SCC Court File No.: 38534

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

B E T W E E N:

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

Appellants

- and -

DAVID HELLER

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO, 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, UNITED FOOD AND COMMERCIAL WORKERS CANADA, WORKERS' HEALTH AND SAFETY LEGAL CLINIC, MONTREAL ECONOMIC INSTITUTE, CANADIAN AMERICAN BAR ASSOCIATION, CHARTERED INSTITUTE OF ARBITRATORS (CANADA) INC. AND 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 INTERVENER
Don Valley Community Legal Services
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

MONKHOUSE LAW
220 Bay St. Suite 900
Toronto, Ontario M5J 2W4

Andrew Monkhouse
andrew@monkhouselaw.com
Alexandra Monkhouse
alexandra@monkhouselaw.com
Peter Spiro
peter.spiro@monkhouselaw.com

Tel: (416) 907-9249
Fax: (888) 501-7235

Counsel for the Intervener, Don Valley Community Legal Services

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

Moira S. Dillon
mdillon@supremelawgroup.ca

Tel: (613) 691-1224
Fax: (613) 691-1338

Ottawa Agents to Counsel for the Intervener, Don Valley Community Legal Services

COPIES TO:

TORYS LLP
79 Wellington Street West, Suite 3000
Box 270, TD South Tower
Toronto, Ontario M5K 1N2

Linda Plumpton
lplumpton@torys.com
Lisa Talbot
ltalbot@torys.com
Sarah Whitmore
swhitmore@torys.com

Tel: (416) 865-0040
Fax: (416) 865-7380

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

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

Lior Samfiru
lior.samfiru@stlawyers.ca
Stephen Gillman
stephen.gillman@stlawyers.ca

Tel: (416) 861-9065
Fax: (416) 361-0993

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

Michael Wright
mwright@wrighthenry.ca
Danielle E. Stampley

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

Jeffrey W. Beedell
jeff.beedell@gowlingwlg.com

Tel: (613) 786-0171
Fax: (613) 788-3587

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

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

Tel: (613) 282-1712
Fax: (613) 288-2896

Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Respondent, David Heller

dstampley@wrighthenry.ca

Tel: (416) 306-8280
Fax: (416) 964-8281

Counsel for the Respondent, David Heller

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

Christopher P. Thompson
christopher.p.thompson@ontario.ca

Tel: (416) 605-3857
Fax: (416) 326-4181

Counsel for the Intervener, Attorney General of Ontario

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

Eric Morgan
emorgan@osler.com
Tel: (416) 862-5871
Fax: (416) 862-6666

Counsel for the Intervener, Young Canadian Arbitration Practitioners

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

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

Ottawa Agents for Counsel for the Intervener, Attorney General of Ontario

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

Maxine Vincelette
mvincelette@juristespower.ca

Tel: (613) 702-5573
Fax: (613) 702-5572

Ottawa Agents for Counsel for the Intervener, Attorney General of Ontario

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

Geoffrey Langen
glangen@osler.com

Tel: (613) 787-1009
Fax: (613) 235-2867

Ottawa Agents for Counsel for the Intervener, Young Canadian Arbitration Practitioners

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

Robert Deane
rdeane@blg.com
Chris Chaisson
cchaison@blg.com

Tel: (604) 640-4250

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

Karen Perron
kperron@blg.com

Tel: (613) 369-4795
Fax: (613) 230-8842

Ottawa Agents for Counsel for the Intervener, Arbitration Place

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

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

Counsel for the Intervener, Arbitration Place

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

Anthony Daimsis
adaimsis@uottawa.ca

Tel: (613) 562-5800 ext. 3211

Counsel for the Intervener, Canadian Federation of Independent Business

UNIVERSITE D'OTTAWA

Common Law Section
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5

David Fewer
david.fewer@uottawa.ca

Tel: (613) 562-5800 ext. 2558
Fax: (613) 562-5417

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, Ontario K1N 6N5

Marina Pavolovic
marina.pavlovic@uottawa.ca
Tel: (613) 562-5800 ext. 2675

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

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

UNIVERSITE D'OTTAWA

Common Law Section
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5

David Fewer
david.fewer@uottawa.ca

Tel: (613) 562-5800 ext. 2558
Fax: (613) 562-5417

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

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

Nabila Qureshi
qureshn@lao.on.ca
Karin Baqi
baqikr@lao.on.ca

Tel: (416) 597-5820

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

GOLDBLATT PARTNERS LLP

500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4

Colleen Bauman
cbauman@goldblattpartners.com

Tel: (613) 482-2463
Fax: (613) 235-3041

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

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

Steven Barrett
sbarrett@goldblattpartners.com

Tel: (416) 977-6070

Counsel for the Intervener, United Food and Commercial Workers Canada

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

Colleen Bauman
cbauman@goldblattpartners.com

Tel: (613) 482-2463
Fax: (613) 235-3041

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

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

Kevin Simms
simmsk@lao.on.ca

Tel: (416) 971-8832 ext. 203

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

SUPREME ADVOCACY LLP

130-340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-Francis Major
mfmajor@supremeadvocacy.ca

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580

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, Ontario M5X 1B8

Robert Carson
rcarson@osler.com

Tel: (416) 862-4235

Counsel for the Intervener, Montreal Economic Institute

OSLER, HOSKIN & HARCOURT LLP

340 Albert Street, Suite 1900
Ottawa, Ontario K1R 7Y6

Geoffrey Langen
glangen@osler.com

Tel: (613) 787-1009
Fax: (613) 235-2867

Agent for Counsel for the Intervener, Montreal Economic Institute

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

Alyssa Tomkins
atomkins@plaideurs.ca
James Plotkin
jplotkin@plaideurs.ca

Tel: (613) 564-8269
Fax: (613) 565-2087

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, British Columbia V7X 1L3

Joseph C McArthur
joe.mcarthur@blakes.com
Rahat Godil
Laura Cundari
Justin Manoryk
Andrew Kavanagh

Tel: (604) 631-3300
Fax: (604) 631-3309

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

GOWLING WLG (CANADA) LLP

2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
lynne.watt@gowlingwlg.com

Tel: (613) 786-8695
Fax: (613) 788-3509

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

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

Matthew Milne-Smith
mmilne-smith@dwpv.com
Chantelle Cseh

Tel: (416) 863-0900
Fax: (416) 863-0871

Counsel for the Intervener, Canadian Chamber of Commerce

NORTON ROSE FULBRIGHT CANADA LLP
1, Place Ville Marie, Bureau 2500
Montreal, Quebec H3B 1R1

Pierre Bienvenu
pierre.bienvenu@nortonrosefulbright.com
Andres C. Garin
Alison FitzGerald

Tel: (514) 847-4747
Fax: (514) 286-5474

Counsel for the Intervener, International Chamber of Commerce

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

Matthew Estabrooks
matthew.estabrooks@gowlingwlg.com

Tel: (613) 786-0211
Fax: (613) 788-3573

Agent for Counsel for the Intervener, Canadian Chamber of Commerce

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

Matthew J Halpin
matthew.halpin@nortonrosefulbright.com

Tel: (613) 780-8654
Fax: (613) 230-5459

Agent for Counsel for the Intervener, International Chamber of Commerce

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

Mohsen Seddigh
mseddigh@sotosllp.com
Daniel Hamson

Tel: (416) 572-7320
Fax: (416) 977-0717

Counsel for the Intervener, Consumers Council of Canada

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

Greg J Allen
greg@amlc.com
Wes McMillan

Tel: (604) 282-3982
Fax: (604) 628-3832

Counsel for the Intervener, Community Legal Assistance Society

GIB VAN ERT LAW

148 Third Avenue
Ottawa, Ontario K1S 2K1

Gib van Ert
gib@gibvanertlaw.com

Tel: (613) 408-4297
Fax: (613) 651-0304

Agent for Counsel for the Intervener, Community Legal Assistance Society

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

Andrew D Little
littlea@bennettjones.com
Ranjan K Agarwal
agarwalr@bennettjones.com
Charlotte Harman
manc@bennettjones.com

Tel: (416) 863-1200

Counsel for the Intervener, ADR Chambers Inc.

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

Mark Jewett
jewettm@bennettjones.com

Tel: (613) 683-2328
Fax: (613) 683-2323

Agent for Counsel for the Intervener, ADR Chambers Inc.

Table of Contents

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The intervener Don Valley Community Legal Services ("**DVCLS**") represents low and middle-income employees who have been wrongfully dismissed or who wish to enforce their rights under employment standards statutes. The present case concerns a class action commenced in the name of application-based workers who claim their entitlements to minimum standards under Ontario's statutes governing employment. The challenges faced in this case are not unique to Uber and are representative of work done at other technology companies and the 'gig economy', as a whole. The Court's decision will impact the access to justice of application-based and gig economy workers and their ability to enforce their entitlements pursuant to social minimums included in employment standards statutes.

2. Close to one-third of Canadians have done some application-based work and the percentage is over fifty percent for the youngest part of the population. The ascendency of application-based work has profound implications on intergenerational equity, structural discrimination, and equality of opportunity. While the common law develops incrementally, it already has all the necessary tools to ensure fairness in this apparent upheaval of how work is distributed and executed.

3. The Appellants argue that workers bargained for all their claims to be arbitrated in the Netherlands under Dutch law. The Respondents retort that such a bargain is unconscionable and an illegal contracting out of the Ontario employment standards. DVCLS aims to take a step back and analyze simple questions applicable to all misclassification class actions. Who agrees to the arbitration clause, where is the arbitration clause, what does the arbitration clause cover and when should a Court look at the arbitration clause?

4. DVCLS submits that application based workers generally agree to an arbitration clause in their capacity as licensees. The arbitration agreement is part of a contract that is specifically defined as not an employment contract. The contract purports that there is no work and thus no employment. Because of this, however, the arbitration clause cannot cover misclassification. Finally, in the interest of access to justice, for a class action, the

Court should look at the stay motion in the context of the preferability analysis in a certification motion.

PART II – QUESTION IN ISSUE

5. The issue in this appeal is whether the Court should grant a stay in favour of arbitration in a misclassification class action for minimum employment standards.

PART III – STATEMENT OF ARGUMENT

6. For the reasons set out below, DVCLS submits that this Court should read contracts for application-based workers *contra proferentem* and construe arbitration clauses narrowly. Further, it suggests that contracts that purport not to be employment contracts cannot create a regime of mandatory arbitration for misclassification claims. Finally, DVCLS suggests, in the interest of access to justice, that in misclassification class actions, stay motions should be heard at the preferable procedure step at certification.

Who: Application-based Workers Wear Two Hats in Their Dealings with Technology Companies

7. Application-based workers wear two hats in their dealings with technology companies, one of licensee upon ticking the "I agree" box and another of worker, once they start using the app. The Ontario Court of Appeal cogently noted that, in the case at bar, that "the drivers are individuals who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish to avail themselves of Uber's services, they have only one choice and that is to click 'I agree' with the terms of the contractual relationship that are presented to them."[1]

8. Technology companies[2] provide leads to workers and then the workers provide services to those leads; this is all mediated through an app. For a worker to receive leads,

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1 *Heller v Uber Technologies Inc*, 2019 ONCA 1 at 71.

2 While of limited importance for the present discussion, some foreign Courts have found that such companies are in the business of providing real world services, rather

she must fulfil certain conditions set out in a written contract which grants her access to the technology company's app. In the case before the court, the Services Agreement is similar to a software license agreement. Once the worker starts using the app, the relationship between her and the technology company actualizes and bears specific factual markers, such as whether the worker provides her own equipment, has helpers, takes on financial risk, takes on a high level of responsibility, or has an opportunity to profit from her tasks.

9. The factual relationship between the worker and the technology company may give rise to an employment relationship subject to the *Employment Standards Act, 2000*, S.O. 2000 ("***ESA***"). Although a technology company may try to limit its liability for minimum standards by stipulating in the Services Agreement that the parties are not engaged in an employment relationship, that issue cannot be solved by simple contractual drafting. It is only by analyzing the factual matrix of the relationship between the parties that a decision maker can determine whether the worker is an employee or not.

Where: The Services Contract Should be Read Contra Proferentem

10. A Services Agreement will almost always be drafted by the technology company without any input from the worker or those delivering the service. Unlike in a standard form paper contract, there is not even an option to add terms 'by hand' in an app, or any ability to question the contents. The choice is 'accept all' or 'close the app'. In consequence, interpretation of these contracts should always be under the auspices of the

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than ethereal technology services, see *Douglas O'Connor v Uber Technologies Inc*, Case 3:13-cv-034260EMC, dated 11 March 2015, the Court stated: Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs […]. The *Douglas* decision was quoted in approval in the UK in *Aslam & Farrar v Uber BV, Uber London Ltd. & Uber Britannia Ltd.*, Employment Tribunal, Case Nos: 2202550/2015 & Others, dated October 26, 2016, at para 89 [*Aslam*].

contra proferentem[3] doctrine as it covers contracts of adhesion and its clauses should not be extended to cover unstipulated claims.

11. The worker's employment standards claims arise out of the factual matrix of her relationship with the technology company, rather than from the Services Agreement which granted her access to the app. If the Services Agreement contains a dispute resolution clause, that clause should not be extended to cover all claims between the parties, but only those that relate to the agreement itself. By consequence, in the absence of an express contractual stipulation concerning statutory employment claims, it would be contrary to the *contra proferentem* principle to construe an arbitration clause so broadly as to cover the resolution of statutory claims.[4]

12. In another employment class action, Ontario Courts have interpreted ambiguity in an arbitration clause in favour of the Plaintiffs. In *Huras v Primerica Financial Services Ltd.*,[5] the Court refused to enforce an arbitration clause against persons training to become agents, on the grounds that the arbitration agreement only dealt with the company's relationship with its agents.[6]

13. The fact that a person has signed an agreement with a company in her role as a licensee of an app, agreeing to arbitration, does not preclude her from suing the company in court alleging that the factual relationship between her and the technology company entitles her to minimum employment standards.

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3 *Manulife Bank v Conlin*, [1996] 3 SCR 415, 139 DLR (4th) 426 at para 9.

4 *Aslam, supra* note 2 at para 105, where the UK Employment Tribunal analyzed a Services Agreement similar to the one at hand and found that there must be a separate unwritten employment contract.

5 [2000] OTC 533 (Ont. S. C.) (aff'd by ONCA 55 OR (3d) 449 at paras 37-38 and 44.

6 Following that decision, in *Graves v Correactology Health Care Group Inc*, 2018 ONSC 4263, the Ontario Superior Court of Justice refused to grant a stay of proceedings in a contract dispute on the grounds that the arbitration clause in an adhesion contract was ambiguous.

What: Making Misclassification Subject to Arbitration Is Contrary to the ESA

14. Misclassification is essentially a question of fact. It is the mischief defined in section 5.1 of the ESA as:

> **No treating as if not employee**
> 5.1 An 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.

15. Section 5.1 was added to the *ESA* following a policy review for the Ontario Ministry of Labour[7] entitled the "Changing Workplaces Review."[8] The report identifies misclassification of employees as independent contractors as a growing problem. It specifically mentions Uber, and states that the rise of such companies has made "the issue of who is an employee even more important than previously."[9]

16. The amendment was introduced "to make sure that workers are properly classified and not incorrectly treated as independent contractors. […] Our proposed legislation would […] prohibit employers from misclassifying employees as independent contractors. This is intended to address cases where employers improperly treat their employees as if they were self-employed and not entitled to any employment standards protections."[10]

17. Section 5.1 only came into force as an express provision of the *ESA* on December 3, 2017[11], but it was necessarily implicit in the *ESA* prior to that as a corollary to section 5, which provides that the rights under the Act cannot be waived. The latter would have been rendered futile if the *ESA* standards could have been avoided by merely declaring, falsely, that a worker is not an employee. In prohibiting contracting out, the legislature must always have intended to prohibit an employer from treating somebody who is an employee as if the person were not an employee.

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[7] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess, No 124 (22 November 2017), at p 6493 (Hon K Flynn).

[8] Special Advisors C Michael Murray and John C Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights, Final Report*, May, 2017.

[9] *Ibid* at p 32.

[10] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess, No 91 (12 September 2017), at p 4902 (Hon P Milczyn).

[11] *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 - Bill 148.

18. This Court has taken the view that a written contract declaring whether or not a party is an employee is not determinative.[12] The status of workers must be decided based on the facts of the relationship.

19. This Court has on more than one occasion recognized that the *ESA* deserves special consideration because "employment is of central importance to our society."[13]

20. It is certainly true, as observed by the motion judge in the case at bar, that the *ESA* does not "expressly oust arbitration agreements."[14] However, it does expressly oust the right to contract out of the *ESA*, which is considerably broader than merely ousting arbitration agreements.

21. In a recent decision involving employees misclassified as independent contractors, the California Supreme Court applied a policy reason previously asserted by the United States Supreme Court for ignoring contracts where individuals agreed that they were not employees:

> [T]he purposes of the [*Fair Labor Standards Act*] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.[15]

22. In the United Kingdom, in another case regarding the classification of Uber employees, the Employment Tribunal dealt with the submission that Dutch law should apply to UK workers in a way that is instructive for the present discussion. The Tribunal noted that the agreement between the technology company and the workers purported to deny, as in the case before this Court, that it created, or gave rise to any form of employment relationship. The Tribunal then went on to say:

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12 *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59, [2001] 2 SCR 983 at para 49.

13 *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 91 DLR (4th) 491 at p 1002.

14 *Heller v Uber Technologies Inc*, 2018 ONSC 718, 421 DLR (4th) 343 at para. 57.

15 *Dynamex Operations West, Inc v Superior Court of Los Angeles County*, April 30, 2018, Docket Number: S222732, p 71; quoting *Tony & Susan Alamo Foundation v Secretary of Labor*, Apr 23, 1985, 471 US 290 (1985), p 301.

> It is one thing to disregard terms on the basis that they are not consistent to the real bargain between the parties, quite another to imply into the written contract an entirely fresh agreement wholly incompatible with its express terms. We conclude that any inferred 'worker' contract must have an existence separate and apart from "this Agreement," in which the choice of law clause relied on by [Uber] is contained.[16]

23. Additionally, the Employment Tribunal went on to analyze the applicable law in the alternative that the conflict of law clause was applicable in the situation before it. After reviewing various provisions of the applicable conflict of laws rules, in that case Regulation Rome I[17], the Tribunal found that the applicable law would have been that of the England and Wales. In particular, the Tribunal noted that the applicable employment standards were mandatory provisions of the law of England and Wales and that the parties could not derogate from such provisions.[18]

The Policy Objective of Avoiding Misclassification is Central to the ESA and Should Inform Its Interaction with the Arbitration Act and the Class Proceedings Act

24. The courts below in the current proceeding did not have the benefit of this Court's decision in *TELUS Communications Inc. v Wellman*[19] ("***TELUS***"). This was a split 5-4 decision. It also hinged on a question of statutory interpretation on which the two sides differed.

25. The minority in *TELUS* was impressed by the argument that including business customers in the class was both fair and preferable. They emphasized the "contextual policy objectives of both the *Arbitration Act, 1991*, SO 1991, c 17 and the *Class*

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16 *Aslam, supra* note 2 at para 105.

17 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

18 *Aslam, supra* note 2 at paras 106 to 120. The Employment Tribunal made reference to the principles applicable under Rome I in Article 8 which contains specific provisions for individual employment contracts and Article 9 which contains specific provisions regarding overriding mandatory provisions.

19 *TELUS Communications Inc v Wellman*, 2019 SCC 19, 433 DLR (4th) 1 [*TELUS*].

Proceedings Act, 1992, SO 1992, c 6."[20] They believed that s 7(5) of the *Arbitration Act* should be interpreted on policy grounds so as to exempt such a group from mandatory arbitration.

26. Justice Moldaver, writing for the majority, did not reject the significance of policy in statutory interpretation, but noted that a reasonable limit has to be placed on it. Policy considerations, no matter how desirable they may appear in their own right, cannot be allowed to include what the statute explicitly excludes. He emphasized the fact that the *Consumer Protection Act* specifically invalidated arbitration agreements for consumer contracts but not for business contracts:

> [79] …. While policy analysis has a legitimate role in the interpretative process (see Sullivan, at pp. 223-50), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts….
>
> [80] This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts. The legislature made a careful policy choice to exempt consumers — and only consumers — from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

27. Therefore, the majority and the dissent in *TELUS* both agreed that policy can inform statutory interpretation in the context of a stay for arbitration. The difference was in interpreting the significance of the content of the specific statute.

28. The discussion above highlighted the significance of the threshold issue of employee status, and the special emphasis evident in the *ESA* in the provisions against contracting out in sections 5 and 5.1. That creates a strong policy context for interpreting the purpose of the statute. It provides a basis for distinguishing misclassification cases from *TELUS*. The issue of employment status and the avoidance of misclassification is very central to the purposes of the *ESA*. It justifies making that issue the subject of a judicial decision in Canada under Canadian law, rather than to a foreign arbitration.

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[20] *Ibid* at para 109.

When: A Stay of Proceedings Motion is Better Decided at the Preferability Stage of The Certification Motion

29. In earlier jurisprudence concerning class actions versus arbitration in Ontario, a conclusion was reached that class actions, in general, should take precedence over arbitration. This would extend to the point of determining preferability at the certification motion, on the grounds that arbitrators cannot assume jurisdiction over class proceedings:

> [24] Money Mart asserts that the *Class Proceedings Act, 1992* does not oust the *Arbitration Act, 1991*. On this basis it is suggested that the court would be wrong to interfere with the legislature and in particular section 7. (1) of the *Arbitration Act, 1991*. I agree with Margaret Smith's submission that it is illogical to assume that the legislature which enacted the *Class Proceedings Act, 1992* after the *Arbitration Act, 1991* intended to create a legislative scheme that would permit companies such as Money Mart to oust themselves from class action legislation. I see the arbitration provisions of the agreements with Money Mart as an attempt on the part of Money Mart to immunize itself from the *Class Proceedings Act* and more generally the jurisdiction of the Superior Court.
>
> [25] One must not overlook the purposes of the *Class Proceedings Act*, 1992 including the promotion of judicial economy, improved access to justice, and behavior modification of potential or actual wrongdoers. I keep in mind the provisions contained in s. 5 of the *Class Proceedings Act, 1992*, which are the preferable procedure criteria. This section contemplates an examination by a Superior Court judge of whether a class proceeding or arbitration is the better procedure for resolution of any dispute on a class wide basis. The examination of these issues takes place at the certification motion.[21]

30. Subsequently, an argument was raised about whether this principle has been overturned by later decisions of this Court, but the issue has not been decided.[22]

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[21] *Smith v National Money Mart Co*, [2005] OJ No 2660, 140 ACWS (3d) 29, at paras 24-25; affirmed, *Smith v National Money Mart Company*, 258 DLR (4th) 453, 204 OAC 47; application for leave to appeal dismissed, *National Money Mart Company v Margaret Smith*, 2006 CanLII 6171 (SCC).

[22] *Smith Estate v National Money Mart Company*, 2008 ONCA 746, 303 DLR (4th) 175 at para 53; application for leave to appeal dismissed, *National Money Mart Company and Dollar Financial Group, Inc v Kenneth Smith, Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Adrien Oriet*, 2009 CanLII 8845

31. This Court has clearly stated that challenges to the arbitrator's jurisdiction should be resolved first by the arbitrator. A court should depart from this general rule only if the challenge is based on a question of law, or on questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record, and is not merely a delaying tactic.[23]

32. Where the fundamental threshold issue that needs to be determined is a question of law, such as the one in the present case, and where the operation of a stay under the *Arbitration Act* would foreclose access to the procedures under the *Class Proceedings Act*, the preferability analysis previously used by Ontario courts may strike the right balance between enforcing arbitration clauses and ensuing access to justice.

33. If this Court were to allow the appeal in the current proceeding, defendants would be able to decontextualize misclassification class actions and fight them as regular stay motions. That is contrary to the scheme of the *Class Proceedings Act,* and also the *ESA*.

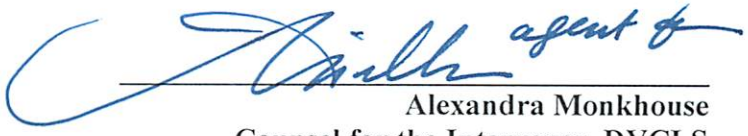
PART IV – STATEMENT ON COSTS

34. DVCLS requests that no costs be awarded either for or against it.

PART V – ORDER SOUGHT

35. DVCLS makes no submissions in respect to the order to be granted in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this day October 18, 2019



Alexandra Monkhouse
Counsel for the Intervener, DVCLS

(SCC); the majority decision in *Seidel v Telus Communications Inc*, 2011 SCC 15 did not deal with whether the equivalent decision in British Columbia, *MacKinnon v National Money Mart Co*, 2004 BCCA 473 was still good law after this Court's decision in *Union des consommateurs c Dell Computer Corp*, 2007 SCC 34 [*Dell*].

[23] *Dell*, *ibid* paras 84-86.

PART VI – TABLE OF AUTHORITIES

Tab	Authority Cited	Paragraph
	Jurisprudence	
1.	*Heller v Uber Technologies Inc*, 2019 ONCA 1.	7
2.	*Douglas O'Connor v Uber Technologies Inc*, Case 3:13 CV-034260 EMC.	8
3.	*Aslam & Farrar v Uber BV, Uber London Ltd & Uber Britannia Ltd*, Employment Tribunal, Case Nos: 2202550/2015 & Others.	8, 10, 22, 23
4.	*Manulife Bank v Conlin*, [1996] 3 SCR 415.	10
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6.	*671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59.	18
7.	*Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986.	19
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