SCC File Number: 38534

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

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)

and

YOUNG CANADIAN ARBITRATION PRACTITIONERS, ARBITRATION PLACE, DON VALLEY COMMUNITY LEGAL SERVICES, CANADIAN FEDERATION OF INDEPENDENT BUSINESS, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, INCOME SECURITY ADVOCACY CENTRE, PARKDALE COMMUNITY LEGAL SERVICES, ATTORNEY GENERAL OF ONTARIO, UNITED FOOD AND COMMERICAL WORKERS CANADA, WORKERS' HEALTH AND SAFETY LEGAL CLINIC, MONTREAL ECONOMIC INSTITUTE, CANADIAN AMERICAN BAR ASSOCIATION, CHARTERED INSTITUTE OF ARBITRATORS (CANADA) INC., TORONTO COMMERCIAL ARBITRATION SOCIETY, CANADIAN CHAMBER OF COMMERCE, INTERNATIONAL CHAMBER OF COMMERCE, CONSUMERS COUNCIL OF CANADA, COMMUNITY LEGAL ASSISTANCE SOCIETY, and ADR CHAMBERS INC.

Interveners

FACTUM OF THE RESPONDENT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

WRIGHT HENRY LLP
602-200 Wellington Street West
Toronto, ON M5V 3C7

Michael D. Wright, LSO# 32522T
Danielle E. Stampley, LSO# 69487C
Tel: 416-306-8280
Fax: 416-964-8281
Email: mwright@wrighthenry.ca
dstampley@wrighthenry.ca

SAMFIRU TUMARKIN LLP
350 Bay Street, 10th Floor
Toronto, ON M5H 2S6

Lior Samfiru, LSO# 48609U
Stephen Gillman, LSO# 680940
Tel: 416-861-9065
Fax: 416-361-0993
Email: lior.samfiru@stlawyers.ca
stephen.gillman@stlawyers.ca

Counsel for the Respondent,
David Heller

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Agent for Counsel for the Respondent,
David Heller

COPIES TO:

TORYS LLP
Barristers and Solicitors
79 Wellington Street West, Suite 3000
Box 270, TD South Tower
Toronto, ON M5K 1N2

Linda M. Plumpton, LSO# 38400A
Tel: 416-865-8193
Email: lplumpton@torys.com

Lisa Talbot, LSO# 44672I
Tel: 416-865-8222
Email: ltalbot@torys.com

Sarah Whitmore, LSO# 61104E
Tel: 416-865-7315
Email: swhitmore@torys.com

Counsel for the Appellants,
Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V.

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for Counsel for the Appellants,
Uber Technologies Inc., Uber Canada Inc., Uber B.V. and Rasier Operations B.V.

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Eric Morgan
Tel: 416-862-5871
Email: emorgan@osler.com

PERLEY-ROBERTSON, HILL & MCDOUGALL LLP
1400-340 Albert Street
Ottawa, ON K1R 0A5

John Siwiec
Tel: 613-566-2814
Email: jsiwiec@perlaw.ca

Counsel for the Intervener,
Young Canadian Arbitration Practitioners

OSLER, HOSKIN & HARCOURT LLP
Suite 1900
340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1009
Fax: 613-235-2867
Email: glangen@osler.com

Agent for Counsel for the Intervener,
Young Canadian Arbitration Practitioners

BORDEN LADNER GERVAIS LLP
1200-200 Burrard Street
Waterfront Centre
P.O. Box 48600
Vancouver, BC V7X 1T2

Robert Deane
Tel: 604-640-4250
Email: rdeane@blg.com

Craig Chaisson
Tel: 604-640-4221
Email: cchaison@blg.com

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Suite 3400
Toronto, ON M5H 4E3

Hugh Meighen
Tel: 416-367-6324
Email: hmeighen@blg.com

Counsel for the Intervener,
Arbitration Place

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: 613-369-4795
Fax: 613-230-8842
Email: kperron@blg.com

Agent for Counsel for the Intervener,
Arbitration Place

MONKHOUSE LAW
220 Bay Street
Suite 900
Toronto, ON M5J 2W4

Andrew Monkhouse
Alexandra Monkhouse
Tel: 416-907-9249
Email: andrew@monkhouselaw.com

Counsel for the Intervener,
Don Valley Community Legal Services

SUPREME LAW GROUP
900-275 Slater Street
Ottawa, ON
K1P 5H9

Moira S. Dillon
Tel: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for Counsel for the Intervener,
Don Valley Community Legal Services

CANADIAN FEDERATION OF INDEPENDENT BUSINESS (CFIB)
National Affairs and Partnerships
1202-99 Metcalfe Street
Ottawa, ON K1P 6L7

Anthony Daimsis
Tel: 613-562-5800 Ext. 3211
Email: adaimsis@uottawa.ca

Counsel for the Intervener,
Canadian Federation of Independent Business

UNIVERSITE D'OTTAWA
Common Law Section
57 Louis Pasteur St.
Ottawa, ON K1N 6N5

David Fewer
Tel: 613-562-5800 Ext. 2558
Fax: 613-562-5417
Email: david.fewer@uottawa.ca

Agent for Counsel for the Intervener,
Canadian Federation of Independent Business

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC
University of Ottawa, Faculty of Law
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Marina Pavolovic
Tel: 613-562-5800 Ext. 2675
Email: marina.pavlovic@uottawa.ca

Cynthia Khoo
Tel: 437-886-5854
Email: ckhoo@cynthiakoo.ca

Counsel for the Intervener,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

UNIVERSITE D'OTTAWA
Common Law Section
57 Louis Pasteur St.
Ottawa, ON
K1N 6N5

David Fewer
Tel: 613-562-5800 Ext. 2558
Fax: 613-562-5417
Email: david.fewer@uottawa.ca

Agent for Counsel for the Intervener,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

INCOME SECURITY ADVOCACY CENTRE
1500-55 University Ave.
Toronto, ON M5J 2H7

Nabila Qureshi
Tel: 416-597-5820 Ext. 5156
Email: qureshn@lao.on.ca

Karin Baqi
Tel: 416-597-5820 Ext. 5157
Email: baqikr@lao.on.ca

Counsel for the Interveners,
Income Security Advocacy Centre, and
Parkdale Community Legal Services

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Agent for Counsel for the Interveners,
Income Security Advocacy Centre, and Parkdale Community Legal Services

ATTORNEY GENERAL OF ONTARIO
720 Bay Street
8th Floor
Toronto, ON M7A 2S9

Christopher P. Thompson
Tel: 416-605-3857
Email: Christopher.P.Thompson@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

JURISTES POWER
130 rue Albert
bureau 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@juristespower.ca

Agent for Counsel for the Intervener,
Attorney General of Ontario

GOLDBLATT PARTNERS LLP
20 Dundas Street West
Suite 1039
Toronto, ON M5G 2C2

Steven Barrett
Tel: 416-977-6070
Email: sbarrett@goldblattpartners.com

Counsel for the Intervener,
United Food and Commercial Workers Canada

GOLDBLATT PARTNERS LLP
500-30 Mecalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Agent for Counsel for the Intervener,
United Food and Commercial Workers Canada

WORKERS' HEALTH AND SAFETY LEGAL CLINIC
2000-180 Dundas Street West, Box 4
Toronto, ON M5G 1Z8

Kevin Simms
Tel: 416-971-8832 Ext. 203
Email: simmsk@lao.on.ca

Counsel for the Intervener,
Workers' Health and Safety Legal Clinic

SUPREME ADVOCACY LLP
130-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-Francis Major
Tel: 613-695-8855 Ext. 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener,
Workers' Health and Safety Legal Clinic

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place, Suite 6200
Toronto, ON M5X 1B8

Robert Carson
Tel: 416-862-4235
Email: rcarson@osler.com

Counsel for the Intervener,
Montreal Economic Institute

OSLER, HOSKIN & HARCOURT LLP
Suite 1900
340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Tel: 613-787-1009
Fax: 613-235-2867
Email: glangen@osler.com

Agent for Counsel for the Intervener,
Montreal Economic Institute

CAZA SAIKALEY LLP
350-220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins
James Plotkin
Tel: 613-564-8269
Fax: 613-565-2087
Email: atomkinds@plaideurs.ca
jplotkin@plaideurs.ca

Counsel for the Intervener,
Canadian American Bar Association

BLAKE, CASSELS & GRAYDON LLP
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Joseph C. McArthur
Rahat Godil
Laura Cundari
Justin Manoryk
Andrew Kavanagh
Tel: 604-631-3300
Fax: 604-631-3309
Email: joe.mcarthur@blakes.com

Counsel for the Interveners,
Chartered Institute of Arbitrators (Canada) Inc., and Toronto Commercial Arbitration Society

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Interveners,
Chartered Institute of Arbitrators (Canada) Inc., and Toronto Commercial Arbitration Society

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
37th Floor
Toronto, ON M5V 3J7

Matthew Milne-Smith
Chantelle Cseh
Tel: 416-863-0900
Fax: 416-863-0871
Email: mmilne-smith@dwpv.com

Counsel for the Intervener,
Canadian Chamber of Commerce

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: 613-786-0211
Fax: 613-788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Agent for Counsel for the Intervener,
Canadian Chamber of Commerce

NORTON ROSE FULBRIGHT CANADA LLP
1, Place Ville Marie
Bureau 2500
Montréal, QC H3B 1R1

Pierre Bienvenu
Andres C. Garin
Alison FitzGerald
Tel: 514-847-4747
Fax: 514-286-5474
Email:
pierre.bienvenu@nortonrosefulbright.com

Counsel for the Intervener,
International Chamber of Commerce

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Agent for Counsel for the Intervener,
International Chamber of Commerce

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto, ON M5G 1Z8

Mohsen Seddigh
Daniel Hamson
Tel: 416-572-7320
Fax: 416-977-0717
Email: mseddigh@sotosllp.com

Counsel for the Intervener,
Consumers Council of Canada

ALLEN/MCMILLAN LITIGATION COUNSEL
1550-1185 West Georgia Street
Vancouver, BC V6E 4E6

Greg J. Allen
Wes McMillan
Tel: 604-282-3982
Fax: 604-628-3832
Email: greg@amlc.ca

Counsel for the Intervener,
Community Legal Assistance Society

GIB VAN ERT LAW
148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
Email: gib@gibvanertlaw.com

Agent for Counsel for the Intervener,
Community Legal Assistance Society

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M4X 1A4

Andrew D. Little
Ranjan K. Agarwal
Charlotte Harman
Tel: 416-863-1200
Email: littlea@bennettjones.com
agarwalr@bennettjones.com
manc@bennettjones.com

Counsel for the Intervener,
ADR Chambers Inc.

BENNETT JONES LLP
World Exchange Plaza
1900-45 O'Connor Street
Ottawa, ON K1P 1A4

Mark Jewett
Tel: 613-683-2328
Fax: 613-683-2323
Email: jewettm@bennettjones.com

Agent for Counsel for the Intervener,
ADR Chambers Inc.

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Respondent, David Heller, seeks to represent Ontario workers in an Ontario class action who have picked up passengers or delivered food pursuant to a series of service agreements with the Appellants (collectively "Uber"). Delivering food 40-50 hours a week for Uber, Mr. Heller earns between $400 and $600 a week before taxes and expenses. The Uber agreements describe Mr. Heller and the other Uber delivery personnel and drivers (collectively "Uber drivers") as independent contractors. However, given the extent of Uber's control over his work, Mr. Heller seeks to challenge that classification under the Ontario *Employment Standards Act*[1] (the "*ESA*"), seeking compensation for Uber's failure to pay him and others minimum wage, overtime, vacation pay, and other minimum amounts owed to employees under the act.

2. Uber contends that the Ontario courts cannot hear this dispute because an arbitration agreement in the service agreements requires Mr. Heller and other Uber drivers to give up their right to determine their status under the *ESA* in Ontario and, instead, to arbitrate their dispute in the Netherlands under the law of the Netherlands and rules that require a driver to pay $14,500 USD in "up front administrative/filing-related costs to participate"[2] (the "Arbitration Agreement"). The Ontario Court of Appeal disagreed, holding that the Arbitration Agreement was unenforceable because it violates the *ESA* and is unconscionable.

3. This Honourable Court should affirm the Court of Appeal's decision for three reasons. First, the Court of Appeal's holdings did not violate the competence-competence principle. *Seidel v Telus Communications Inc* ("*Seidel*")[3] and *Telus Communications Inc v Wellman* ("*Wellman*")[4] have delineated where a court's discretion ends and competence-competence begins. Where, like here, an Ontario court can determine an arbitration clause's validity by examining an Ontario statutory scheme to discern a legislative intent to prohibit arbitration of claims as a matter of law, that determination does not violate competence-competence. Likewise, where unconscionability can be determined from a superficial review of a documentary record, that determination does not violate competence-competence.

---

[1] *Employment Standards Act, 2000*, SO 2000, c 41 [***ESA***].
[2] *Heller v Uber Technologies Inc*, 2019 ONCA 1 at para 15 [***ONCA Reasons***].
[3] 2011 SCC 15 at para 8 [***Seidel***].
[4] 2019 SCC 19 [***Wellman***].

4. Second, the Court of Appeal correctly determined that mandatory arbitration is inconsistent with the *ESA*'s statutory enforcement mechanisms, which cannot be waived. As a result, the Arbitration Agreement is invalid and unenforceable as to *ESA* claims.

5. Third, the Court of Appeal applied the correct unconscionability analysis and determined that the facts available based on a superficial review of the record establish that the Arbitration Agreement unconscionably prevents Uber drivers from enforcing their rights. In reaching this holding, the court reasonably found that the Arbitration Agreement imposes costs that are out of proportion with Mr. Heller's economic means and the size of his potential claims and, moreover, requires adjudication in the Netherlands, which he has no connection to, and under the law of the Netherlands, of which he has no knowledge.

6. In a situation where Uber has reached out into Ontario to benefit from its workforce and economy, the Court of Appeal's decision reflects both the *ESA*'s remedial purpose and the legislature's intent to ensure Ontario workers, working in Ontario, have access to justice in Ontario. In other words, the court affirmed that mandatory statutory protections that cannot be meaningfully enforced are illusory. The Court of Appeal's decision likewise recognizes that contracts of adhesion that create nearly insurmountable barriers to access to justice, nominally in service of that same goal, are more likely than not intentionally drafted to impede access. Where low-wage workers are concerned—whatever their classification under Ontario employment law—Uber should not be permitted to operate in Ontario with impunity. If this Arbitration Agreement is enforced, it will.

B. Facts

7. Fundamentally, though Uber chooses to rely primarily on the record rather than the facts found by the Ontario courts and fails to mention the quantum of the fees required to bring an arbitration under the International Chamber of Commerce ("ICC") Arbitration Rules imposed under the Arbitration Agreement, the parties do not disagree on the material facts. They disagree on the import of these facts.

1. Background

8. Mr. Heller is an Ontario resident who began delivering food for UberEATS, in 2016. He is 36 years old and has a high school education. As an UberEATS delivery person, Mr. Heller earns about $400-600 a week before paying taxes and expenses using his own vehicle and working

40-50 hours a week (about $21,000-31,000 annually).[5] At this rate, Mr. Heller earns on average between $10 and $12 per hour. The minimum wage in Ontario is $14 per hour.[6]

9. Mr. Heller proposes to bring this action on behalf of Ontario Uber drivers who have worked for Uber since 2012 (the "Class" or "Class Members"). He alleges that Uber has violated the *ESA* by misclassifying him and other similarly situated Uber drivers in Ontario. Mr. Heller seeks a declaration that he and the Class Members are employees of Uber entitled to minimum wage, overtime pay, vacation pay and other minimum entitlements guaranteed under the *ESA*. He also seeks damages for Uber's breach thereof. Further, Mr. Heller seeks a declaration that Uber's Arbitration Agreement is void and unenforceable.[7]

10. Uber has divided its corporate operations into numerous subsidiaries, including Uber Canada Inc., which is incorporated in Canada and provides marketing and administrative support to drivers and customers, and Uber B.V., Rasier Operations B.V. and Uber Portier B.V., which hold Uber's intellectual property and are incorporated under the laws of the Netherlands.[8]

11. Uber has developed numerous mobile phone applications ("Apps"), which it operates around the world. The Uber Apps relevant to this action connect users seeking transportation or food delivery with nearby drivers.[9] Uber sets and collects the fares and fees users must pay and charges a fee per transaction.[10] Uber determines the maximum fares and fees drivers receive for their work according to a base fare amount plus distance (based on GPS data from the App), plus applicable time amounts. Uber collects the payments, provides receipts to customers, and remits payments periodically to drivers.[11] Downloading the App is free, but if the drivers do not pick up riders and make deliveries, Uber does not make money.

---

[5] *ONCA Reasons* at para 2; *Heller v Uber Technologies Inc*, 2018 ONSC 718 at paras 26-29 [***ONSC Reasons***].
[6] *ESA*, s 23.1(1).
[7] Statement of Claim, paras 1, 8, **Appellants' Record** [**AR]**, Tab 6, pp 62-66.
[8] *ONSC Reasons* at paras 7-11, 15, 23.
[9] *ONSC Reasons* at paras 9-10, 13-14; *ONCA Reasons* at paras 5-6.
[10] *ONSC Reasons* at paras 13-14; *ONCA Reasons* at para 9.
[11] *ONSC Reasons* at paras 13-14; *ONCA Reasons* at para 9; *see also* Affidavit of R van der Woude, Ex B, ss 4.1, 4.6, **AR**, Vol II, Tab 9, pp 39-40; Transcript of Cross-Examination of D Heller, Exs 4, 7, **AR**, Vol III, Tab 13, pp 169-74, 183.

2. Uber's Relationship with Uber Drivers

12. Uber requires drivers to create an online account to access the Apps. After they download the requisite App, Uber requires drivers in Ontario (performing services by car) to provide copies of the following: (i) a valid driver's license; (ii) valid vehicle registration; (iii) proof of eligibility to work in Canada; (iv) valid insurance; and (v) an Ontario Safety Standards Certificate.[12]

13. Uber also requires prospective drivers to undergo criminal and driving-history screening through a third-party agency. After reviewing their documentation and screening results, Uber activates the drivers' account.[13] The first time Uber drivers log into the Uber App on their phone, they must agree to a 14- to 15-page service agreement[14] from their phone's screen. They accept by clicking "I agree" and reviewing language confirming they have reviewed the "documents".[15]

14. The agreements include the following Arbitration Agreement, which contains a forum selection clause:

> ***Governing Law; Arbitration***. Except as otherwise set forth in this Agreement, ***this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws***. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. ***The place of arbitration shall be Amsterdam, The Netherlands***. . .[16] (emphasis added).

15. Under the ICC Mediation Rules the Arbitration Agreement imposes, Uber drivers like Mr. Heller must pay a $2,000 USD non-refundable filing fee to initiate mediation. For disputes valued under $200,000 USD, drivers must pay an additional administrative fee, which may be as much as

---

[12] *ONSC Reasons* at para 18; *ONCA Reasons* at para 7.
[13] R van der Woude Answers to Undertakings at Q 190, **AR**, Vol III, Tab 12, pp 93-94; *ONCA Reasons* at para 7.
[14] *ONSC Reasons* at para 19; *ONCA Reasons* at para 8.
[15] *ONSC Reasons* at para 19; *ONCA Reasons* at para 8.
[16] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11.

$5,000 USD. These fees do not cover the mediator's fee or Mr. Heller's legal fees or travel expenses related to the mediation.[17]

16. If the parties are unable to resolve their dispute within 60 days, they must proceed to arbitration.[18] Any party wishing to join the arbitration, including the driver who initiated it, must pay an additional $5,000 USD filing fee.[19] The ICC Arbitration Rules also require the parties to pay an advance on the arbitrator's fees and expenses.[20] These payments must be in cash, unless a party's share is greater than $500,000 USD.[21] A claimant like Mr. Heller would have to advance at least $7,500 USD in respect of these fees,[22] which do not cover Mr. Heller's legal fees or personal expenses related to the arbitration.[23]

17. In total, the up-front cost for a driver like Mr. Heller to participate in the Netherlands-based mediation-arbitration process in the Uber Arbitration Agreement is $14,500 USD.[24] As an Uber driver, Mr. Heller earns about $20,800-31,200 CAD a year, before taxes and expenses.[25]

3. The Motion Judge's Decision

18. On October 13, 2017, Uber moved in the Ontario Superior Court of Justice to stay the proposed class action in favour of arbitration. On January 30, 2018, Perell J granted a stay.[26]

4. The Ontario Court of Appeal Decision

19. The Ontario Court of Appeal, in a unanimous decision dated January 2, 2019, concluded that the motion judge erred in granting the stay because the Arbitration Agreement is invalid on

---

[17] *ONSC Reasons* at para 25; *ONCA Reasons* at para 12. *See also* ICC Mediation Rules, Art 6 and Appx, Arts 1,2, **Respondent's Book of Authorities** [**RBOA**], Tab 25.
[18] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11.
[19] *ONSC Reasons* at para 25; *ONCA Reasons* at paras 12-13. *See also* ICC Arbitration Rules, Arts 4(4)(b) and 7 and Appx III, Art 1, **RBOA**, Tab 26
[20] *ONCA Reasons* at para 14. *See also* ICC Arbitration Rules, Art 37 and Appx III, Art 1, **RBOA**, Tab 26.
[21] *ONCA Reasons* at para 14. *See also* ICC Arbitration Rules, Appx III, Art 1(5), **RBOA**, Tab 26.
[22] *ONSC Reasons* at para 25; *ONCA Reasons* at para 14. *See also* ICC Arbitration Rules, Art 38 and Appx III, Art 3 (scales of expenses and fees), **RBOA**, Tab 26.
[23] *ONSC Reasons* at para 25; *ONCA Reasons* at para 12.
[24] *ONCA Reasons* at para 15; *ONSC Reasons* at para 25.
[25] *ONCA Reasons* at para 15.
[26] *ONSC Reasons* at para 4.

two grounds: (i) as applied to claims under the *ESA*, it constitutes an illegal contracting out of the *ESA*; and (ii) it is unconscionable.[27]

20. First, the Court of Appeal held that, though it had "serious reservations" about the motion judge's finding that Mr. Heller and Uber are in a "commercial" relationship for the purposes of the *International Commercial Arbitration Act* ("*ICAA*"),[28] its analysis would be the same under the *ICAA* and the Ontario *Arbitration Act*.[29]

21. Second, following *Seidel*,[30] the Court of Appeal presumed Mr. Heller's claim was "capable of proof" for the purpose of the motion and asked: "if the appellant (and those like him) is an employee of Uber, does the Arbitration Clause constitute a prohibited contracting out of the *ESA*?".[31] The Court of Appeal answered, "yes". The court reviewed the *ESA*, particularly s 5, which prohibits contracting out of any employment standard under the act.[32] The Court of Appeal then considered the *ESA*'s plain language and purpose, and determined that the Arbitration Agreement is invalid as to claims under the *ESA* because it impermissibly contracts out of the act.[33] Accordingly, the court, relying on s 7(2) of the *Arbitration Act*, denied the stay.[34]

22. Finally, the Court of Appeal held that the Arbitration Agreement is unconscionable.[35] Applying the four-part test from *Titus v William F. Cooke Enterprises Inc* ("*Titus*"),[36] the court concluded that Uber drafted the Arbitration Agreement to "take advantage of its drivers" and that it did so "knowingly and intentionally".[37]

---

[27] *ONCA Reasons* at paras 41-42, 73.
[28] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 [***ICAA***].
[29] *ONCA Reasons* at para 21 (citing *Arbitration Act*, SO 1991, c 17 [***Arbitration Act***].
[30] *Seidel* at para 8.
[31] *ONCA Reasons* at para 28.
[32] *ONCA Reasons* at paras 29-32.
[33] *ONCA Reasons* at paras 32-43.
[34] *ONCA Reasons* at para 51.
[35] *ONCA Reasons* at para 52.
[36] *Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573 at paras 60, 68 [***Titus***]; *ONCA Reasons* at paras 60, 68.
[37] *ONCA Reasons* at paras 68-69.

PART II: RESPONDENT'S POSITION ON APPELLANTS' QUESTIONS

23. Contrary to Uber's submissions, Mr. Heller submits that the proposed class proceeding should not be stayed because:

(a) according to this Court's decisions in *Seidel* and *Wellman*, the *Arbitration Act* (and likewise the *ICAA*) allow courts to deny a stay without violating competence-competence where an arbitration agreement is invalid or otherwise unenforceable;

(b) the Court of Appeal correctly concluded that the Arbitration Agreement is invalid as a matter of law because it impermissibly precludes Ontario workers from seeking the *ESA*'s protections; and

(c) the Court of Appeal applied the correct test from *Titus* and did not commit palpable and overriding error in holding that the Arbitration Agreement is unconscionable.

PART III: STATEMENT OF ARGUMENT

A. The Court of Appeal's Decision Respects Competence-Competence

24. The competence-competence principle does not deprive the courts of their authority under applicable arbitration legislation to deny a stay where the arbitration agreement in question is invalid. Regardless of the applicable legislation, where, as here, a court can determine as a matter of law or based on a superficial review of the record that an agreement is invalid, that determination does not violate competence-competence.[38] The Court of Appeal properly exercised its discretion and denied the stay in accordance with the legislation and these principles.

1. Denying the stay is permitted under both the *Arbitration Act* and the *ICAA*.

25. Although Uber asserts that the *ICAA*, rather than the *Arbitration Act*, applies, it acknowledges that both acts allow courts to decline to stay a proceeding in favour of arbitration where an agreement is invalid, void or inoperative.[39] The Ontario courts below agreed that this issue is not determinative, and this Court need not decide it.[40]

---

[38] *Seidel* at para 29; *see also Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40, paras 37-38; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, paras 84-85 [***Dell***]; *Rogers Wireless Inc v Muroff*, 2007 SCC 35 [***Rogers Wireless***].

[39] Appellants' Factum at para 35.

[40] *ONCA Reasons* at para 21; *ONSC Reasons* at para 35.

26. Section 7(2) of the *Arbitration Act* provides, in relevant part, that a court may exercise its discretion to deny a stay in favour of arbitration where "the arbitration agreement is invalid".[41] Similarly, Article 8 of the *ICAA* grants courts the discretion to deny a stay where "it finds that the agreement is null and void, inoperative or incapable of being performed".[42] In *Seidel*, the Court applied identical language under what was then the British Columbia *Commercial Arbitration Act*.[43] There, the Court treated the words "void" and "invalid" as interchangeable, noting that if the clause at issue contravened the *Business Practices and Consumer Protection Act* ("*BPCPA*"),[44] it was "invalid".[45] In light of *Seidel*, both lower courts correctly determined that it does not matter to the outcome which legislation applies.

27. If, however, the Court finds it necessary to decide the issue of which act applies, Mr. Heller submits that the *Arbitration Act* governs. The crux of the parties' disagreement on this issue is whether courts should consider the nature of the dispute or the agreement to determine which legislation applies. Uber asserts that its characterization of the parties' relationship in the service agreements controls. The law is to the contrary.

28. Courts considering the applicability of arbitration legislation consider the nature of the dispute as pleaded and the nature of the parties' relationship based on the evidence, of which the arbitration agreement is only a part.[46] Looking beyond the agreement's characterization of the parties' relationship is particularly important in cases like this one, where the fundamental claim is that Uber has mischaracterized the relationship and violated employment standards.[47]

29. An interpretive guide for the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") provides that, though the term "commercial" is construed broadly,

---

[41] *Arbitration Act*, s 7(2).
[42] *ICAA*, Sch 2, Art 8(1) (UNCITRAL Model Law on International Commercial Arbitration [**Model Law**]).
[43] RSBC 1996, c 55, s 15(2) (now called the *Arbitration Act*).
[44] SBC 2004, c 2.
[45] *Seidel* at paras 21, 28-31.
[46] *See Matrix Integrated Solutions Ltd v Naccarato*, 2009 ONCA 593 at paras 11-13; *Patel v Kanbay International Inc*, 2008 ONCA 867 at paras 9, 12, 18, 19.
[47] *See Modern Cleaning Concept Inc v Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 at paras 25, 37; *671122 Ontario Ltd v Sagaz Industries* Canada *Inc*, 2001 SCC 59 at paras 33-48.

not all agreements that arise from a business relationship are "commercial".[48] In particular, "labour or employment disputes and ordinary consumer claims" are excluded, "despite their relation to business".[49] In other words, parties may have a business relationship that leads to employment claims, which are *not* commercial.[50] That is the case here.

30. Furthermore, when Canada adopted the Model Law, it declared that it would only apply "to *differences* arising out of legal relationships . . . which are considered as commercial under the laws of Canada" (emphasis added).[51] Canadian courts and legislators have recognized that employment relationships are inherently different than commercial relationships,[52] and interpret the term "employment" liberally when construing remedial legislation such as the *ESA*.[53] Moreover, independent contractors are workers, and whether someone has been misclassified goes to the heart of employment law.[54]

31. Here, the pleadings evidence claims sounding in employment. Mr. Heller seeks to enforce the *ESA*. Numerous adjudicators have rejected Uber's characterization of its business as mere "lead generation" or technology licensing.[55] Instead, they treat Uber drivers like Mr. Heller as

---

[48] Report of the UN Commission on International Trade Law, *Report of the Secretary-General*, UNGAOR, 18th Sess, UN Doc A/CN.9/264 (1985) at Part II, Art 18, pp 3-4, 10, **ABOA**, Tab 28; *see also Patel v Kanbay International Inc*, 2008 ONCA 867 at paras 9, 12, 18.

[49] Report of the UN Commission on International Trade Law, *Report of the Secretary-General*, UNGAOR, 18th Sess, UN Doc A/CN.9/264 (1985) at Part II, Art 18, p 10, **ABOA**, Tab 28.

[50] The Hague Convention on Choice of Court Agreements likewise excludes employment matters from its scope. Castel & Walker, *Canadian Conflict of Laws*, 6th ed (LexisNexis Canada, 2005), s 11.2(d), **RBOA**, Tab 20.

[51] *Commission on International Trade Law, Report of the Secretary General*, UNGAOR, 2017, UN Doc A/CN.9/909, Enactments of model laws at pp 18-19, **RBOA**, Tab 21.

[52] *Machtinger v HOJ industries Ltd*, [1992] SCR 986 (SCC) at pp 997, 1003-1004, [***Machtinger***]; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 25-27;[***Rizzo Shoes***]; *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 26.

[53] *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at paras 21-23; *Kaszuba v Salvation Army Sheltered Workshop*, 41 OR (2d) 316 (ONDC 1983) at para 2, **RBOA**, Tab 9; *See also* Ontario Ministry of Labour, *Employment Standards Act 2000*, Policy and Interpretation Manual, Part I, "Definitions" (noting "employer" is defined).

[54] *See 671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at paras 33-34; *Marbry v Avrecan International Inc*, 1999 BCCA 172 at para 9; *New Prime v Oliveira*, 139 S Ct 532 (US 2019), **RBOA**, Tab 15.

[55] *O'Connor v Uber Technologies, Inc*, 82 F Supp 3d 1133 at p 1141-1145 (ND Cal 2015), **RBOA**, Tab 16; *Uber BV v Aslam*, [2018] EWCA Civ 2748 (UK) at paras 90-97, **RBOA**, Tab 18;

transportation workers. Given the nature of the pleadings and the work at issue, Mr. Heller's claims do not qualify as "commercial."

2. The Court of Appeal's *ESA* analysis did not violate competence-competence.

32. Citing s 7(2) of the *Arbitration Act* and *OMA v Willis Canada Inc*, in which it held that the competence-competence principle applies to that act,[56] the Court of Appeal considered whether, "as a matter of statutory interpretation", the *ESA* prohibits mandatory arbitration of claims seeking its protection.[57] This approach is consistent with competence-competence.

33. As the Court recognized in *Wellman*, s 7 of the *Arbitration Act* serves to ensure that *valid* arbitration agreements are enforced.[58] To that end, s 7(2) grants courts the discretion to deny a stay in a series of circumstances where "it would be either unfair or impractical to refer the matter to arbitration", including where an arbitration agreement is invalid.[59]

34. Article 8 of the *ICAA* likewise grants courts this discretion where the impugned arbitration agreement is "void, inoperative or incapable of being performed".[60] In *Seidel*, the Court considered identical language under what is now the British Columbia *Arbitration Act*,[61] in particular, whether an action pursuant to the *BPCPA*[62] was subject to a stay.[63] As noted in *Wellman*, *Seidel* confirmed that courts may determine that an arbitration agreement is void or invalid where "a close examination of the law" evidences an intent to curtail arbitration of certain claims.[64] Examining the *ESA* as the Court of Appeal did conforms to *Wellman* and *Seidel*'s delineation of the limits of competence-competence and the courts' discretion to determine an arbitration agreement's validity.

Asociación Profesional Elite Taxi v Uber Systems Spain SL, [2017] C-434/15 ECJ at paras 38-40, **RBOA**, Tab 3.

[56] *ONCA Reasons* at para 26; *Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745 at paras 19-37.

[57] *Seidel* at para 26.

[58] *Wellman* at paras 50-52, 65.

[59] *Wellman* at paras 65 (quoting *MDG Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656 at para 36).

[60] *ICAA*, Sch 2, Art 8(1) (Model Law).

[61] *Arbitration Act*, RSBC 1996, c 55.

[62] *Business Practices and Consumer Protection Act*, SBC 2004 c 2.

[63] *Seidel* at paras 7, 15, 27-30.

[64] *Wellman* at para 43 (citing *Seidel* at paras 41-42).

35. Uber incorrectly argues that the Court of Appeal erred when it presumed for the purposes of that analysis that Mr. Heller could "prove that which he pleads" because the applicability of the *ESA* is in dispute. Uber's argument fails for two reasons: (i) as in *Seidel*, the question is whether, as a matter of law, the *ESA* prohibits the mandatory private arbitration of claims under the act, not whether Mr. Heller will succeed; and (ii) the *ESA*, among other things, prohibits misclassifying workers as independent contractors rather than employees, and precluding workers from bringing claims alleging misclassification would deny them access to the *ESA*'s protections entirely.

36. The Court of Appeal's analysis derived from this Court's approach in *Seidel*,[65] which started with a presumption that "Ms. Seidel's complaints against TELUS are taken to be capable of proof only for the purposes of this application".[66] In *Seidel*, the Court's concern was whether Ms. Seidel's claims invoked the relief available under s 172 of the *BPCPA*, which provides that such actions should be filed in court.[67] Like the *ESA*, the *BCPA* voids agreements that contract out of any "rights, benefits or protections" conferred by the act.[68] The Court's assumption that Ms. Seidel's claims were capable of proof was necessary because, if they were not, she would not be entitled to relief under s 172. If she was not entitled to relief under s 172, then the arbitration clause would not have deprived her of any rights under the *BPCPA*, and the action would be stayed.

37. The Court of Appeal's analysis followed the same logic. To determine whether the Arbitration Agreement impermissibly contracts out of the *ESA* by denying Mr. Heller access to its enforcement mechanisms, the Court of Appeal properly presumed that Mr. Heller's claims are capable of proof. If not, then Mr. Heller would not be entitled to any relief under the *ESA*.

38. Uber's contention that this presumption will encourage plaintiffs to plead around arbitration agreements likewise fails. First, Mr. Heller does not need to prove he is an employee to seek adjudication under the *ESA* because the act prohibits misclassification. Section 5.1(1) of the *ESA* provides that "[a]n employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act."[69] As explained

---

[65] *ONCA Reasons* at para 27.
[66] *Seidel* at para 8.
[67] *Seidel* at paras 5-6, 11, 31, 40.
[68] *Seidel* at para 5.
[69] *ESA*, s 5.1

in the *ESA Policy and Interpretation Manual*,[70] a guide for Ontario Employment Standards Officers, the legislature introduced s 5.1 as part of the *Fair Workplaces Better Jobs Act, 2017*.[71] Section 5.1(1) requires Employment Standards Officers to determine whether an employer has misclassified an employee.[72] Accordingly, any claimant alleging misclassification is entitled to have that claim determined in Ontario under the *ESA*.

39. The *ESA*'s prohibition of misclassification distinguishes it from other legislation, such as the Ontario *Consumer Protection Act, 2002* considered in *Wellman*,[73] where a claimant's status might determine whether the legislation applies and precludes arbitration. All Ontarians have recourse under the *ESA* to determine whether they have been misclassified and whether, therefore, the act applies, but only consumers have recourse under the *Consumer Protection Act*.[74]

40. Second, relying on "artful pleading" to invoke the protection of remedial legislation and avoid arbitration would be at the plaintiffs' peril where the claims have no chance of success because ultimately the plaintiffs' claims would fail. For example, in *Wellman*, the business customers did not allege that they were consumers for the purposes of the *Consumer Protection Act*. Doing so would have served little purpose because they would later get no relief under that legislation, which only protects "consumers".[75] The same is true of workers seeking the *ESA*'s protections. If the *ESA* does not apply, then a plaintiff recovers nothing and gains nothing from structuring a pleading to avoid arbitration. Additionally, *Seidel* and *Wellman* discourage plaintiffs from pleading claims under legislation that prohibits arbitration in conjunction with other arbitrable claims because the arbitrable claims will be stayed.[76]

41. Whether the *ESA* precludes mandatory arbitration of claims under the act is a distinct inquiry from whether Uber has violated the act. The answer depends on a review of the legislation, not the record. The presumption that claims are capable of proof allows courts to consider questions of law—in this case statutory interpretation—without wading into the merits or delving

---

[70] Ontario Ministry of Labour, *Employment Standards Act 2000*, Policy and Interpretation Manual [***ESA Manual***].
[71] SO 2017, c 22.
[72] *ESA Manual*, s 5.1(1).
[73] *Wellman* at paras 13-16.
[74] *Wellman* at paras 2-8.
[75] *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, ss 1-2.
[76] *Seidel* at para 50; *Wellman* at paras 100-103.

deeply into the factual record. This Court has endorsed that approach because it is efficient and avoids duplication of a "strictly legal debate".[77]

42. Under Uber's approach, Mr. Heller's claims would (theoretically) proceed to an arbitrator in the Netherlands where he would argue that the *ESA* should apply. The arbitrator would refuse to apply the *ESA* because the Arbitration Agreement's choice of law provision provides that the "laws of the Netherlands, excluding its rules on conflicts of laws" apply. Excluding the application of the rules on conflicts of laws ensures that the substantive law of the chosen jurisdiction—the Netherlands—will apply.[78] The *Arbitration Act* and *ICAA* reinforce this interpretation by providing that arbitral tribunals should apply the substantive law of the chosen jurisdiction, without recourse to choice of law rules.[79]

43. Then, after incurring the expense of arbitration, Mr. Heller would have to apply to the Ontario courts for a determination of whether the *ESA* precludes mandatory arbitration of claims under the act. This is not only inefficient, but exceedingly improbable (if not impossible) for a person like Mr. Heller earning $400 to $600 a week as an Uber driver.[80]

44. If this is the law, then employers are incentivized both to misclassify employees and impose onerous arbitration clauses. "Artful," *i.e.* mis-, classification is already a serious concern for Ontario workers; "artful pleading" to avoid arbitration is speculative at best.[81]

3. Applying unconscionability does not violate competence-competence.

45. Uber asserts that competence-competence bars courts from considering whether an agreement is unconscionable because: (i) unconscionability necessarily requires a "probing factual

---

[77] *Dell* at para 84.
[78] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11. *See Douez v Facebook, Inc*, 2015 BCCA 279 at para 84, *rev'd on other grounds*, 2017 SCC 33; *see also* Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 287, **RBOA**, Tab 32; Kenneth McEwan QC & Ludmila B Herbst, *Commercial Arbitration in Canada*: A Guide to Domestic and International Arbitrations, (Toronto: Thomson Reuters Canada Limited, 2017) at 8:20, **RBOA**, Tab 29.
[79] *Arbitration Act*, s 32(2); *ICAA*, Sch 2, Art 28 (Model Law).
[80] *ONCA Reasons* at para 2; *ONSC Reasons* at paras 26-29.
[81] Ontario Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", SC Michael Mitchell & John C Murray at pp 54, 73, 262-265 [***Changing Workplaces Review***], **RBOA**, Tab 30; Pamela A. Izvanariu, "Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector" (2016) 66 DePaul LR 133, 136-141, **RBOA**, Tab 27.

inquiry" beyond a superficial review of documentary evidence; and (ii) contract interpretation requires a review of the surrounding "factual matrix".[82] To support its position, Uber claims that evidence as to the likely size of Mr. Heller's claims, the relative cost of arbitration compared to a civil proceeding, where the arbitration will take place, and what law will apply are in dispute and must be determined in an in-depth inquiry. Leaving aside that Uber is raising this argument for the first time in this appeal, Uber misstates the law and ignores the uncontroverted evidence already in the record. Uber's attempts to manufacture controversy about the meaning of the Arbitration Agreement's plain language—which it drafted—should not be countenanced.

46. Although this Court's and the Court of Appeal's jurisprudence establish that competence-competence limits courts' review of arbitration agreements, they are nonetheless empowered to consider an agreement's validity.[83] Courts will decline to intervene if a "thorough review of the parties' complex contractual discussions, understanding, expectations and arrangements" is required.[84] The Court of Appeal's approach conformed to these well-settled principles.

(i) Unconscionability is apparent from a superficial review of the record.

47. Because arbitration agreements are contracts, they are subject to ordinary contract law defences and any Ontario law that might render them unenforceable.[85] Duress, mistake, fraud, illegality, and unconscionability are all reasons a court might find an arbitration agreement invalid or "null and void".[86] These remedies are essential to preventing stronger and more sophisticated

---

[82] Appellants' Factum at paras 52-53.
[83] *Dell* at para 85; *Rogers Wireless* at para 11; *Seidel* at para 8; *Ontario Medical Association v Willis Canada Inc*, 2011 ONCA 525 at para 32; *Ontario v Imperial Tobacco Canada Ltd*, 2011 ONCA 525 at paras 33-42 [***Imperial Tobacco***]; *Dancap Productions Inc v Key Brand Entertainment, Inc*, 2009 ONCA 135 [***Dancap***].
[84] *Imperial Tobacco* at paras 55-58; *Dancap* at paras 40-43.
[85] *See* Brian Casey, *International and Domestic Commercial Arbitration*, looseleaf (Toronto: Carswell) at para. 4.5(b)(i), **RBOA**, Tab 19; Alexander Gay & Alexandre Kaufman, *Annotated Ontario Arbitration Legislation* – Arbitration Act, 1991 *and* International Commercial Arbitration Act, 2017, (Toronto: Thomson Reuters, 2017) at pp 114-115, 542, **RBOA**, Tab 23; Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada*, loose-leaf (Toronto: Thomson Reuters) at s 2:70, **RBOA**, Tab 29.
[86] See *Brady v Williams Capital Group, LP*, 14 NY3d 459 at pp 466-467 (NY Ct App 2010), **RBOA**, Tab 4; *ACORN v Household Intern, Inc*, 211 F Supp 2d 1160 at pp 1168-1174 (ND Cal 2002), **RBOA**, Tab 2.

parties from unfairly precluding weaker parties from vindicating their rights, especially where a standard form contract is at issue.[87]

48. Uber incorrectly assumes that every unconscionability analysis requires a probing factual inquiry that cannot be resolved based on documentary evidence. Unconscionability is assessed on a case-by-case basis.[88] Where a court can conclude based on a superficial review of the documentary evidence before it—such as in this case—that an arbitration agreement was not freely bargained for and, instead, is the result of an inequitable exercise of influence of one party over another,[89] unconscionability can be assessed without violating competence-competence. For example, numerous courts have found arbitration agreements unconscionable and unenforceable where the fees and costs associated with pursuing arbitration are outsized compared to court filing fees or likely to be prohibitively expensive compared to the plaintiff's financial means.[90]

49. In *Wellman*, this Court observed as much: "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with through the doctrine of unconscionability, which was the approach taken in *Heller v Uber*".[91] As the Court of Appeal recognized, the Arbitration Agreement is a contract of adhesion, not an agreement resulting from "complex contractual discussions".[92] It involved no discussions—of any complexity. Accordingly, the Court of Appeal's analysis did not extensively weigh credibility or consider the parties' relative expectations.

50. Uber's reliance on *Dell* and *Rogers Wireless* is misplaced. Neither case considered prohibitive administrative fees or the application of foreign law; both involved more than a

---

[87] Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012), 53 Can Bus LJ 475, 482-484, **RBOA**, Tab 36; Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33 Windsor YB Access to Jus 177 at pp 184-185, **RBOA**, Tab 33.

[88] *See Norberg v Wynrib*, [1992] SCR 226 at pp 247-249; *Birch v Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at para 49; *Harry v Kreutziger*, [1978] BCJ No 1318 (BC CA) at paras 12-15.

[89] *Norberg v Wynrib*, [1992] SCR 226 at pp 248-249.

[90] *See, e.g., ACORN v Household Intern, Inc*, 211 F Supp 2d 1160 at pp 1168-1174 (ND Cal 2002), **RBOA**, Tab 2; *Phillips v Associates Home Equity Services, Inc*, 179 F Supp 2d 840 at pp 846-847 (ND Ill 2001), **RBOA**, Tab 17; *Mendez v Palm Harbor Homes, Inc*, 45 P3d 594 at pp 601-606 (Wash Ct App 2002), **RBOA**, Tab 13.

[91] *Wellman* at para 85.

[92] *Cf. Imperial Tobacco* at paras 55-58; *Dancap* at paras 40-43.

superficial review of documentary evidence.[93] In *Dell*, the Court was tasked with evaluating the arbitration provisions' accessibility by reviewing web pages and hyperlinks to determine whether they were "external" under the *Civil Code of Quebec*.[94] In *Rogers Wireless*, the applicant sought to prove the "abusive" nature of the impugned agreement in court "using a variety of evidence", including cross-examination, in a "long and complex inquiry".[95] Here, by contrast, the Arbitration Agreement's unconscionability can be determined based on a review of the pleadings, the agreement's plain language, the ICC Arbitration Rules, and limited documentary evidence.[96]

51. Indeed, the Court of Appeal's conclusion relied primarily on the following facts (all of which were discerned from documentary evidence) and legal analysis:

(a) Uber's internal dispute resolution process is not independent and is not in Ontario;[97]

(b) the Arbitration Agreement requires arbitration of *all* disputes regardless of size, unless the driver voluntarily resolves the dispute with Uber;[98]

(c) because this class action has not yet been certified, the Arbitration Agreement must be considered in the context of an individual claim, rather than a collective claim;[99]

(d) under the ICC Rules imposed under the Arbitration Agreement, the up-front cost to bring an arbitration is $14,500 USD, excluding the cost of travel, accommodation and counsel, which should be considered relative to Mr. Heller's claims for minimum wage, overtime, vacation pay and his earnings of $400-$600 a week;[100]

(e) as written, the Arbitration Agreement requires arbitration in the Netherlands under the law of the Netherlands, of which Mr. Heller had no knowledge;[101]

(f) Mr. Heller had no legal advice and was not able to negotiate the agreement;[102] and

---

[93] *Dell* at para 7; *Rogers Wireless* at paras 1-8.
[94] *Dell* at paras 94-103.
[95] *Rogers Wireless* at 14-15, 25.
[96] *ONCA Reasons* at paras 55-56, 59, 68.
[97] *ONCA* Reasons at para 55.
[98] *ONCA Reasons* at para 56.
[99] *ONCA Reasons* at paras 57-58. *See Seidel* at para 8.
[100] *ONCA Reasons* at para 59; *see also ONSC Reasons* at paras 25, 29 (noting Mr. Heller's income and relative costs of arbitration under the ICC Arbitration Rules).
[101] *ONCA Reasons* at para 68.
[102] *ONCA Reasons* at para 68. *Cf.* Petition for Order Compelling Arbitration, *Abadilla v Uber Technologies, Inc*, Case No 3:18-cv-7343 (ND Cal Dec 5, 2018) at paras 10-13, **RBOA**, Tab 1 (alleging that arbitration agreement provides fees will be the same as if filed in court and Uber will

(g) the "significant inequality of bargaining power", which Uber admits.[103]

52. When viewed through an objective lens, these facts are not controversial, nor are they facts that require a "probing inquiry" to discern. Accordingly, though Uber may disagree with the Court of Appeal's conclusions, the court did not violate competence-competence. The relevance of these facts to the unconscionability analysis is addressed in Part C.3 below.

(ii) The Arbitration Agreement can be interpreted as a matter of law.

53. Uber muddies the waters by suggesting that the Arbitration Agreement must be interpreted as part of a complex "factual matrix", citing *Sattva Capital Corp v Creston Moly Corp* ("*Sattva*").[104] However, unlike in *Sattva*, the Arbitration Agreement is not a negotiated agreement between two corporations.[105] It is a contract of adhesion issued to all Uber Drivers via the Uber App, the interpretation of which is less informed by the "factual matrix" giving rise to its formation.[106] As a contract with precedential value, the Arbitration Agreement is susceptible to interpretation as a matter of law.[107]

54. In any event, as the Court explained in *Sattva*, *when necessary*, inquiries into a contract's "surrounding circumstances" should not overwhelm the text and should "consist only of objective evidence of the background facts at the time of execution".[108] An inquiry into "objective evidence of background facts" does not necessarily require more than a superficial review of the evidence. Indeed, here, most of the background facts from the time of execution are neither controversial nor sincerely in dispute. The Arbitration Agreement's meaning can be resolved by interpreting its plain language with reference to the relevant legal principles.[109]

---

pay such fees); *Kai Peng v Uber Technologies, Inc*, 237 F Supp 3d 36, 41-43 (EDNY 2017), **RBOA**, Tab 10 (allowing drivers to opt out of arbitration and not applying law of the Netherlands).

[103] *ONCA Reasons* at para 68.

[104] 2017 SCC 53 [***Sattva***].

[105] *Sattva* at paras 2-3.

[106] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at paras 27-32 [***Ledcor***].

[107] *Ledcor* at paras 39-45.

[108] *Sattva* at paras 56-58.

[109] *Ledcor* at para 49; *see also Sattva* at para 57 (noting that "[t]he interpretation of a written contractual provision must always be grounded in the text").

55. The Arbitration Agreement provides, in relevant part, that: (i) it "shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws"; (ii) any dispute shall be "first mandatorily submitted to mediation proceedings" under the ICC Mediation Rules; (iii) if the parties do not settle their dispute within 60 days, it "shall be exclusively and finally resolved by arbitration" under the ICC Arbitration Rules; and (iv) "the place of arbitration shall be Amsterdam, The Netherlands".[110]

56. In its factum in support of its motion to stay the arbitration, Uber argued that the Arbitration Agreement requires "arbitration in the Netherlands", specifically "in Amsterdam".[111] On cross-examination, Uber's witness and counsel confirmed that Uber drivers have to "travel to the Netherlands to mediate and . . . participate in arbitration" under the Arbitration Agreement.[112]

57. Uber did not suggest that the arbitration could take place anywhere else until after Mr. Heller had obtained counsel, filed a claim, prepared an affidavit, participated in cross-examinations, and opposed Uber's motion. The first time Uber raised the *possibility* of conducting the arbitration outside of the Netherlands was in its reply factum, in which Uber suggested that the parties are "*capable of* participating in Ontario arbitration".[113] Uber reiterated this during the motion hearing.[114] The timing of Uber's offer both undermines its legitimacy and suggests Uber is aware how unfair the Arbitration Agreement is to Ontario Uber drivers.

58. Further, by specifying "Amsterdam" as the place of the arbitration,[115] the plain language belies Uber's contention that "place" refers to the arbitral seat and the applicable procedural rules.[116] Given that the agreement says the law of the Netherlands (not Amsterdam) applies, the reasonable reading is that Amsterdam is where the arbitration will take place.

59. Likely recognizing that Uber drafted the Arbitration Agreement and that any "agreement" to hold the arbitration outside the Netherlands would be entirely at Uber's discretion given the

---

[110] *ONSC Reasons* at para 21; ONCA *Reasons* at para 11.
[111] Motion Factum of the Defendants at paras 2, 33, 55-57, **Respondent's Record** [**RR**], Tab 1, pp 4, 12, 19.
[112] Transcript of Cross-Examination of R van der Woude at Q 198 [**Van der Woude Trans**], **AR**, Vol III, Tab 11, p 66.
[113] Reply Factum of the Defendants at para 23, **RR**, Tab 2, p 50.
[114] *ONSC Reasons* at n 39.
[115] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11.
[116] Appellants' Factum at para 23.

parties' unequal bargaining power, Justice Perell found that the Arbitration Agreement required arbitration "in the Netherlands".[117] Likewise, the Ontario Court of Appeal concluded that the Arbitration Agreement provides for arbitration in Amsterdam.[118] In this context, the Court should disregard Uber's attempt to insert ambiguity on this point and rely on the document's plain language. This is consistent with the principles of contract interpretation and does not violate competence-competence.[119]

60. As to Uber's assertion that the applicable law is ambiguous and cannot be resolved, the plain language of the Arbitration Agreement is to the contrary. It provides that the agreement is "exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws".[120] The authorities and the arbitration legislation confirm that the agreement means what it says: a choice of law clause in an arbitration agreement refers to the substantive law of that jurisdiction, excluding choice of law rules, to ensure that the law of the chosen jurisdiction applies.[121]

61. Under Uber's approach, parties facing similarly prohibitive arbitration processes would never be able to challenge arbitration agreement as unconscionable in court, and the drafting parties would have no incentive to prepare fair agreements. Litigants would be subject to arbitration agreements that impose even more exorbitant fees and require travel to even farther places. Terms obviously intended to prevent the weaker party from obtaining a remedy could never be challenged, and parties would be forced to arbitrate (if they could afford it) even if the arbitration agreement was invalid at law. Enforcing agreements—which is what sending litigants

---

[117] *ONSC Reasons* at para 66.
[118] *ONCA Reasons* at paras 55-58.
[119] *Sattva* at paras 56-58; *Dumbrell v The Regional Group of Companies Inc*, 2007 ONCA 59 at paras 51-52.
[120] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11.
[121] *See* Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 287, **RBOA**, Tab 32; Kenneth McEwan QC & Ludmila B Herbst, *Commercial Arbitration in Canada*: A Guide to Domestic and International Arbitrations, (Toronto: Thomson Reuters Canada Limited, 2017) at 8:20, **RBOA**, Tab 29; *see also Arbitration Act*, s 32(2); *ICAA*, Sch 2, Art 28 (Model Law).

to arbitration is—so patently designed to prevent unsophisticated individuals from vindicating their rights would be detrimental to the rule of law and devastating to access to justice.[122]

B. The Arbitration Agreement Violates the *ESA*

62. Whether the *ESA* precludes mandatory arbitration of claims under that act turns on whether the legislation "manifests a legislative intent to intervene in the marketplace" to relieve workers of a "contractual commitment to 'private and confidential' mediation/arbitration and, if so, under what circumstances".[123] The Court of Appeal correctly applied these principles and held that the Arbitration Agreement violated the *ESA* and undermined its remedial purpose by: (i) precluding workers from accessing the *ESA*'s enforcement mechanisms; and (ii) contracting out of the *ESA* entirely, depriving Mr. Heller of the minimum benefits and protections of Ontario law.[124]

1. The enforcement mechanisms are *ESA* benefits that cannot be waived.

(i) *Seidel* supports the Court of Appeal's analysis.

63. The *ESA* contemplates three enforcement mechanisms in ss 96-101: (i) a complaint to the Ministry of Labour; (ii) a civil proceeding in Superior Court; and (iii) for unionized workers, arbitration pursuant to a collective agreement.[125] These are the only avenues for dispute resolution of *ESA* claims contemplated by the legislature. The Court of Appeal, after examining the *ESA*'s text, remedial purpose, and the importance of these proceedings to that purpose, correctly held that the *ESA*'s complaint process and related enforcement mechanisms are employment standards, which cannot be waived. The court likewise concluded that the *ESA* gives workers the option to choose between that process and bringing a civil proceeding in court, which is incompatible with private and confidential mandatory arbitration of *ESA* claims.[126]

64. To discern the legislature's intent, courts review legislation "textually, contextually and purposively".[127] In *Seidel*, the Court held that the *BPCPA* curtailed enforcement of an arbitration clause in Ms. Seidel's contract with TELUS because: (i) the act prohibited the "waiver or release

---

[122] *See* Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33 Windsor YB Access to Jus 177 at pp 185-186, **RBOA**, Tab 33.
[123] *Seidel* at para 2; *Wellman* at para 40.
[124] *ONCA Reasons* at paras 28-45.
[125] *See ESA*, ss 96-101.
[126] *ONCA Reasons* at paras 36, 41-46.
[127] *Seidel* at paras 33-40.

by a person of the person's rights, benefits or protections under th[e] Act"; (ii) s 172 of the *BPCPA* provided for enforcement by bringing an action in court;[128] and (iii) the legislation served a broad and remedial purpose with which the "usual rationales for arbitration" were incompatible.[129]

65. Likewise, the *ESA*'s goal is protecting employees and remedying the inherently unequal bargaining power between individual workers and employers.[130] Courts interpret the *ESA* in a way that encourages compliance and extends protection to as many employees as possible.[131]

66. Section 5(1) of the *ESA* provides that no employer or employee can "contract out of or waive an employment standard and any such contracting out or waiver is void".[132] 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] Accordingly, any arbitration agreement that deprives an employee of rights or benefits conferred by the *ESA* is invalid.[134]

67. Much like s 172 of the *BPCPA*,[135] s 96 establishes the right for anyone to bring a complaint, specifically that "a person alleging that [the *ESA*] has been or is being contravened may file a complaint with the Ministry [of Labour]".[136] As the Court of Appeal noted, these complaints lead to investigation by an Employment Standards Officer, who has a range of enforcement powers.[137]

68. Additionally, ss 8, 97 and 98 confirm the right to enforce the *ESA* in court and address the impact of filing a complaint under s 96 on that right, particularly that an employee who files a s 96 complaint may not also "commence a civil proceeding" involving the same matter, unless "he or she withdraws the complaint within two weeks after it is filed."[138] Section 8 clarifies that the act does not preclude "civil" remedies against employers, and requires employees who commence

---

[128] *Seidel* at paras 31-32.
[129] *Seidel* at paras 31-40.
[130] *Machtinger* at pp 1002-1003; *Rizzo Shoes* at paras 24-25.
[131] *Rizzo Shoes* at paras 24-25; *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at paras 20-21; *Ceccol v Ontario Gymnastic Federation*, [2001] OJ No. 3488 (ON CA) at para 47.
[132] *ESA*, s 5(1).
[133] *ESA*, s 1(1).
[134] *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at paras 20-21.
[135] *Seidel* at paras 5-6.
[136] *ESA*, s 96; *see also Changing Workplaces Review*, p 111, **RBOA**, Tab 30.
[137] *ESA*, ss 101.1-113; *ONCA Reasons* at paras 32-34, 41-43.
[138] *ESA*, ss 97-98.

civil claims to serve notice on the Director before "the civil proceeding is set down for trial".[139] These provisions evidence a legislative intent to establish "a civil action . . . as an alternative to the administrative procedure of the *ESA*".[140]

69. In *Seidel*, the Court noted that "private enforcement in the public interest vastly increases the potential effectiveness of the Act" and promotes compliance by providing for relief to more than a single complainant.[141] The *ESA*'s mechanisms to protect the public interest are even more robust and evidence the same intention to promote private enforcement in public proceedings.

(ii) A civil proceeding is not an arbitration.

70. Uber challenges the Court of Appeal's holding that a "civil proceeding" under the *ESA* excludes arbitration.[142] But as the Court of Appeal recognized, "nothing in the *ESA* . . . suggests that there was any intention to include arbitrations within the usual meaning of the term 'civil proceeding'".[143] Further, the Ontario *Courts of Justice Act*[144] defines both actions and applications as "civil proceedings".[145] The *Rules of Civil Procedure*,[146] likewise define a "proceeding" as an action or application.[147] Arbitration is neither of these.

71. As the Court of Appeal also noted, the *ESA* notice requirements are inconsistent with arbitration, and the act separately refers to arbitration as "arbitration".[148] Including "arbitration" in the definition of "civil proceeding," despite the act's explicit and separate references to "arbitration" does not give meaning to all of the terms and is, therefore, incorrect.[149]

---

[139] *ESA*, s 8; *ONCA Reasons* at para 34.
[140] *Kumar v Sharp Business Forms Inc*, [2001] OJ No 1729 (ON SC) at paras 40-41.
[141] *Seidel* at paras 24, 32.
[142] Appellants' Factum at paras 75-76; *ONCA Reasons* at para 34.
[143] *ONCA* Reasons at para 34.
[144] RSO 1990, c C 43.
[145] *Courts of Justice Act*, RSO 1990, c C 43, s 1(1).
[146] RRO 1990, Reg 194.
[147] *Rules of Civil Procedure*, s 1.03; *ONCA Reasons* at 33-34.
[148] *ONCA Reasons* at para 34; *ESA*, ss 99-101.
[149] *See ONCA Reasons* at para 34.

72. Uber's reliance on *Reference re Public Service Employee Relations Act*[150] and *ONA v Extendicare (Canada) Inc.*[151] is misplaced.[152] These decisions address whether members of statutory bodies engaged in confidential work can be compelled to give evidence in labour arbitrations.[153] The courts' concern was protecting the confidentiality and integrity of the relevant statutory processes, which the members' participation in the arbitrations would have undermined. Here, by contrast, Uber's construction of the term "civil proceeding" would undermine the *ESA*'s plain language and purpose.

73. Uber further challenges the Court of Appeal's textual interpretation, arguing that the absence of an express prohibition of arbitration in the *ESA* is significant. Uber misapplies the law. Under the doctrine of implied exclusion, where the legislature has listed comparable items, "an 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 expressly mentioned."[154] Here, the *ESA* provides a comprehensive framework through which claimants may seek redress via the complaints process, in a civil proceeding, or, only if they are unionized, in arbitration. The only reasonable interpretation is that if the legislature had contemplated non-unionized workers enforcing the *ESA* in private arbitration, it would have said so.[155]

(iii) The legislative history supports the Court of Appeal's holding.

74. Contrary to Uber's assertions,[156] the legislative history reveals that the 1996 *ESA* amendments were meant to: (i) allow "non-union employees" to choose whether "to file an employment standards claim with the ministry or *take the matter to court*" (emphasis added); and

---

[150] 1973 CarswellNat 47F, **ABOA**, Tab 5
[151] 159 LAC (4th) 30, 89 CLAS 36 at para 12, **ABOA**, Tab 3.
[152] Appellants' Factum at para 75.
[153] *Reference re Public Service Employee Relations Act*, 1973 CarswellNat 47F at paras 5-8, **ABOA**, Tab 5; *ONA v Extendicare (Canada) Inc*, 59 LAC (4th) 30, 89 CLAS 36 at paras 3, 10-13, **ABOA**, Tab 3.
[154] Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at pp 153-154, **ABOA**, Tab 25.
[155] *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at paras 9-10; *Grey-Owen Sound Health Unit v ONA*, 1979 CarswellOnt 824 (ONSC App Div) at paras 13-20.
[156] Appellants' Factum at paras 75-76.

(ii) allow union members to pursue their *ESA* claims in accordance with their collective agreement's arbitration process.[157]

75. The legislature's concern was that *all* employees were pursuing *ESA* claims through only the complaints process. To conserve resources, the legislature allowed unionized employees to pursue their claims in arbitration and non-unionized employees to choose between a court process or the complaints process.[158] The Court of Appeal did not rely on this legislative history, but it would have found support there.

(iv) The *ESA*'s purpose supports the Court of Appeal's holding.

76. The *ESA*'s complaint provisions' "objective is to make redress available, where it is appropriate at all, expeditiously and cheaply".[159] As the Ontario Ministry of Labour's 2017 Changing Workplaces Review explains, to achieve the *ESA*'s goals "complaint procedures must afford ordinary Ontarians the opportunity for fair and just adjudication and enforcement of their rights."[160] As explained above, the *ESA* likewise relies on civil proceedings to further the *ESA*'s objectives of enforcement, compliance, and ensuring workers have access to justice.

77. Quoting former Dean of Osgoode Hall Law School, Harry Arthurs, the Changing Workplaces Review emphasizes the importance of consistent enforcement: "Wide[-]spread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers . . . and weakens public respect for the law".[161] The *ESA*'s notice provisions are one of the ways in which the Ministry of Labour promotes enforcement and oversight. Unlike a confidential and private arbitration, the *ESA* requires labour arbitrators in the union context who find an *ESA* contravention to notify the Director of Employment Standards, and civil litigants to notify the Director before setting an *ESA* matter down for trial.[162]

---

[157] *Legislative Assembly of Ontario Debates*, No 81 (3 June 1996) at 3256 (Joseph N Tascona), **RBOA**, Tab 28; *see also Kumar v Sharp Business Forms Inc*, [2001] OJ No 1729 (ONSC) at paras 40-41.
[158] *Legislative Assembly of Ontario Debates*, No 73 (13 May 1996) at 2909-2910 (Elizabeth Witmer), **ABOA**, Tab 16; *Legislative Assembly of Ontario Debates*, No 80 (30 May 1996) at 3213 (John R Baird), **ABOA**, Tab 17.
[159] *Danyluk v Ainsworth Technologies*, 2001 SCC 44 at 27.
[160] *Changing Workplaces Review* at p 22 **RBOA**, Tab 30.
[161] *Changing Workplaces Review* at p 23, **RBOA**, Tab 30.
[162] *ESA*, ss 8, 100(5); *ONCA Reasons* at para 34.

78. Uber, in error, contends that this is simply to avoid a multiplicity of proceedings.[163] The *ESA Manual* states that the purpose is to allow the Director to seek standing in a proceeding where "important issues are being raised or the integrity of the legislation is being challenged", and to ensure that the Director is aware of lawsuits "involv[ing] a legislative interpretation or policy issue".[164] Private arbitration is antithetical to these goals.

79. Uber's reliance on *Robert v Markandu*[165] and *Morrison v Ericsson Canada*[166] to suggest that Ontario courts routinely enforce arbitration agreements in *ESA* claims is likewise misplaced. Neither of these cases considers claims under the *ESA* or whether the *ESA* precludes the arbitration of such claims. However, a New Brunswick court has found an arbitration agreement void because it precluded the application of local employment law.[167]

80. *Huras v Primerica Financial Services Ltd*[168] is the only Ontario case Mr. Heller is aware of that squarely addresses this issue. The Ontario Superior Court denied a motion to stay an action in favour of an arbitration agreement, holding that the agreement did not apply to claims for unpaid wages during a training program because the parties entered the agreement after the program ended.[169] That court also opined that the arbitration agreement likely violated the *ESA* by purporting to preclude an employee from filing an *ESA* complaint, but declined to decide the issue on mootness grounds.[170]

81. Reading the *ESA* purposively and in a manner consistent with the legislature's intention to protect employees, the Court of Appeal's approach is the only reasonable one. Under Uber's interpretation, employers could simply contract out of the *ESA*'s complaint mechanism—precluding the "complaints driven model" that is integral to enforcing employment rights in Ontario.[171] Workers bringing complaints to the Ministry face barriers related to fear of reprisal,

---

[163] Appellants' Factum at para 79.
[164] *ESA Manual* at s 8(2).
[165] 2012 ONSC 6891.
[166] 2016 ONSC 3908.
[167] *Houston v Exigen (Canada) Inc*, 2006 NBQB 29 at paras 7-12.
[168] [2000] OJ No 1474 (ONSC), **RBOA**, Tab 8.
[169] *Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC) at paras 26-35, **RBOA**, Tab 8, *aff'd on other grounds*, [2001] OJ No 3318 (ONCA).
[170] *Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC) at paras 26-35, **RBOA**, Tab 8.
[171] *Changing Workplaces Review* at pp 75-79, **RBOA**, Tab 30.

opportunity cost, language, and cultural barriers.[172] The suggestion that the legislature contemplated allowing employers to contract out of this regime, particularly in favour of the kind of arbitration contemplated by the Arbitration Agreement, is absurd.[173]

2. The Arbitration Agreement impermissibly contracts out of the entire *ESA*.

82. Regardless of whether the enforcement mechanisms are "employment standards," the Court of Appeal correctly observed that Mr. Heller works in Ontario and is entitled to the minimum benefits and protections of Ontario law, in this case the *ESA*.[174] The *ESA* guarantees more than the enforcement mechanisms set out in ss 96-98. It sets a minimum wage, overtime rules, and vacation pay requirements, among other things. Despite Uber's arguments to the contrary, the Arbitration Agreement's plain language provides that the arbitrator will apply the law of the Netherlands, excluding its rules on conflicts of laws. As set out above, the ordinary interpretation of these words means that only the substantive law of the Netherlands will apply. Therefore, even if the arbitrator considered whether Mr. Heller is an employee, the *ESA* would not apply. Accordingly, the Arbitration Agreement is void because it contracts out of the *ESA* entirely.[175]

83. Evidence of the law of the Netherlands is not necessary to consider this issue because to supplant the standards guaranteed under the *ESA*, an employer must expressly provide a "greater benefit" than "the employment standard".[176] To determine whether a greater right or benefit is offered, the Ministry of Labour considers whether, as written, the terms confer a greater right or benefit in respect of each standard at issue. Accordingly, without expressly denoting each benefit it offers in excess of the *ESA* minimums, the Arbitration Agreement cannot satisfy s 5(2).

84. Ontario courts frequently consider whether a contractual provision breaches the *ESA* by comparing it to specific employment standards.[177] This case is far simpler—the Arbitration Agreement expressly contracts entirely out of the *ESA* and no such comparison is necessary.

---

[172] *Changing Workplaces Review* at pp 76-78, **ABOA**, Tab 30.
[173] *ONCA Reasons* at para 37 (citing *Machtinger* at p 1003).
[174] *See ONCA* Reasons at para 46. *See also Douez v Facebook*, 2017 SCC 33 at paras 60-61.
[175] *See Nowak v Biocomposites Inc*, 2018 BCSC 785 at paras 32-98 (finding forum selection clause invalid for contracting out of employment standards legislation).
[176] *ESA*, s 5(2).
[177] *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at paras 19-21, 29-51.

3. The Court of Appeal properly considered the policy reasons for the *ESA*.

85. Ignoring *Seidel*, Uber further argues that the Court of Appeal erred by considering the following policy concerns: (i) the nature of the complaint process compared to arbitration under the Arbitration Agreement; (ii) the benefit of a public decision through the complaint process compared to private and confidential arbitration; (iii) the benefits of class proceedings and their availability in Ontario compared to arbitration; and (iv) the importance of an Ontario court determining whether workers like Mr. Heller have been misclassified under the *ESA*.[178] The Court properly cited these concerns to support its conclusion that Mr. Heller does not need to bring an *ESA* complaint to show that the Arbitration Agreement contracts out of the *ESA*.[179]

86. In *Seidel*, the Court's conclusion that the *BPCPA* prohibited the arbitration of claims under s 172 turned, in part, on s 172's function as a public interest remedy drafted to enhance private enforcement of the legislation and "shine a spotlight on shabby corporate conduct".[180] The Court of Appeal's examination of the public interest objectives animating the *ESA* is no different. The Court of Appeal determined that the complaints process serves the public interest because: (i) the Ministry investigation of complaints under the *ESA* shifts the burden away from complainants to enforce the act; and (ii) rendering public findings likewise benefits other complainants.[181] This reasoning parallels the Court's consideration of s 172's ability to deter unlawful conduct and protect more than one complainant through public proceedings.[182]

87. As to the availability of class proceedings, the Court of Appeal's reasoning likewise focuses on the precedential value of civil proceedings under the *ESA* and the benefits to Ontario workers beyond a single litigant.[183] Again, *Seidel* supports the Court of Appeal's approach. There, the Court considered whether private arbitration offered the same remedies with the same impact and, if not, how that impacted s 172's legislative purpose.[184] This Court observed that the remedies were significantly "different in scope and quality" from those available in private arbitration and therefore inconsistent with s 172. Similarly, the Court of Appeal concluded that private arbitration

---

[178] Appellants' Factum at paras 85-87 (citing *ONCA Reasons* at paras 41-45, 49-50).
[179] *ONCA* Reasons at para 42.
[180] *Seidel* at paras 33-38.
[181] *ONCA* Reasons at paras 41-43, 44.
[182] *Seidel* at paras 36-38.
[183] *ONCA* Reasons at paras 44-45.
[184] *Seidel* at paras 38-40.

conflicts with the *ESA* because it would deny other similarly situated litigants the benefits of public proceedings, precedents and the ability to impact many workers at once.

88. The Court of Appeal's consideration of the importance of misclassification claims being determined in Ontario was likewise proper. Citing *Douez v Facebook* ("*Douez*"),[185] for the proposition that "a court's plenary jurisdiction only yields to private contracts where appropriate",[186] the court's primary concern was whether arbitration under the law of another country would protect the rights of Ontario workers misclassified as independent contractors. As in *Seidel*, which emphasized the *BPCPA* is "all about consumer protection",[187] the Court of Appeal's reasoning simply recognized the *ESA*'s purpose in preventing misclassification.

89. Indeed, as set out above, s 5.1 of the *ESA* expressly prohibits misclassification, one of the chief abuses of the *ESA*.[188] The misclassification of employees as independent contractors is both "illegal and widespread" and constitutes a "fundamental refutation of the essential protection of the law".[189] Companies like Uber misclassify workers to cut labour costs and avoid paying taxes.[190] The US Department of Labour has described the misclassification of employees as "one of the most serious problems facing affected workers, employers and the entire country".[191]

4. Reading down the Arbitration Agreement is improper.

90. If the Court affirms the Court of Appeal's holding that the Arbitration Agreement is unenforceable as to *ESA* claims, it should decline Uber's invitation to read down the Arbitration Agreement to allow only *ESA* complaints to the Ontario Ministry of Labour.[192]

91. First, if the Court determines that the *ESA* is mandatory and Ontario Uber drivers must be able to bring complaints to the Ministry of Labour, allowing drivers to bring *ESA* complaints to the Ministry only addresses half of the problem. The Arbitration Agreement would still preclude

---

[185] 2017 SCC 33.
[186] *ONCA Reasons* at para 50 (citing *Douez v Facebook*, 2017 SCC 33 at para 37).
[187] *Seidel* at para 37.
[188] *ESA*, s 5.1(1); *ESA Manual*, s 5.1(1); *Changing Workplaces Review* at pp 54, 73, 262-265, **RBOA**, Tab 30.
[189] *Changing Workplaces Review* at pp 54, 73, 262-265, **RBOA**, Tab 30.
[190] Pamela A. Izvanariu, "Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector (2016) 66 DePaul LR 133, 136-141, **RBOA**, Tab 27.
[191] *Changing Workplaces Review* at p 264, **RBOA**, Tab 30.
[192] Appellants' Factum at paras 80-81.

arbitrators from applying the *ESA* in arbitration, which is inconsistent with the Court's initial conclusion that the *ESA* cannot be waived.

92. In this respect, Uber's reliance on *Seidel* is misplaced. Although the Court determined that the arbitration agreement in *Seidel* was unenforceable only as to claims relying on s 172 of the *BPCPA*,[193] that arbitration agreement did not contain a forum selection clause.[194] Accordingly, the Court did not consider whether the *BPCPA* precluded arbitration where that law would not apply or the arbitration would take place outside of British Columbia. If it had, the entire arbitration clause might have been unenforceable as to *BPCPA* claims.

93. Moreover, Uber's approach ignores the legislative intent to allow plaintiffs to choose either to file an *ESA* complaint with the Ministry or pursue an *ESA* claim in court. As set out above, the legislature amended the act in 1996 to give workers that option.[195] Uber is urging the Court to allow access to the complaints process while barring Mr. Heller from pursuing the other option, a claim in court. The Court of Appeal correctly held that this was inconsistent with the *ESA*'s statutory enforcement mechanisms and purpose.[196]

94. Second, notional severance, *i.e.*, reading down an unenforceable provision to make it enforceable, is inappropriate where a contractual provision violates the *ESA*. This Court held in *Machtinger* that a provision that violates the *ESA* is "void for all purposes" and declined to read down the employment agreement to the minimums required under the act because it would undermine the legislation's purpose—to protect employees.[197]

95. Although the Court did not explicitly apply it, the *Machtinger* decision is consistent with the four-factor test courts typically apply to determine whether to read down an illegal contractual provision. That test considers: (i) whether reading down the provision undermines a statutory or legislative purpose; (ii) whether the parties entered into the agreement for an improper purpose; (iii) the parties' relative bargaining positions; and (iv) the potential to create an unjustified

---

[193] *Seidel* at para 31.
[194] *Seidel* at para 13.
[195] *See Legislative Assembly of Ontario Debates*, No 73 (13 May 1996) at 2909-2910 (Elizabeth Witmer), **ABOA**, Tab 16; *Legislative Assembly of Ontario Debates*, No 80 (30 May 1996) at 3213 (John R Baird), **ABOA**, Tab 17.
[196] *ONCA* Reasons at paras 37, 43.
[197] *Machtinger* at pp 1001-1005.

windfall.[198] Here, the parties' unequal bargaining power is not in dispute, and the remaining factors weigh against reading down the agreement.

96. As in *Machtinger*, the fundamental importance of employment rights, the *ESA*'s remedial purpose, and the historical approach to employment contract interpretation weigh heavily against severing the problematic pieces of this agreement.[199] The *ESA* prohibits contracting out of the act because, presumptively, workers have less bargaining power and in many instances do not fully understand the terms offered to them.[200] Allowing putative employers to remove unenforceable provisions from agreements they drafted after benefiting from their deterrent effect would entirely undermine *ESA* enforcement and compliance.[201]

97. Although arbitration is not an improper purpose, reading down the agreement would still leave Mr. Heller subject to both prohibitive arbitration fees and the law of the Netherlands, which is improper (as set out below). In any event, even if this is a neutral factor, Mr. Heller would still be required to prove his claims in a court of law and would not unjustifiably benefit if the entire Arbitration Agreement is unenforceable.[202]

98. Third, notional severance is used sparingly because courts are reluctant to alter parties' agreements.[203] The goal, in applying it, is to remedy the contract's illegality while hewing as closely as possible to the parties' original intent.[204] Here, notional severance to allow *ESA* complaints in Ontario would involve re-writing: (i) the provision applying the law of the

---

[198] *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7 at para 42; *2176693 Ontario Ltd v The Cora Franchise Group Inc*, 2015 ONCA 152 at paras 35-39, 48-51.

[199] *Machtinger* at pp 997-1005; *see also Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at paras 90-92; *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at paras 36-41; *Andros v Colliers Macaulay Nicolls Inc*, 2019 ONCA 679 at paras 18-20; *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 26; *Ceccol v Ontario Gymnastic Federation*, [2001] OJ No 3488 (ONCA) at paras 47-49.

[200] *ESA*, s 5(1); *Machtinger* at p 1003; *Alberta v United Food and Commercial Workers*, 2013 SCC 62 at para 32; *Mounted Police Association of Ontario v Canada*, 2015 SCC 1 at para 70; *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at paras 26-28.

[201] *Machtinger* at pp 1003-1004; *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at paras 47-50; *Ceccol v Ontario Gymnastic Federation*, [2001] OJ No 3488 (ONCA) at paras 47-49.

[202] *See Ontario Ltd v The Cora Franchise Group Inc*, 2015 ONCA 152 at paras 48-62.

[203] *Shafron v KRG* Insurance *Brokers (Western) Inc*, 2009 SCC 6 at paras 29-32.

[204] *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7 at para 32.

Netherlands; (ii) the mandatory mediation and arbitration provisions; and (iii) the requirement that dispute resolution take place in Amsterdam. This is far different than the parties' original agreement and undermines the "main purpose and substance of the clause", making notional severance inappropriate.[205]

C. The Arbitration Agreement is Unconscionable

99. The Court of Appeal correctly held that the Arbitration Agreement is unconscionable.[206] None of Uber's challenges to the court's analysis can succeed.

1. The Court of Appeal properly assessed the Arbitration Agreement alone.

100. At first instance, Uber argued that "[t]he arbitration agreement is to be considered separately from other terms of the agreement . . . as a separate contract".[207] Uber now erroneously contends that unconscionability must be assessed with respect to the entire agreement.[208]

101. Courts frequently consider the enforceability of single provisions under general contract law.[209] Moreover, treating the Arbitration Agreement as a separate agreement in respect of challenges to its validity is most consistent with competence-competence. Both the *ICAA* and the *Arbitration Act* direct arbitrators to treat arbitration clauses as independent agreements under such circumstances.[210] Reviewing the *arbitration clause* for unconscionability or other failings that render it unenforceable makes sense because, if it is invalid, then the matter will not proceed to arbitration. However, if the arbitration clause is enforceable, then any challenges to the overall agreement may be considered by the arbitrator (unless the parties have agreed otherwise).

---

[205] *See Shafron v KRG* Insurance *Brokers (Western) Inc*, 2009 SCC 6 at para 24 (internal quotations omitted).
[206] *ONCA Reasons* at paras 52-73.
[207] Motion Factum of the Defendants at para 75, **RR**, Tab 1, p 25.
[208] Appellants' Factum at paras 92-93.
[209] *See Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras 122-123; *Shelanu Inc v Print Three Franchising Corp*, [2003] OJ No 1919 (ONCA) at paras 53-62 (refusing to enforce exclusion clause); *Melrose v Halloway Holdings Ltd*, 2005 CarswellOnt 104 (ONSC) at paras 47-48, **RBOA**, Tab 12; *see also Seidel* at paras 10-13; *Douez v Facebook*, 2017 SCC 33 at paras 1-4 (considering enforceability of single clauses).
[210] *ICAA*, Sch 2, Art 16(1) (Model Law); *Arbitration Act*, s 17(2); *see also Dell* at para 75.

2. The Court of Appeal did not lower the threshold for unconscionability.

102. Contrary to Uber's argument,[211] the Court of Appeal's references to *Douez* and the deterrent effect of foreign forum selection clauses did not lower the threshold for unconscionability. The Court of Appeal's recitation of the facts—that Uber drivers who want to work for Uber must accept Uber's terms and click "I agree"[212]—suggests only that the drivers, like many consumers, are vulnerable in that they had no ability to negotiate the terms of the agreements. The court simply considered this as part of its analysis of the agreement's unfairness.

103. However, the Court should not countenance Uber's attempt to recharacterize the Arbitration Agreement as only an arbitration agreement when it plainly contains a forum selection clause as well. Indeed, Uber labeled the agreement "Governing Law and Jurisdiction" and "Governing Law; Arbitration"[213] in the relevant agreements.

104. Although the Court of Appeal did not apply a strong cause analysis, it correctly identified *Douez*'s relevance to arbitration agreements that function both as a mandatory arbitration clause and a forum selection clause.[214] Uber attempts to side-step this issue, which, as the Court of Appeal rightly observed, needs to be confronted.

105. Forum selection clauses affect both the public and the courts.[215] Therefore, courts treat them as a "unique category of contracts" subject to special consideration, especially in standard form contracts.[216] The parties to forum selection clauses are held to their terms, where enforceable,

---

[211] Appellants' Factum at paragraphs 94-97.
[212] *ONCA* Reasons at para 71.
[213] Service Agreements, Affidavit of R van der Woude, Exs A-E, **AR**, Tab 9, pp 31, 47, 74, 90, 123.
[214] *ONCA Reasons* at para 50 (citing *Douez v Facebook*, 2017 SCC 33 at para 37).
[215] Arbitration Agreements likewise implicate the courts' public function by stifling the development of precedents and denying ordinary people access to the courts. *See* Maria Glover, "Disappearing Claims and the Erosion of Substantive Law" (2015) 124:8 Yale LJ 3052 at pp 3054-3057, 3074-3080, **RBOA**, Tab 24; Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124:8 Yale LJ 2804 at pp 2806-2810, **RBOA**, Tab 34.
[216] *Douez v Facebook*, 2017 SCC 33 at paras 24-27, 33-34; Marina Pavlovic, "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016) 62:2 McGill LJ 389 at pp 399-400, **RBOA**, Tab 31.

but such provisions are not presumptively valid.[217] Even after a party seeking to enforce a forum selection clause establishes its validity, courts consider whether strong cause precludes enforcement, taking into consideration whether the clause was freely negotiated.[218]

106. In *Douez*, the Court recognized the increasing proliferation of standard form contracts including such clauses and acknowledged that the law needed to evolve to address the reality that "ordinary people" do not "foresee or expect [the] implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account".[219] Although the burden remains on the "ordinary person" challenging the forum selection clause to establish strong cause not to enforce it, courts must keep in mind the fact that the parties did not negotiate on an even playing field and policy considerations weighing against enforcement.[220]

107. The Court of Appeal's approach correctly recognized that these same concerns arise in the context of arbitration agreements containing forum selection clauses and should, at the very least, inform a court's analysis where relevant to the applicable legal test. Mr. Heller submits it is open to this Court to go further and apply the strong cause test to the forum selection clause here, which raises concerns similar to the one in *Douez* and should likewise be unenforceable.

3. The Court of Appeal applied the correct unconscionability test.

108. Contrary to Uber's assertions,[221] the Court of Appeal did not apply a two-part unconscionability analysis. It applied the test from *Titus*,[222] as affirmed in *Phoenix Interactive Design Inc v Alterinvest II fund LP*,[223] and required Mr. Heller to establish four elements: (i) a grossly unfair and improvident transaction; (ii) a lack of independent legal advice; (iii) an overwhelming imbalance in bargaining power; and (iv) the other party's knowingly taking advantage of this vulnerability.[224] The second and third parts of this test are not contested.

---

[217] *Douez v Facebook*, 2017 SCC 33 at paras 27-29.
[218] *Douez v Facebook*, 2017 SCC 33 at para 38.
[219] *Douez v Facebook*, 2017 SCC 33 at paras 33-36.
[220] *Douez v Facebook*, 2017 SCC 33 at paras 38-40.
[221] Appellants' Factum at paras 98-102.
[222] 2007 ONCA 573 at para 38 [***Titus***].
[223] 2018 ONCA 98, paras 39-41.
[224] *ONCA Reasons* at para 60 (citing *Titus* at paras 60, 68).

(i) The agreement is grossly unfair.

109. The Court of Appeal concluded that the Arbitration Agreement is a substantially improvident or unfair bargain because: (i) it "requires an individual with a small claim to incur significant costs of arbitrating that claim"; (ii) the potential to recover these costs ($14,500 USD) as part of an arbitration award does not mitigate the unfairness of the requirement to pay these costs "up-front"; (iii) Uber is better situated to incur such costs for an arbitration procedure it has selected; (iv) the claims must be arbitrated individually in the Netherlands, Uber's home jurisdiction, which is unconnected to Ontario where the Uber drivers work and live; and (v) it applies the law of the Netherlands but provides the drivers no information as to what that is.[225]

110. Uber argues that the Court of Appeal erred because the "expense of the arbitration" is "irrelevant".[226] The cases Uber cites are inapposite. They state that the mere potential for inconvenience or extra cost in arbitration is insufficient to render an agreement unenforceable. They do not consider actual evidence of prohibitive costs or a litigant's inability to pay.[227]

111. Mr. Heller is unaware of another Canadian court decision considering evidence on this issue. As the Court of Appeal noted,[228] in *Kanitz v Rogers* ("*Kanitz*"), it declined to hold that the arbitration clause at issue was unenforceable on the basis that the costs were prohibitive because the evidence before the court was insufficient.[229] The court cited the U.S. Supreme Court decision, *Green Tree Financial Corp-Alabama v Rudolph*,[230] for the proposition that "large arbitration costs" could preclude litigants from effectively vindicating their rights, but found that the record contained "hardly any information" on this point.[231]

---

[225] *ONSC Reasons* at para 25; *ONCA Reasons* at paras 15, 68.
[226] Appellants' Factum at paras 108-111.
[227] *Prince George (City of) v AL Sims & Sons Ltd*, [1995] 9 WWR 503 (BCCA) at para 36; *Morrison v Ericsson Canada Inc*, 2016 ONSC 3908 at para 23.
[228] *ONCA Reasons* at para 72.
[229] *Kanitz v Rogers Cable Inc*, [2002] OJ No 665 (ONSC) at paras 41-42.
[230] 531 US 79 (2000), **RBOA**, Tab 7.
[231] *Kanitz v Rogers Cable Inc*, [2002] OJ No 665 (ON SC) at para 42 (citing *Green Tree Financial Corp-Alabama v Rudolph*, 531 US 79 at p 90 (2000), **RBOA**, Tab 7).

112. Numerous U.S. courts have applied this principle and found arbitration clauses unconscionable.[232] For example, in *Phillips v Associates Home Equity Services, Inc*,[233] the court determined that an arbitration agreement was unenforceable where: (i) the plaintiff would have to pay "upwards of $4,000 simply to file her claim", plus arbitrator's fees, travel expenses, hearing room rental and other costs;[234] (ii) the amount at issue was $70,000; (iii) and the plaintiff affirmed that she could not afford these costs.[235]

113. Similarly, in *Mendez v Palm Harbor Homes,*[236] the court considered whether an arbitration agreement imposing up-front fees of "well over $2,000" was unconscionable.[237] The court rejected the suggestion that the plaintiff's evidence as to costs, which was based on information provided by the American Arbitration Association, was insufficient.[238] The court further rejected the defendant's argument that the possibility of recovering these costs in an arbitration award mitigated this unfairness, noting that such an approach would always render the costs of arbitration irrelevant, "even in the case of an indigent plaintiff."[239] Costs must be relevant to the unconscionability analysis.

114. Uber wrongly argues the arbitration's cost is not unconscionable because the record is silent on the costs to pursue a class action or civil claim in Ontario.[240] This information is not necessary because Mr. Heller has sworn that he cannot afford the arbitration fees and expenses.[241]

115. In any event, regulations set the relevant Ontario filing fees and other administrative fees. The fees to file a statement of claim in the Ontario Superior Court of Justice and Small Claims

---

[232] *ACORN v Household Intern, Inc*, 211 F Supp 2d 1160 at pp 1173-1174 (ND Cal 2002), **RBOA**, Tab 2; *Phillips v Associates Home Equity Services, Inc*, 179 F Supp 2d 840 at pp 846-847 (ND Ill 2001), **RBOA**, Tab 17; *Brady v Williams Capital Group, LP*, 14 NY3d 459 at pp 466-467 (NY Ct App 2010), **RBOA**, Tab 4; *Mendez v Palm Harbor Homes, Inc*, 45 P3d 594 at pp 601-606 (Wash Ct App 2002), **RBOA**, Tab 13.
[233] 179 F Supp 2d 840 (ND Ill 2001), **RBOA**, Tab 17 [***Phillips***].
[234] *Phillips* at p 846, **RBOA**, Tab 17.
[235] *Phillips* at p 847, **RBOA**, Tab 17.
[236] *Mendez v Palm Harbor Homes, Inc*, 45 P3d 594 (Wash Ct App 2002) [***Mendez***], **RBOA**, Tab 13.
[237] *Mendez* at p 605, **RBOA**, Tab 13.
[238] *Mendez* at p 605, **RBOA**, Tab 13.
[239] *Mendez* at pp 605-607, **RBOA**, Tab 13.
[240] Appellants' Factum at paras 106-110.
[241] Affidavit of D Heller at para 15, **AR**, Vol II, Tab 10, p 135.

Court are $229[242] and $102,[243] respectively. Applying an exchange rate of 1.3, the $14,500 USD in fees to initiate mediation and arbitration under the ICC Rules imposed by the Arbitration Agreement[244] amounts to nearly $19,000 CAD—82 times the cost of filing in Superior Court and 186 times the cost of filing in Small Claims Court. Courts have held arbitration agreements unenforceable where the filing fees were only 12 times and 20 times more than the comparable court filing fees.[245] Moreover, Mr. Heller earns $400-$600 CAD a week working 40-50 hours for Uber, which amounts to about $20,800-$31,200 CAD a year before taxes and expenses.[246] The mediation-arbitration fees range from 60% to 90% of his gross annual earnings as an Uber driver.

116. The Court of Appeal correctly rejected the contention that the arbitration costs should be compared to the putative class's collective damages, noting that the class has not been certified.[247] The issue is whether the Arbitration Agreement is unconscionable as to Mr. Heller. Moreover, the ICC Arbitration Rules do not contemplate class proceedings and require each party who joins a proceeding to pay an additional $5,000 USD fee,[248] any such comparison would have to take that into account. Uber's urged approach also ignores the fundamental efficiency of class actions, which allow plaintiffs who cannot afford the cost of litigation to collectively pursue access to justice by shifting the risk to lawyers who work on contingency.[249] Arbitration—in particular the up-front fees—fundamentally changes the calculus and deters such arrangements.[250]

117. Uber further asserts that the Arbitration Agreement is not grossly unfair because it does not require arbitration in the Netherlands. The agreement's plain language and Uber's evidence is

---

[242] *Superior Court of Justice and Court of Appeal - Fees*, O Reg 293/92, s 1(1).
[243] *Small Claims Court - Fees and Allowances*, O Reg 332/16, s 1(2); *Small Claims Court Jurisdiction*, O Reg 626/00, s 1.
[244] *ONSC Reasons* at para 25; *ONCA Reasons* at para 12.
[245] *See Mendez* at pp 606-607 (reviewing decisions), **RBOA**, Tab 13.
[246] *ONCA Reasons* at paras 2, 15; *ONSC Reasons* at paras 26-29.
[247] *ONCA Reasons* at paras 57-58; *see also Seidel* at para 8 (considering only individual claim).
[248] ICC Arbitration Rules, Arts 4(b), 7(3) and Appx III, **RBOA**, Tab 26.
[249] Jean R Sternlight, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80:4 Brook L Rev 1309 at pp 1334-1339, **RBOA**, Tab 35.
[250] Jean R Sternlight, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80:4 Brook L Rev 1309 at pp 1325-1327, 1334-1339, **RBOA**, Tab 35; *see also Lee v Postmates*, Case No 18-cv-03421-JCS (ND Cal April 25, 2019) at p 6, **RBOA**, Tab 11 (noting efficiency of class actions compared to arbitration).

to the contrary.[251] Both the motion judge and the Court of Appeal found otherwise.[252] The ICC Arbitration Rules provide that the arbitrator may determine the venue of the proceedings only in the absence of the parties' agreement.[253] Here, the Arbitration Agreement asserts that they have agreed the arbitration will be in "Amsterdam, The Netherlands".[254]

118. Uber's claim that it "agreed" to arbitrate in Ontario and that the motion judge acknowledged that purported fact is disingenuous. The parties did not agree. Uber transparently suggested, after arguing that the arbitration had to take place in the Netherlands,[255] that the arbitration "*could* instead be arranged in Ontario" (emphasis added).[256] Leaving aside the legitimacy of Uber's late-blooming offer, it suggests that Uber recognizes the unfairness inherent in the agreement and only bolsters the conclusion that the Arbitration Agreement is unconscionable. It also falls well short of remedying the flaws—the prohibitive costs and ousting of Ontario law—that render the Arbitration Agreement invalid.

(ii) Uber took undue advantage of Mr. Heller.

119. The Court of Appeal held that, based on the unfairness described above, it could "safely" conclude that Uber chose the Arbitration Agreement "to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber".[257] Uber asserts this was an error,[258] but the law supports the Court of Appeal's decision.

120. Courts assess unconscionability on a case-by-case basis. Contrary to Uber's assertions,[259] no set of fixed criteria apply.[260] Because unconscionability relieves a weaker party from an unfair advantage gained by a stronger party, the inquiry's focus is on whether a person who is vulnerable—be it due to financial circumstances or lack of information—has been unduly

---

[251] van der Woude Trans at Q 198, **AR**, Vol III, Tab 11, p 66. *See supra* paras 56-69.
[252] *ONSC Reasons* at para 66; *ONCA Reasons* at paras 55-58.
[253] ICC Arbitration Rules, Art 18, **RBOA**, Tab 26.
[254] *ONSC Reasons* at para 21; *ONCA Reasons* at para 11.
[255] Motion Factum of the Defendants at paras 2, 33, 55-57, **RR**, Tab 1, pp 4, 12, 19.
[256] *ONSC Reasons* at n 39.
[257] *ONCA Reasons* at para 68.
[258] Appellants' Factum at paras 103-107.
[259] Appellants' Factum at para 103.
[260] *See Norberg v Wynrib*, [1992] SCR 226 at pp 248-250; *Birch v Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at para 49.

disadvantaged because of this vulnerability.[261] The fourth part of the test, in particular, considers whether some circumstance exists, of which the stronger party knows or reasonably should know, that creates an opportunity for the stronger party to take advantage of that person in a way that is "unconscientious".[262] Courts do not require direct evidence to satisfy every part of the test.[263] Instead, the issue is whether the inferences drawn from the evidence are reasonable.[264]

121. The Court of Appeal's holding reflects an appreciation for the severity of the Arbitration Agreement's terms and how a person with a high school education like Mr. Heller would not have understood their significance when he signed up to be an Uber driver. The court's holding likewise reflects an appreciation for Uber's role in drafting that agreement and the admitted advantages to arbitration in the Netherlands (such as local offices, a legal team, and familiarity with the legal system), [265] relative to Mr. Heller, who has no connection whatsoever with the Netherlands.

122. Mr. Heller and workers like him are vulnerable because they are low-paid, have no benefits plans or pensions, and are exempt from statutory entitlements like employment insurance.[266] They cannot easily forgo work, are unlikely to know their rights and, under this Arbitration Agreement, are unlikely to enforce them.[267] Moreover, Uber determined the amount Mr. Heller earned as a Uber driver (about $21,000-31,000 annually before paying taxes and expenses).[268] Uber understood the Arbitration Agreements' legal implications and could easily afford the arbitration.

---

[261] *Norberg v Wynrib*, [1992] SCR 226 at pp 248-250; *Downer v Pitcher*, 2017 NLCA 13 at paras 44-47, 54; *see also Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC), at paras 36-49, **RBOA**, Tab 8, *aff'd on other grounds*, [2001] OJ No 3318 (ONCA).
[262] *See Norberg v Wynrib*, [1992] SCR 226 at pp 248-250; *Downer v Pitcher*, 2017 NLCA 13 at para 54.
[263] *Birch v Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at paras 53-55, 59.
[264] *Birch v Union of Taxation Employees, Local 70030*, 2008 ONCA 809 at para 59; *Insurance Corp of BC v Atwal*, 2012 BCCA 12 at paras 39-40.
[265] van der Woude Trans at Qs 209-213, **AR**, Vol III, Tab 11, pp 71-73.
[266] Pamela A. Izvanariu, "Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector [2016] 66 DePaul LR 133, 136-140, **RBOA**, Tab 27; *Changing Workplaces Review* at pp 41-48, **RBOA**, Tab 30.
[267] Charlotte Garden, "Disrupting Work Law: Arbitration in the Gig Economy" 2017 U Chicago Legal F 205 at pp 205-207, **RBOA**, Tab 22; *Changing Workplaces Review* at pp 58, 76-78, **RBOA**, Tab 30.
[268] *ONCA Reasons* at paras 2, 9; *ONSC Reasons* at paras 13-14, 26-29. *See also* Statistics Canada, Table 11-10-0232-01 Low income measure (LIM) thresholds by income source and household size (noting 2017 low-income measure of $23,513).

Mr. Heller, however, had only a high school education and his financial circumstances were such that the arbitration fees would never be in his reach, and Uber knew or should have known it.[269]

123. Uber's reliance on *Downer v Pitcher*[270] to suggest Mr. Heller is not vulnerable is misplaced. That case considered whether a release of personal injury claims after a car accident was unconscionable.[271] The court concluded that the agreement might have been unfair, but the plaintiff was not particularly disadvantaged in dealing with the defendant, the other driver, and the release was not particularly unusual.[272] Here, however, the disparity in Mr. Heller and Uber's sophistication and bargaining power has been well-canvassed, and the Arbitration Agreement's terms are particularly shocking, notably the fees and the forum selection clause.

124. Uber also takes issue with the Court of Appeal giving little weight to Uber's claim that its only motives were ensuring consistency and convenience in its dispute resolution process.[273] However, improper motive is not part of the test. Instead, the test requires only evidence of constructive knowledge (at least) of circumstances that render the parties' agreement unconscientious—meaning the stronger party knew the agreement was unfairly one-sided.[274]

125. To that end, the Court of Appeal properly considered Uber's assertions in light of the context, which included a forum selection clause likely "to defeat the very claims it purports to resolve".[275] This Court acknowledged the impact of similar forum selection clauses in *Douez*.[276] Justice Abella pointed out the particular "deterrent effects of geography" that arise from the "burdens" of retaining counsel in a foreign jurisdiction, travel, long-distance communication, and complications related to preparation from afar.[277] These burdens are especially onerous where the claims are of limited value. As addressed above, numerous courts have discussed how cost alone

---

[269] *See Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC), at paras 36-49, **RBOA**, Tab 8, *aff'd on other grounds*, [2001] OJ No 3318 (ONCA).
[270] *Downer v Pitcher*, 2017 NLCA 13.
[271] *Downer v Pitcher*, 2017 NLCA 13 at paras 2-5, 55-70.
[272] *Downer v Pitcher*, 2017 NLCA 13 at paras 2-5, 55-70.
[273] Appellants' Factum at para 106.
[274] *Downer v Pitcher*, 2017 NLCA 13 at paras 44-49; Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012), 53 Can Bus LJ 475 at pp 482-483, **RBOA**, Tab 36.
[275] *ONCA* Reasons at para 70 (citing *Douez v Facebook*, 2017 SCC 33 at para 62).
[276] *Douez v Facebook*, 2017 SCC 33 at para 62.
[277] *Douez v Facebook*, 2017 SCC 33 at paras 101-102, 115-116.

can effectively prevent individuals from vindicating their rights under arbitration agreements.[278] No Ontario Uber driver has ever brought an arbitration claim against Uber in the Netherlands.[279] The Court of Appeal could not ignore the Arbitration Agreement's obvious impact and Uber's ability to both appreciate the barriers it had created and benefit from them.

126. Furthermore, though the Court of Appeal did not cite them, Mr. Heller introduced at the hearing examples of U.S. cases involving Uber arbitration clauses that allow drivers to opt-out of the arbitration agreement, do not require arbitration in the Netherlands under the law of the Netherlands, and require Uber to pay the arbitration fees.[280] These terms, which are much less onerous to workers, undermine Uber's claim that it did not knowingly draft the Arbitration Agreement to its unfair advantage.

127. Inferring that Uber knew the Arbitration Agreement would give it an outsized advantage is more than reasonable in this context. Indeed, in light of the barriers the Arbitration Agreement imposes between Uber drivers and independent dispute resolution, which only Uber could surmount, Mr. Heller submits it is the only reasonable inference.

PART IV: SUBMISSION ON COSTS

128. The Respondent respectfully submits that costs should follow the event, and if the appeal is dismissed, seeks its costs in this Court and in the courts below.

PART V: ORDER SOUGHT

129. Mr. Heller respectfully requests that the appeal be dismissed, with costs throughout.

PART VI: SUBMISSIONS ON CONFIDENTIALITY

130. 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 this Court's reasons in the appeal.

---

[278] *ACORN v Household Intern, Inc*, 211 F Supp 2d 1160 at pp 1173-1174 (ND Cal 2002), **RBOA**, Tab 2; *Phillips* at pp 846-847, **RBOA**, Tab 17; *Brady v Williams Capital Group, LP*, 14 NY3d 459 at pp 466-467 (NY Ct App 2010), **RBOA**, Tab 4; *Mendez* at pp 601-606, **RBOA**, Tab 13.
[279] R van der Woude Answers to Undertakings at Q 214, **AR**, Vol III, Tab 12, p 94.
[280] *See, e.g.*, *Mohamed v Uber Technologies, Inc*, 836 F3d 1102 at pp 1106-1108 (9th Cir 2016), **RBOA,** Tab 14; *Kai Peng v Uber Technologies, Inc*, 237 F Supp 3d 36 at pp 41-43 (EDNY 2017), **RBOA**, Tab 10; *Bruster v Uber Technologies, Inc*, 188 F Supp 3d 658 at p 660 n 4 (ND Ohio 2016), **RBOA**, Tab 5.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF OCTOBER, 2019.

Michael D. Wright / Danielle E. Stampley
Lior Samfiru / Stephen Gillman

PART VII: TABLE OF AUTHORITIES

Tab	Description	Paragraph(s)
Cases		
1.	*2176693 Ontario Ltd v The Cora Franchise Group Inc*, 2015 ONCA 152	95
2.	*671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59	28, 30
3.	*Abadilla v Uber Technologies, Inc*, Case No 3:18-cv-7343, **RBOA**, Tab 1	51
4.	*ACORN v Household Intern, Inc*, 211 F Supp 2d 1160 (ND Cal 2002), **RBOA**, Tab 2	47, 48, 112, 125
5.	*Alberta v United Food and Commercial Workers*, 2013 SCC 62	96
6.	*Andros v Colliers Macaulay Nicolls Inc*, 2019 ONCA 679	96
7.	*Asociación Profesional Elite Taxi v Uber Systems Spain SL*, [2017] C-434/15 ECJ, **RBOA**, Tab 3.	31
8.	*Birch v Union of Taxation Employees, Local 70030*, 2008 ONCA 809	48, 120
9.	*Brady v Williams Capital Group, LP*, 14 NY3d 459 (NY Ct App 2010), **RBOA**, Tab 4	47, 112, 125
10.	*Bruster v Uber Technologies, Inc*, 188 F Supp 3d 658 (ND Ohio 2016), **RBOA**, Tab 5	126
11.	*Ceccol v Ontario Gymnastic Federation*, [2001] OJ No 3488 (ONCA)	65, 96
12.	*Dancap Productions Inc v Key Brand Entertainment, Inc*, 2009 ONCA 135	46, 49
13.	*Danyluk v Ainsworth Technologies*, 2001 SCC 44	76
14.	*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34	24, 41, 46, 50, 101
15.	*Douez v Facebook, Inc*, 2015 BCCA 279	42

Tab	Description	Paragraph(s)
16.	*Douez v Facebook, Inc*, 2017 SCC 33	42, 82, 88, 101, 104-106, 125
17.	*Downer v Pitcher*, 2017 NLCA 13	120, 123-124
18.	*Dumbrell v The Regional Group of Companies Inc*, 2007 ONCA 59	59
19.	*Gladstone v Canada (Attorney General)*, 2005 SCC 21	73
20.	*Green Tree Financial Corp-Alabama v Rudolph*, 531 US 79, **RBOA**, Tab 7	111
21.	*Grey-Owen Sound Health Unit v ONA*, 1979 CarswellOnt 824 (ONSC App Div), **RBOA**, Tab 6	73
22.	*Harry v Kreutziger*, [1978] BCJ No 1318 (BC CA)	48
23.	*Heller v Uber Technologies Inc*, 2018 ONSC 718	8, 10-18, 25, 42-43, 51, 55, 57- 60, 109, 115, 117-118, 122
24.	*Heller v Uber Technologies Inc*, 2019 ONCA 1	2, 8, 11-17, 19-22, 25, 32, 36, 42-43, 50-51, 55, 58-60, 62-63, 68, 70-71, 77, 81-82, 85-88, 93, 99, 102, 104, 108-109, 111, 115-117, 119, 122, 125
25.	*Houston v Exigen (Canada) Inc*, 2006 NBQB 29	79
26.	*Huras v Primerica Financial Services Ltd*, [2000] OJ No 1474 (ONSC), **RBOA**, Tab 8	80, 120, 122
27.	*Huras v Primerica Financial Services Ltd*, [2001] OJ No 3318 (ONCA)	80, 120, 122
28.	*Insurance Corp of BC v Atwal*, 2012 BCCA 12	120

Tab	Description	Paragraph(s)
29.	*Kai Peng v Uber Technologies, Inc*, 237 F Supp 3d 36 (EDNY 2017), **RBOA**, Tab 10	51, 126
30.	*Kanitz v Rogers Cable Inc*, [2002] OJ No 665 (ONSC)	111
31.	*Kaszuba v Salvation Army Sheltered Workshop*, 41 OR (2d) 316, **RBOA**, Tab 9	30
32.	*Kumar v Sharp Business Forms Inc*, [2001] OJ No 1729 (ONSC)	68, 74
33.	*Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37	53, 54
34.	*Lee v Postmates*, Case No 18-cv-03421-JCS (ND Cal April 25, 2019), **RBOA**, Tab 11	116
35.	*Machtinger v HOJ industries Ltd*, [1992] SCR 986 (SCC)	30, 65, 81, 94, 96
36.	*Marbry v Avrecan International Inc*, 1999 BCCA 172	30
37.	*Matrix Integrated Solutions Ltd v Naccarato*, 2009 ONCA 593	28
38.	*McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39	30
39.	*MDG Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656	33
40.	*Melrose v Halloway Holdings Ltd*, 2005 CarswellOnt 104 (ONSC), **RBOA**, Tab 12	101
41.	*Mendez v Palm Harbor Homes, Inc*, 45 P3d 594 (Wash Ct App 2002), **RBOA**, Tab 13	48, 112-113, 115, 125
42.	*Modern Cleaning Concept Inc v Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28	28
43.	*Mohamed v Uber Technologies*, 836 F3d 1102 (9th Cir 2016), **RBOA**, Tab 14	126
44.	*Morrison v Ericsson Canada*, 2016 ONSC 3908	79, 110
45.	*Mounted Police Association of Ontario v Canada*, 2015 SCC 1	96
46.	*New Prime v Oliveira*, 139 S Ct 532 (US 2019), **RBOA**, Tab 15	30

Tab	Description	Paragraph(s)
47.	*Norberg v Wynrib*, [1992] SCR 226	48, 120
48.	*Nowak v Biocomposites Inc*, 2018 BCSC 785	82
49.	*O'Connor v Uber Technologies, Inc*, 82 F Supp 3d 1133, (ND Cal 2015), **RBOA**, Tab 16	31
50.	*ONA v Extendicare (Canada) Inc*, 159 LAC (4th) 30, 89 CLAS 36, **ABOA**, Tab 3	72
51.	*Ontario Ltd v The Cora Franchise Group Inc*, 2015 ONCA 152	95, 97
52.	*Ontario v Imperial Tobacco Canada Ltd*, 2011 ONCA 525	46, 49
53.	*Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745	32, 46
54.	*Patel v Kanbay International Inc*, 2008 ONCA 867	28-29
55.	*Phillips v Associates Home Equity Services, Inc*, 179 F Supp 2d 840 (ND Ill 2001), **RBOA**, Tab 17	48, 112, 125
56.	*Phoenix Interactive Design Inc v Alterinvest II Fund LP*, 2018 ONCA 98	108
57.	*Prince George (City of) v AL Sims & Sons Ltd*, [1995] 9 WWR 503 (BCCA)	110
58.	*Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313	96
59.	*Reference re Public Service Employee Relations Act*, 1973 CarswellNat 47F, **ABOA**, Tab 5	72
60.	*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27	30, 65
61.	*Robert v Markandu*, 2012 ONSC 6891	79
62.	*Rogers Wireless Inc v Muroff*, 2007 SCC 35	24, 46, 50
63.	*Sattva Capital Corp v Creston Moly Corp*, 2017 SCC 53	53, 54, 59

Tab	Description	Paragraph(s)
64.	*Seidel v TELUS Communications Inc*, 2011 SCC 15	3, 21, 24, 26, 32, 34, 36, 40, 46, 51, 62, 64, 67, 69, 86-88, 92, 101, 116
65.	*Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6	96, 98
66.	*Shelanu Inc v Print Three Franchising Corp*, [2003] OJ No 1919 (ONCA)	101
67.	*TELUS Communications Inc v Wellman*, 2019 SCC 19	3, 33-34, 39-40, 49, 62
68.	*Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4	101
69.	*Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573	22, 108
70.	*Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7	95, 98
71.	*Uber BV v Aslam*, [2018] EWCA Civ 2748 (UK), **RBOA**, Tab 18	31
72.	*Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40	24
73.	*Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158	30, 65, 66, 84, 96
Statutes and Legislation		
74.	*Arbitration Act*, RSBC 1996, c 55, s 15(2)	26, 34
75.	*Arbitration Act*, SO 1991, c 17, ss 7(2), 17(2), 32(2) *Arbitrage (Loi de 1991 sur l')*, LO 1991, chap 17, ss 7(2), 17(2), 32(2)	20, 26, 34, 42, 60, 101
76.	*Business Practices and Consumer Protection Act*, SBC 2004, c 2	26, 34
77.	*Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, ss 1, 2 *Protection du consommateur (Loi de 2002 sur la)*, LO 2002, chap 30, annexe A, ss 1, 2	40

Tab	Description	Paragraph(s)
78.	*Courts of Justice Act*, RSO 1990, c C 43, s 1(1) *Loi sur les tribunaux judiciaires*, L.R.O. 1990, chap. C.43, s 1(1)	70
79.	*Employment Standards Act, 2000*, SO 2000, c 41, ss 1(1), 5, 5.1, 8, 23.1(1), 96-101, 101.1-113 *Normes d'emploi (Loi de 2000 sur les)*, LO 2000, chap 41, ss 1(1), 5, 5.1, 8, 96-101, 101.1-113	1, 8, 38, 63, 66-68, 71, 77, 83, 89, 96
80.	*Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 *Équité en milieu de travail et de meilleurs emplois (Loi de 2017 pour l')*, LO 2017, chap 22 - Projet de loi 148	38
81.	*International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5, Schedule 2, UNCITRAL Model Law on International Commercial Arbitration, Arts 8(1), 16(1) 28 *Arbitrage commercial international (Loi de 2017 sur l')*, LO 2017, chap 2, Annexe 5, Annexe 2, Loi type de la cnudci sur l'arbitrage commercial international, Arts 8(1), 16(1) 28	20, 26, 34, 42, 60, 101
82.	*Rules of Civil Procedure*, RRO 1990, Reg 194, s 1.03 *Règles de procédure civile*, RRO 1990, Règl 194, s 1.03	70, 73
83.	*Small Claims Court - Fees and Allowances*, O Reg 332/16, s 1(2) *Cour des petites créances - honoraires, frais et indemnités*, Règl de l'Ont 332/16, s 1(2)	115
84.	*Small Claims Court Jurisdiction*, O Reg 626/00, s 1 *Compétence de la cour des petites créances et plafond pécuniaire relatif aux appels*, Règl de l'Ont 626/00, s 1	115
85.	*Superior Court of Justice and Court of Appeal - Fees*, O Reg 293/92, s 1(1) *Cour supérieure de justice et cour d'appel — honoraires et frais*, Règl de l'Ont 293/92, s 1(1)	115

Tab	Description	Paragraph(s)
Secondary Sources		
86.	Brian Casey, *International and Domestic Commercial Arbitration*, looseleaf (Toronto: Carswell), **RBOA**, Tab 19	47
87.	Castel & Walker, *Canadian Conflict of Laws*, 6th ed. (LexisNexis Canada, 2005), **RBOA**, Tab 20	29
88.	*Commission on International Trade Law, Report of the Secretary General*, UNGAOR, 2017, UN Doc A/CN.9/909, **RBOA**, Tab 21	30
89.	Alexander Gay & Alexandre Kaufman, *Annotated Ontario Arbitration Legislation* – Arbitration Act, 1991 *and* International Commercial Arbitration Act, 2017, (Toronto: Thomson Reuters, 2017), **RBOA**, Tab 23	47
90.	Charlotte Garden, "Disrupting Work Law: Arbitration in the Gig Economy" 2017 U Chicago Legal F 205, **RBOA**, Tab 22	122
91.	Maria Glover, "Disappearing Claims and the Erosion of Substantive Law" (2015) 124:8 Yale LJ 3052, **RBOA**, Tab 24	105
92.	Pamela A. Izvanariu, "Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector" (2016) 66 DePaul LR 133, **RBOA**, Tab 27	44, 89, 122
93.	International Chamber of Commerce, "Mediation Rules" (in force as of 1 January 2014) (excerpts), **RBOA**, Tab 25	15
94.	International Chamber of Commerce, "Arbitration Rules" (in force as of 1 March 2017) (excerpts), **RBOA**, Tab 26	16, 116, 117
95.	*Legislative Assembly of Ontario Debates*, No 73 (13 May 1996) (Elizabeth Witmer) (excerpt), **ABOA**, Tab 16	75, 93
96.	*Legislative Assembly of Ontario Debates*, No 80 (30 May 1996) at 3213 (John R Baird) (excerpt), **ABOA**, Tab 17	75, 93
97.	*Legislative* Assembly *of Ontario Debates*, No 81 (3 June 1996) (Joseph N. Tascona) (excerpt), **RBOA**, Tab 28	74

Tab	Description	Paragraph(s)
98.	Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada*: A Guide to Domestic and International Arbitrations, loose-leaf (Toronto: Thomson Reuters), **RBOA**, Tab 29	42, 47, 60
99.	Ontario Ministry of Labour, "The Changing Workplaces Review: An Agenda for Workplace Rights", SC Michael Mitchell & John C Murray (excerpts), **RBOA**, Tab 30	44, 67, 76, 77, 81, 89, 122
100.	Ontario Ministry of Labour, *Employment Standards Act 2000*, Policy and Interpretation Manual	30, 38, 78, 89
101.	Marina Pavlovic, "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016) 62:2 McGill LJ 389, **RBOA**, Tab 31	105
102.	Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016), **RBOA**, Tab 32	42, 60
103.	Report of the UN Commission on International Trade Law, *Report of the Secretary-General*, UNGAOR, 18th Sess, UN Doc A/CN.9/264 (1985), **ABOA**, Tab 28	29
104.	Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33 Windsor YB Access to Jus 177, **RBOA**, Tab 33	47, 61
105.	Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124:8 Yale LJ 2804, **RBOA**, Tab 34	105
106.	Jean R Sternlight, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80:4 Brook L Rev 1309, **RBOA**, Tab 35	116
107.	Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016), **ABOA**, Tab 25	73
108.	Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012), 53 Can Bus LJ 475, **RBOA**, Tab 36	47, 124