charles Harnick), ABOA, Tab 15.

[119] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 63.

arbitration legislation. Interpreting legislation in a coherent manner across statute books is to be encouraged.[120]

66. ***The ESA provides for arbitration of disputes under collective agreements***. The *ESA*'s silence on prohibiting arbitration for non-unionized employees did not result from a lack of legislative attention paid to arbitration. Rather, the express references to arbitration in the *ESA* indicate that the legislature turned its mind to the use of arbitration as a dispute resolution mechanism under the *Act*.[121] These provisions of the *ESA* support Uber's position that had the legislature intended to limit the use of arbitration it would have done so expressly.

67. ***Courts repeatedly permit arbitration of ESA disputes***. In various judicial decisions, courts in Ontario have repeatedly endorsed the view that parties may agree to arbitrate their disputes under the *ESA*. Courts in Ontario have regularly stayed court proceedings in favour of arbitration agreements contained in employment contracts governed by the *ESA*.[122] The legislature has not acted to correct these judicial interpretations. The absence of such legislative intervention further supports Uber's position that the legislature did not intend to prohibit arbitration under the *ESA*.[123]

68. ***Calls for legislative action to resolve tension with arbitration legislation have not led to ESA amendments***. In its 2002 decision *Kanitz v. Rogers Cable Inc.*, the Ontario Superior Court invited the Ontario legislature to resolve the tension between any statutes with public policy objectives that compete with Ontario's arbitration legislation.[124] Immediately following the judicial call for action, the legislature responding by amending the *CPA* to expressly prohibit arbitration of disputes arising under that statute.[125] It made no such amendment to the *ESA*.

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[120] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), p. 181, ABOA, Tab 25; *Green v. University of Winnipeg*, 2018 MBCA 137, para. 25.
[121] *Employment Standards Act, 2000*, S.O. 2000, c. 41, ss. 100-101.
[122] See e.g. *Robert v. Markandu*, 2012 ONSC 6891; *Morrison v. Ericsson Canada Inc.*, 2016 ONSC 3908.
[123] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, paras. 52-54.
[124] *Smith Estate v. National Money Mart Co.*, 57 C.P.C. (6th) 99, 2008 CanLII 27479, paras. 63-64 (Ont. Sup. Ct.), quoting *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d), para. 52, 21 B.L.R. (3d) 104 (Sup. Ct).
[125] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, s. 7(2).

69. ***Other Ontario statutes expressly prohibit arbitration***. As noted above, the Ontario legislature has made an express policy choice to prohibit arbitration between certain classes of parties. Where it has made this policy choice, it has expressly prohibited arbitration in the governing legislation.[126] In each of these statutes, the legislature has used the same language to limit arbitration, adapted to the specific statutory context, as follows:

> any term or acknowledgment in a … [agreement]…that requires or has the effect of requiring that disputes arising out of the … [agreement] … be submitted to arbitration is invalid insofar as it prevents a [consumer or borrower] from exercising a right to commence an action in the Superior Court of Justice given under this Act…[127]

70. Related legislation forms part of the legal context in which legislation is passed.[128] As a result, the absence of an express prohibition on arbitration in the *ESA* in contrast to the express prohibitions in other Ontario legislation is a meaningful distinction that must be respected. This legislative distinction indicates that the legislature has not restricted arbitration under the *ESA*.

The plain meaning of ss. 96 to 98 supports arbitration of ESA disputes

71. The Court of Appeal found a legislative intent to preclude arbitration in the combination of ss. 96(1) and 5(1) of the *ESA*. Section 96(1) provides that "A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director."[129] Section 5(1) prohibits any employee or employer from contracting out of or waiving any employment standard. The Court of Appeal determined that these provisions operate together to preclude arbitration.[130] It concluded that the s. 96(1) complaint process is an employment standard that, pursuant to s. 5(1), cannot be contracted out of.[131] As a result, the Court held that notwithstanding that the respondent's complaint was not a s. 96(1) complaint, his agreement to arbitrate with Uber prevented him from complaining to the

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[126] *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2).
[127] *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, s. 3(3); *Payday Loans Act, 2008*, S.O. 2008, c. 9, s. 39(2); *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, s. 7(2).
[128] *Tracy (Litigation guardian of) v. Iranian Ministry of Information and Security*, 2016 ONSC 3759, para. 68 (affirmed in 2017 ONCA 549). *University Health Network v. Ontario (Minister of Finance)* (2001), 151 O.A.C. 286, paras. 32-33, 208 D.L.R. (4th) 459 (C.A.).
[129] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 96(1).
[130] CA Reasons, paras. 28-37, 41-42, AR, Vol. I, Tab 3, pp. 35-41.
[131] CA Reasons, paras. 28-37, 41-42, AR, Vol. I, Tab 3, pp. 35-41.

Minister and was thus invalid.[132] This reasoning is not supported by the plain meaning of ss. 96 to 98 of the *Act*.

72. The complaint process set out in ss. 96 to 98 of the *ESA* is an enforcement mechanism. It can be a means to enforce an employment standard, but it is not itself an employment standard. The *ESA* defines "employment standard" as "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee."[133] Sections 96 to 98 permit a "person" (not just an "employee") to file a complaint with the Ministry of Labour alleging violations of the *Act*. This specific legislative language supports the interpretation that the complaint process is not an "employment standard" which operates only to the benefit of employees, a narrower group than persons. The purpose of the complaint mechanism is to ensure that employers are complying with the minimum employment standards set out in the *Act*. Additionally, the case law differentiates between employment standards and complaint procedures, indicating that complaint procedures and employment standards are different legislative mechanisms.[134] In sum, consistent with the rule of statutory interpretation that ordinary meanings prevail over strained or unnatural ones, the complaint mechanism in s. 96 is not an employment standard.[135]

73. Section 5 of the *ESA* prohibits contracting out of "employment standards", not all provisions of the *Act*. Because the complaint process is not an "employment standard", there is no prohibition on employees contracting out of that process. The narrow use of the term "employment standard" in s. 5 rather than a prohibition on contracting out of the *Act* more broadly indicates that the legislature contemplated that freedom to contract was preserved to some extent.

74. In the alternative, if the complaint process is an "employment standard", an arbitration agreement does not contract out of that standard. Sections 96 to 98 of the *ESA* permit arbitration in lieu of complaints to the Minister. The *ESA* provides that an employee who commences a

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[132] CA Reasons, paras. 28-37, 42, AR, Vol. I, Tab 3, pp. 35-41.
[133] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 1.
[134] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, para. 27.
[135] E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterwort & Co., 1983), p. 87, ABOA, Tab 10. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, paras. 18-23, 154 D.L.R. (4th) 193.

"civil proceeding" is restricted from accessing the complaint procedure under s. 96.[136] "Civil proceeding" includes arbitration.

75. "Proceeding" refers to "an action, application, or submission to any court or judge or other body having authority by law or by consent to make decisions as to the rights of persons."[137] The decision of the Federal Court of Appeal in *Reference re Public Service Employee Relations Act* reinforces the understanding of "proceeding" as including arbitration:

> I recognize that the word "proceeding", in this context, had its origin in connection with matters in the ordinary courts of the land but, in current use, it refers, in my understanding of the use of language, to matters before any person or persons having authority to make decisions or give advice after hearing evidence or otherwise giving persons concerned an opportunity of putting forward their point of view.[138]

The statute at issue before the Federal Court of Appeal provided that no one could be compelled to give evidence in any civil action, suit, or other proceeding with respect to information obtained in the discharge of his or her duties under the statute. The Federal Court of Appeal concluded there was no reason this protection would only apply in court proceedings.[139] Widespread statutory use of the term civil proceeding in statutes containing similar non-compellability provisions support the interpretation that civil proceeding in the *ESA* includes arbitration.[140]

76. The *ESA*'s legislative history further supports the conclusion that "civil proceeding" includes arbitration. The 1990 *ESA* excluded parties engaged in a "civil action" from using the legislative complaint process.[141] This language was expanded in 2000 to exclude parties engaged in any "civil proceeding" from using the complaint mechanism. The legislature's decision to

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[136] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 98.
[137] *O.N.A. v. Extendicare (Canada) Inc.*, 159 L.A.C. (4th) 30, 89 C.L.A.S. 36, para. 12, ABOA, Tab 3.
[138] *Reference Re Public Service Employee Relations Act (Alta.)*, 1973 CarswellNat 47F, para. 8, [1973] F.C. 604, ABOA, Tab 5.
[139] *Reference Re Public Service Employee Relations Act (Alta.)*, 1973 CarswellNat 47F, para. 8, [1973] F.C. 604, ABOA, Tab 5.
[140] See e.g. *Regulatory Modernization Act, 2007*, S.O. 2007, c. 4, s. 17; *The Employment Standards Code* (Manitoba), S.M. 1998, c. 29, s. 121; *Pay Equity Act*, R.S.O. 1990, c. P.7, s. 31.
[141] *Employment Standards Act*, R.S.O. 1990, C. E. 14, s. 64.3(1).

broaden the term indicates its intent to encompass a wider variety of dispute resolution processes, including arbitration.

77. The inclusion of arbitration in "civil proceeding" is also consistent with the policy objectives of s. 98. The *ESA* was amended in 1996 to make the complaint process optional. The legislature did so to encourage parties "…to settle more disputes on their own rather than appealing to the minister in each and every case" and to "…make better use of our resources at the Ministry of Labour by no longer investigating and enforcing employment standards claims that are being pursued through other means."[142] There is no basis to conclude that "other means" was intended to be limited to court proceedings.

The Court of Appeal erred in interpreting ss. 96 to 98 of the ESA

78. The Court of Appeal's interpretation of the complaint process was flawed. The Court concluded that the investigative process is a "requirement" that applies to an employer because once the investigative process is triggered, the employer is required to participate. This conclusion is inconsistent with the definition of "employment standard" in s. 1 and the complaint mechanism in ss. 96 to 98, read "in their grammatical and ordinary sense." The fact that an employer must participate in an investigative process once it is triggered does not transform a person's ability to file a complaint to enforce employment standards into a requirement imposed on the employer.

79. The Court of Appeal's reasoning that "civil proceeding" does not include arbitration is similarly flawed. The Court relied on s. 101(1) and its reference to proceedings before labour arbitrators as proof that the *ESA* distinguishes arbitrations from civil proceedings.[143] However, a specific reference to "a proceeding before an arbitrator" in one section of the *ESA* does not necessarily exclude arbitration from the broader use of "civil proceeding" in another section of the *ESA*. The Court also relied on s. 8(2) which requires an employee to give notice to the

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[142] *Legislative Assembly of Ontario Debates*, No. 73 (13 May 1996) at 2909 (Elizabeth Witmer), ABOA, Tab 16; *Legislative Assembly of Ontario Debates*, No. 80 (30 May 1996) at 3213 (John R. Baird), ABOA, Tab 18.

[143] *Employment Standards Act, 2000,* S.O. 2000, c. 41, s. 101(1); CA Reasons, para. 34, AR, Vol. I, Tab 3, pp. 37-38.

Director of Employment Standards if he or she commences a civil proceeding. This provision, however, is not incompatible with arbitration's inclusion in "civil proceeding". One of the other purposes of providing notice to the Director is so that the Director can enforce the prohibition in s. 98 against an employee bringing a complaint where a civil proceeding has been brought in the same matter. The notice is not publicized. It operates to prevent a multiplicity of proceedings. This function is equally applicable to both court and arbitration proceedings.

Arbitration Agreement would only be invalid with respect to complaint to Minister

80. Even if it interferes with the ss. 96 to 98 complaint process and that process is an "employment standard", the Arbitration Agreement would only be invalid insofar as it prohibited the respondent from filing a complaint with the Minister. In *Seidel*, this Court invalidated the arbitration agreement with respect to the plaintiff's claims that fell under s.172, which the Court determined manifested a legislative override of arbitration.[144] The arbitration agreement was upheld with respect to the plaintiff's other statutory and common law claims. So too, in this case, only the respondent's complaint to the Minister, had he brought one, would be permitted to proceed. His proposed class proceeding must still be stayed.

81. The Court of Appeal for Ontario has invalidated termination clauses which contract out of the *ESA*, rather than reading down or severing the components of the clause which violate the statute.[145] There is, however, good reason to distinguish between termination clauses and arbitration agreements. Canadian statutory and judicial law strongly favour the enforcement of arbitration agreements.[146] This Court has emphasized this approach repeatedly, stating that "courts must show due respect for arbitration agreements" and that "the trend in the case law and legislation [is]…to accept and even encourage the use of civil and commercial arbitration."[147] There is no such overarching support or policy basis for the enforcement of termination agreements. Given the clear direction from the legislatures and courts to enforce arbitration

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[144] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 31.
[145] See e.g. *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158.
[146] See e.g. *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, paras. 32-33; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 23.
[147] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 54; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, para. 38.

agreements, if the Arbitration Agreement improperly contracts out of s. 96, it should be read down to permit a complaint to the Minister, not struck in its entirety.

The purpose and object of the ESA are consistent with permitting arbitration

82. This Court has described the purpose of the *ESA* as "the protection of … the interests of employees by requiring employers to comply with certain minimum standards."[148] More specifically, the purpose of the complaint mechanism in ss. 96 to 98 is to make redress available to employees, where it is appropriate, in an expeditious and cost-effective manner.[149] Nothing in the legislative debates discussing the complaint mechanism demonstrates concern with permitting employees to arbitrate their employment disputes. There is no Hansard discussion reflecting a desire to prohibit arbitration. Rather, the debates reflect a legislative desire to expand the forums in which employees could obtain redress.[150] This stands in contrast to the express reference to prohibiting arbitration in the consumer context in the legislative debates concerning amendments to the *CPA*.[151]

83. It is well-accepted that arbitration can offer litigants faster and cheaper dispute resolution before expert decision-makers.[152] Arbitration legislation was specifically enacted to increase access to justice in Ontario and to offer litigants a more expedient dispute resolution mechanism than going to court.[153] Given the *ESA*'s objectives of ensuring that minimum employment standards are protected through expeditious dispute resolution, offering employees increased

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[148] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 24, 154 D.L.R. (4th) 193, quoting *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, para. 31, 91 D.L.R. (4th) 491.
[149] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, para. 27.
[150] *Legislative Assembly of Ontario Debates*, No. 73 (13 May 1996) at 2909 (Elizabeth Witmer), ABOA, Tab 16; *Legislative Assembly of Ontario Debates*, No. 73 (30 May 1996) at 3214 (Elizabeth Witmer), ABOA, Tab 17; *Legislative Assembly of Ontario Debates*, No. 80 (30 May 1996) at 3213 (John R. Baird), ABOA, Tab 18.
[151] *Legislative Assembly of Ontario Debates*, No. F-6 (4 December 2002) at F-59 (Albert Nigro, Gilles Bisson, Rob Harper), ABOA, Tab 19.
[152] Trevor Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005), p. 746, ABOA, Tab 11; *Mungo v. Savernino*, [1995] O.J. No. 3021 (WL), ABOA, Tab 2 cited with approval in *Webber v. Seltzer (2005)*, 2005 CarswellOnt 465, para. 12, [2005] O.J. No. 453 (Sup. Ct. J.).
[153] *Legislative Assembly of Ontario Debates*, No. 7 (27 March 1991) at 256 (Howard Hampton), ABOA, Tab 13; *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3384 (Howard Hampton), ABOA, Tab 14; *Legislative Assembly of Ontario Debates*, No. 80 (5 November 1991) at 3386 (Charles Harnick), ABOA, Tab 15.

access to justice to enforce these standards is desirable. As a result, interpreting the *ESA* to permit arbitration is consistent with the *Act*'s purposes and furthers the objectives of both the *ESA* and arbitration legislation. Offering increased procedural routes to enforce the employment standards of the *ESA*, including through arbitration, is consistent with "extend[ing] [the *Act's*] protection to as many employees as possible."[154]

84. The nature of the *ESA* as remedial legislation does not alter the analysis. The principle that remedial legislation should be interpreted broadly does not operate to expand the legislation's jurisdiction to occupy an area already covered by other specific legislation. Given that there is no express ousting of arbitration in the *ESA* and no demonstrated legislative intent to prohibit arbitration, the remedial nature of the *ESA* cannot be relied upon to derogate from the objectives of arbitration legislation.[155]

The Court of Appeal wrongly weighed policy objectives

85. In concluding that the *ESA* demonstrates a legislative intent to oust arbitration, the Court of Appeal erred in considering policy objectives beyond those embodied in the *ESA*.[156] The Court held that the following policy objectives supported its analysis: the burdens of investigation and proof under the Ministry complaint process compared to arbitration, the benefits of class proceedings compared to arbitration, including the benefit of obtaining class-wide resolution of common issues, the benefit of obtaining a public decision through the complaint process compared to a private arbitration decision, and the importance of having an Ontario court determine the nature of Uber's relationship with Drivers.[157] None of these determinations are rooted in legislative choice.

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[154] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 24, 154 D.L.R. (4th) 193, quoting *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, para. 31, 91 D.L.R. (4th) 491.
[155] In the consumer context, see *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, para. 71. In the competition context, see *Murphy v. Amway Canada Corporation*, 2013 FCA 38, para. 64.
[156] CA Reasons, paras. 41-45, 49-50, AR, Vol. I, Tab 3, pp. 40-44; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 47; *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d), paras. 50-52, 21 B.L.R. (3d) 104 (Sup. Ct); Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), p. 223-224, ABOA, Tab 25.
[157] CA Reasons, paras. 41-49, AR, Vol. I, Tab 3, pp. 40-44.

86. Instead, the Court impermissibly chose to prefer these policy objectives over the policy objectives codified in arbitration legislation. The legislature has not made these choices and it was wrong for the Court of Appeal to do so. For example, the Court of Appeal determined that "like the privacy issue raised in *Douez*, the characterization of [the respondent and all Drivers] as independent contractors or employees for the purposes of Ontario law is an issue that ought to be determined by a court in Ontario." However, the privacy right at issue in *Douez* was a quasi-constitutional right, unlike the *ESA* entitlements sought by the respondent.[158]

87. The Court of Appeal incorrectly engaged in policy weighing typically reserved for the legislature with respect to the Court's concern that the benefits of class proceedings are not available in arbitration. The legislature did not exempt proposed class proceedings from the ambit of arbitration legislation. Had the legislature determined that the benefits of class proceedings discussed by the Court of Appeal outweighed the policy objectives of arbitration, it could have expressed such a policy choice in the *Class Proceedings Act*[159]. It chose not to. It was an error of law for the Court of Appeal to instead make such a policy choice in interpreting the *ESA* to oust arbitration.[160]

The Arbitration Agreement is Not Unconscionable

88. The respondent also argues that the Arbitration Agreement should not be enforced because it is unconscionable. Even if this Court determines that, notwithstanding competence-competence, it can consider the respondent's unconscionability challenge, this challenge should fail.

89. The doctrine of unconscionability permits a court to override an agreement only where the party relying on the doctrine can satisfy the court that equity demands such an intervention. The standard for intervention is high.[161] The "mere fact that the party brought to arbitration

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[158] *Douez v. Facebook*, 2017 SCC 33, paras. 58-60.
[159] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
[160] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), pp. 223-224, ABOA, Tab 25; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 47.
[161] *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 36; *Hans v. Volvo Trucks North America Inc.*, 2011 BCSC 1574, para. 84.

might suffer some tactical, juridical or financial disadvantage is not enough."[162] A court is not permitted to select between arbitration and litigation on the basis of which process the court believes to be more fair.[163]

90. The Court of Appeal in this case erred in several respects in considering the respondent's unconscionability challenge, including the following:

(a) the Court was required to defer the challenge to the arbitrator;

(b) the Court failed to consider the entire factual matrix of the agreement;

(c) the Court wrongly applied a lower threshold for unconscionability; and

(d) the Court applied the incorrect test for unconscionability.

91. Endorsing the Court of Appeal's analysis of the respondent's unconscionability challenge would alter well-established principles of contract law and stifle opportunities for Canadians to engage in international commerce. This Court should intervene and restore the motion judge's decision.

The Court of Appeal wrongly extracted the Arbitration Agreement from the licensing agreement

92. The Court of Appeal erred in failing to consider the entire bargain between Uber and the respondent. In assessing whether an agreement is unconscionable, the entire agreement must be evaluated. It is an error of law for a court to extract a specific provision or clause of an agreement to analyze it in isolation from the remainder of the parties' bargain.[164] Such an approach would fail to consider benefits flowing to one party from other elements of the entire agreement and would distort the analysis of the impugned provision. When parties enter into contracts with multiple provisions, there is give and take across the entire agreement, which must be considered to accurately assess the unconscionability of any specific clause.[165]

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[162] *Engineered Transportation and Rigging Co. v. Babcock & Wilcox Industries Ltd.*, 33 O.T.C. 102, para. 14, [1997] O.J. No. 2312 (Ct. J. (Gen. Div.)), ABOA, Tab 1.
[163] *Engineered Transportation and Rigging Co. v. Babcock & Wilcox Industries Ltd.*, 33 O.T.C. 102, para. 14, [1997] O.J. No. 2312 (Ct. J. (Gen. Div.)), ABOA, Tab 1.
[164] *Amberber v. IBM Canada Ltd*., 2018 ONCA 571, para. 50.
[165] *Ginew Housing Authority Inc. v. Zenke Investment Ltd*., 2016 MBQB 199, para 31; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 44

93. The Court failed to consider that the entire agreement between the parties provides the respondent with many benefits, including the following: the right to use the Driver App with no minimum hour requirements or any fixed schedule, the right to take any job or employment opportunity and no exclusivity of service with Uber, and the mutual right to submit disputes to arbitration.[166] The ability to retain discretion over when to use the Driver App and for how long (if at all) is a significant benefit, as is the respondent's ability to earn an income with competitors of Uber's or with any other entity while he uses the Driver App.

The Court of Appeal lowered the threshold for unconscionability

94. In finding that the Arbitration Agreement was unconscionable, the Court of Appeal wrongly held that the "arbitration clause here is not, strictly speaking, simply an arbitration provision" and equated the clause to a forum selection clause. This was wrong in law and led the Court to incorrectly lower the threshold for unconscionability. The court's jurisdiction to refuse to stay an action where the parties have agreed to arbitrate is much narrower than its discretionary jurisdiction to set aside a forum selection clause.[167]

95. The Court of Appeal distinguished this Arbitration Agreement from "…the type involved in normal commercial contracts where the parties are of relatively equal sophistication and strength."[168] However, the law does not recognize a lower threshold for unconscionability or abusiveness in contracts of adhesion. In *Seidel*, this Court held that contracts of adhesion are to be treated the same as other contracts for the purpose of assessing the validity of an arbitration clause.[169] In *Government of The Dominican Republic c. Geci Española*, the Quebec Superior Court similarly concluded that "…an arbitration clause is not abusive for the sole reason that it is included in a contract of adhesion."[170] This Court confirmed this principle in *Wellman*.[171]

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[166] See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", ss. 2.4, 13.1, AR, Vol. II, Tab 9B, pp. 36-37, 45.
[167] MJ Reasons, paras. 75-79, AR, Vol. I, Tab 1, pp. 13-14.
[168] CA Reasons, para. 70, AR, Vol. I, Tab 3, p. 52.
[169] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para. 2.
[170] *Government of The Dominican Republic c. Geci Española*, 2017 QCCS 2619, paras. 48-49. See also *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, para. 15.
[171] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, para. 46.

96. Nor is there a lower threshold of unconscionability for electronic contracts. In *Rudder v. Microsoft*, the Ontario Superior Court emphasized the importance of applying the same "sanctity" to electronic agreements as to agreements in writing, so as to avoid "chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium."[172]

97. Finally, applying the same threshold of unconscionability for all contracts, including electronic contracts of adhesion, is consistent with the principle of "technological neutrality" developed in copyright law.[173] This principle has been developed to hold that laws must be applied consistently regardless of the technological circumstances and ought to have application to contract law to avoid impeding technological progress in a modern electronic economy.

The Court of Appeal applied the wrong test for unconscionability

98. The well-established elements of unconscionability in Ontario are: (a) a grossly unfair and improvident transaction; (b) a victim's lack of independent legal advice or other suitable advice; (c) an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (d) the other party's knowingly taking advantage of this vulnerability.[174] This test is also applied by courts in several other provinces across Canada.[175]

99. The Court of Appeal acknowledged that a different test – requiring only unequal bargaining power and unfairness – has been applied in British Columbia and by Justice Abella in her concurring decision in *Douez v. Facebook*. The Court determined that it need not resolve the question of which test ought to govern because, it said, both tests were met.[176] However, despite

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[172] *Rudder v. Microsoft Corp.* (1999), 47 C.C.L.T. (2d) 168, para. 16, 106 O.T.C. 381 (Ont. Sup. Ct. J.).
[173] See e.g. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, paras. 2, 5.
[174] *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P.*, 2018 ONCA 98, para. 15, affirming test from *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 38.
[175] See e.g. *Cain v. Clarica Life Insurance Company*, 2005 ABCA 437, para. 32; *Mackay v. Cesar*, 2013 SKQB 380, para. 57; *Ginew Housing Authority Inc. v. Zenke Investment Ltd. et al.*, 2016 MBQB 199, para. 29.
[176] CA Reasons, para. 62, AR, Vol. I, Tab 3, p. 48.

this statement, the Court of Appeal only applied the B.C. two-part test: it required only an inequality of bargaining power and unfairness. This was an error.

100. A fundamental difference between the governing four-part test and the two-part test applied in British Columbia is that the four-part test requires as an element that the stronger party knowingly takes advantage of the weaker party's vulnerability. This element requires an examination of the relationship between the parties, the circumstances in which the impugned contractual terms operate, and the actual conduct of the party who secured an advantage.[177]

101. In this case, the four-part test was not applied, because the Court concluded that the fourth part of the test (that the stronger party knowingly took advantage of the weaker party's vulnerability) was met through inference. However, a party asserting unconscionability "must establish each element of the four-part test to be successful."[178] The fourth part of the test could not be met on the evidentiary record of this motion.

102. Uber submits that the four-part test ought to apply Canada-wide: it strikes the appropriate balance between party autonomy and equity. "[Unconscionability's] equitable jurisdiction is focused on protection of the vulnerable from the 'unconscientious' use of a power imbalance."[179] The requirement that the stronger party knowingly take advantage of the weaker's vulnerability is important because unconscionability "has to be based on some degree of fault or responsibility on the part of the person from whom relief is being sought."[180] Removing this element and reducing the test to unequal bargaining power and unfairness substantially broadens the scope of the unconscionability doctrine. Without requiring the fault or responsibility of the stronger party, the two-part test permits courts to invalidate retroactively contracts which in hindsight prove to be improvident or foolish for a less powerful party.[181] "Instead, the test is based on what was

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[177] *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053, para 32; *Lydian Properties Inc. v. Chambers*, 2007 ABQB 541, para. 68; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, para. 51.
[178] *Cope v. Hill*, 2007 ABCA 32, para. 21.
[179] *Downer v. Pitcher*, 2017 NLCA 13, para. 46.
[180] *Downer v. Pitcher*, 2017 NLCA 13, para. 46.
[181] *Downer v. Pitcher*, 2017 NLCA 13, para. 24.

known at the time the bargain was made."[182] The two-part approach undermines transactional security and the foundational principle of freedom of contract.

103. ***There is no evidence of the respondent's vulnerability***. Pursuant to the four-part test, a finding of unconscionability depends not only on an inequality of bargaining power, but on an inequality or imbalance in bargaining power *caused by* the victim's "ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability."[183] For example, in a case involving a taxi driver, the Court of Appeal of Newfoundland and Labrador specifically rejected the notion that the plaintiff, "a self-employed woman earning a living by driving a taxicab, was so unsophisticated that she was incapable of looking out for her own interests."[184] Further, even if this were an employment relationship, "the mere fact that an employer may be in a position of greater bargaining power is not sufficient."[185] The respondent and the Court of Appeal failed to ground the respondent's unequal bargaining power in one or more of the enumerated vulnerabilities. This approach runs contrary to the use of unconscionability to address "unusual bargaining disabilities or disadvantages", and instead transforms the doctrine into "a more sweeping instrument for the striking down of unfair agreements" than that "envisaged for the doctrine at common law."[186]

104. ***Uber did not knowingly take advantage of the respondent***. As noted above, the Court of Appeal concluded that Uber knowingly took advantage of the respondent because the first three elements of the unconscionability test – inequality of bargaining power, improvident or unfair bargain, and lack of independent legal advice – were met. The Court made no separate finding about whether Uber knowingly took advantage of any vulnerability of the respondent.

105. Upon a proper review of the evidentiary record on this motion, it cannot be concluded that Uber "knowingly took advantage" of any vulnerability of the respondent. There is no

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[182] *Cain v. Clarica Life Insurance Company*, 2005 ABCA 437, para. 35.
[183] *Titus v. William F. Cooke Enterprises Inc*., 2007 ONCA 573, para. 38.
[184] *Downer v. Pitcher*, 2017 NLCA 13, para. 64.
[185] *Cicalese v. Saipem Canada Inc.*, 2018 ABQB 835, para. 172.
[186] John McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), p. 432, ABOA, Tab 21.

evidence in the record about the key issues that would underpin a finding that Uber took advantage of any vulnerability of the respondent's, including:

(a) that Uber engaged in pressure, threats, coercion or even persuasion to get the respondent or any driver to accept its terms[187];

(b) that Uber preyed upon or exploited the respondent[188];

(c) that the respondent left employment to start using the App;

(d) that the respondent did not understand the agreement he signed[189]; or

(e) why the respondent downloaded the App[190], other than that he was motivated to do so as a result of a referral code that he received from his mother.[191]

106. The Court of Appeal stated incorrectly that Uber admitted to favouring itself. In fact, Uber stated that it selected arbitration to enable the company to apply a uniform approach to the resolution of Driver disputes.[192] Uber's ability to ensure consistency and predictability in the administration of a large number of contracts benefits the Drivers as well as Uber. The Court of Appeal rejected Uber's argument that it chose arbitration to provide consistency of results as "unpersuasive", despite the fact that there was no evidence to the contrary.[193] There was no factual foundation for the Court of Appeal's conclusion that Uber's evidence on this issue should not be accepted.

107. In any event, the Court of Appeal wrongly focused on whether Uber chose the Arbitration Agreement to favour itself. As a starting point, favouring oneself is not the same thing as taking advantage of another party. Selecting one's home jurisdiction as the governing

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[187] See in contrast, *Rubin v. Home Depot Canada Inc.*, 2012 ONSC 3053, para. 32 and *Richmond v. James*, [2008] O.J. No. 5616, para. 43, 69 B.L.R. (4th) 79, ABOA, Tab 6.
[188] See in contrast, *Lydian Properties Inc. v. Chambers*, 2007 ABQB 541, para. 68.
[189] See in contrast, *Nery v. Nery*, 2012 ABQB 484, para. 37.
[190] *Cain v. Clarica Life Insurance Company*, 2005 ABCA 437, para. 72.
[191] Heller Cross-Examination, qq. 130-133, AR, Vol. III, Tab 13, pp. 128-129.
[192] CA Reasons, para. 68, AR, Vol. I, Tab 3, pp. 51-52.
[193] CA Reasons, para. 68, AR, Vol. I, Tab 3, pp. 51-52.

law is not unconscionable unless the party making the selection knows that that law would significantly disadvantage the other party.[194] There is no evidence of this here.

108. ***The Arbitration Agreement is not a substantially improvident or unfair bargain***. The first element of the four-part test – a grossly unfair and improvident transaction – is a "high threshold" for a party asserting a contract is unconscionable to meet.[195]

109. In concluding that the Arbitration Agreement was a grossly unfair and improvident bargain, the Court of Appeal relied on issues such as the expense of the arbitration, even though those issues are irrelevant to determining whether an arbitration agreement is null and void, inoperative, or incapable of being performed.[196] In addition to considering issues it should not have considered, the Court of Appeal reached conclusions about the size of the respondent's claim, the likely size of disputes of other Drivers, the fees associated with commencing an arbitration, the location of the arbitration, and the laws of the Netherlands without any evidentiary basis.[197]

110. There is also no support for the conclusion that the costs of arbitration render the Arbitration Agreement unconscionable. The respondent did not put in any evidence about the relative cost of arbitration under the ICC as compared to proceeding with a class action (or an individual claim) in Ontario. In any event, in none of *Seidel*[198], *Dell Computer Corp. v. Union des consommateurs*[199] or *Rogers Wireless Inc. v. Muroff*[200] did this Court find that the arbitration of nominal consumer claims is unconscionable.

111. Further, there is no evidence that the costs involved would prevent a Driver from arbitrating a complaint. In *Kanitz v. Rogers Cable Inc.*, the Ontario Superior Court rejected the

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[194] *Cain v. Clarica Life Insurance Company*, 2005 ABCA 437, para. 72; *Nery v. Nery*, 2012 ABQB 484, para. 37.
[195] *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 201, para. 8.
[196] *Prince George (City of) v. A.L. Sims & Sons Ltd.*, [1995] 9 W.W.R. 503 (B.C.C.A), para. 36, citing *Kaverit Steel & Crane Ltd. v. Kone Corp.*, 1992 ABCA 7; *Morrison v. Ericsson Canada Inc.*, 2016 ONSC 3908, para. 23.
[197] CA Reasons, paras. 58-59, 68, AR, Vol. I, Tab 3, pp. 46-47, 50-52.
[198] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.
[199] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34.
[200] *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35.

plaintiff's claim that no one would pursue arbitration for the amount involved ($240) on the grounds that there was "a complete absence of any evidence to support the contention that no customer would arbitrate such claims because of the costs involved."[201]

112. Finally, the Arbitration Agreement does not require the claimant to arbitrate his or her claim in Uber's home jurisdiction. The Arbitration Agreement stipulates that the "place" of arbitration be Amsterdam.[202] "In practice, parties often agree to arbitration in State X, but the arbitral proceedings are physically conducted in other places for reasons of convenience…"[203] Both the UNCITRAL Model Law and the 2017 ICC Rules confirm that neither the location of the seat nor the law applicable to the arbitral proceedings is affected by the location of the hearings.[204] The motion judge correctly acknowledged that Uber has already agreed to have the physical place of the arbitration be Ontario.[205]

PART IV – COSTS

113. Uber submits that costs should follow the event, and if the appeal is successful, seeks its costs in this Court and in the courts below.

PART V – ORDER SOUGHT

114. Uber requests an order allowing this appeal, setting aside the judgment of the Court of Appeal for Ontario, and granting Uber its costs in this Court and in the courts below.

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[201] *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d), para. 42, 21 B.L.R. (3d) 104 (Sup. Ct).
[202] van der Woude Affidavit, paras. 50-52, AR, Tab 9, pp. 14-15. See e.g. van der Woude Affidavit, 2016 Rasier Agreement, Exhibit "B", ss. 2.4, 13.1, AR, Vol. II, Tab 9B, pp. 36-37, 45.
[203] Gary B. Born, *International Commercial Arbitration*, 2nd ed. (New York: Kluwer Law International, 2014), p. 1596, ABOA, Tab 7.
[204] *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Art. 20(2); International Chamber of Commerce, "Rules of Arbitration" (entered into force 1 March 2017), Art. 18(2), ABOA, Tab 12**;** Gary B. Born, *International Commercial Arbitration*, 2nd ed. (New York: Kluwer Law International, 2014), p. 1596, ABOA, Tab 7.
[205] MJ Reasons, fn. 39, AR, Vol. I, Tab 1, p. 12.

PART VI – SUBMISSIONS ON CONFIDENTIALITY

115. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

August 19, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Linda Plumpton
Lisa Talbot
Sarah Whitmore
Davida Shiff

Counsel for the Appellants

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