S.C.C. File No. 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 RAISER OPERATIONS B.V.

Appellants
(Respondents)

- and -

DAVID HELLER

Respondent
(Appellant)

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TABLE OF CONTENTS

PAGE

PART I and II – OVERVIEW AND POSITION ON ISSUES

1. Although the *Employment Standards Act, 2000* ("*ESA*")[1] does not prohibit arbitration generally, it does prohibit an arbitration that contracts out of the *ESA*.

2. The form of arbitration clause at issue contracts out of the *ESA* through its governing law provision and qualifying indemnity.

3. The governing law provision requires the law of the Netherlands to be applied exclusively, thereby excluding Ontario law, including the *ESA*. Accordingly, the arbitrator is precluded from determining whether a worker making an *ESA* claim is an "employee" for the purposes of the *ESA* and entitled to its minimum standards.

4. The indemnity qualifies the arbitration clause in that it would require the Appellants to be indemnified from any arbitral award based on the *ESA*. Specifically, the indemnity requires indemnification from "any claims by any person, entity, regulators or governmental authorities based on [an] employment…relationship."

5. Since this form of arbitration clause precludes a determination of a claim under the *ESA*, it does not clearly satisfy the *ESA* and is thus void (i.e. "invalid" for the purposes of the *Arbitration Act, 1991* ("*Arbitration Act*"), and "null and void, inoperative, or incapable of being performed" for the purposes of the *International Commercial Arbitration Act, 2017* ("*ICAA*")).[2]

(1) Competence-competence principle not offended: This Court can determine whether the *ESA* invalidates the arbitration clause because the application of the *ESA* to the clause, and the interpretation of the clause as part of a standard form contract, are questions of law.

(2) The *ESA* invalidates the form of arbitration clause at issue:

(a) Assuming that a worker making an *ESA* claim is an employee is not necessary to conclude that the form of arbitration clause contracts out of the *ESA*.

(b) The *ESA* is mandatory local law that prohibits contracting out. Contractual terms that do not "clearly satisfy" the *ESA*'s minimum standards are void.

(c) The form of arbitration clause does not clearly satisfy the *ESA*'s minimum standards because the governing law provision and the qualifying indemnity prevent any

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[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41.
[2] *Arbitration Act*, S.O. 1991, c. 17, s. 7(2); *ICAA*, Schedule 2 (UNCITRAL Model Law on International Commercial Arbitration), Article 8(1).

application of the *ESA* to Ontario worker claims.

6. If courts stay civil actions for minimum employment standards under the Ontario *ESA* in favour of arbitration under foreign law, the consequences are as follows:

(a) If an Ontario worker is not an employee under the law of the foreign jurisdiction, that worker would receive no minimum employment standards, even if that worker is an employee under the *ESA*.

(b) An Ontario worker who is an employee under the law of the foreign jurisdiction would, at best, receive only the minimum employment standards of the foreign jurisdiction (e.g. potentially lower minimum wage, etc.), not those provided by the *ESA*.

(c) Uniform minimum employment standards for all Ontario employees will cease. The certainty and level playing field for businesses that the *ESA* provides will end. Ontario's legislation will be able to be circumvented by private contract and seriously undermined.

7. If courts stay civil actions for minimum employment standards under the *ESA* in favour of arbitration, and such arbitration is qualified by indemnities that prevent any employment remedies, then there are effectively no minimum employment standards at all.

8. The *ESA* prevents these results by prohibiting parties from contracting out of its minimum standards.

PART III – STATEMENT OF ARGUMENT

(A) Competence-competence principle not offended: this Court can determine whether the *ESA* invalidates the form of arbitration clause at issue in this appeal

9. One of the issues raised in this appeal is whether determinations of invalidity under s. 7(2) of the *Arbitration Act* are subject to the competence-competence principle. However, even if the competence-competence principle applies, this Court may still consider the validity of the arbitration clause provided the question of invalidity is a pure question of law, or a question of mixed fact and law that requires only a superficial consideration of the facts.[3]

10. In this appeal, the question of invalidity is a pure question of law. Specifically, the legal effect of the *ESA* on the form of arbitration clause at issue is a question of law. The interpretation of the form of arbitration clause at issue, part of a standard form contract, is also a question of

[3] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, paras 4, 29.

law.[4] Accordingly, this Court can determine whether the *ESA* invalidates this form of arbitration clause, and thus, whether it has discretion to refuse a stay under s. 7(2) of the *Arbitration Act*.

(B) The *ESA* invalidates arbitration clauses with governing law provisions excluding the *ESA*

(i) *ESA* history: legislated minimum standards curtail freedom to contract

11. The Ontario Labour Relations Board described the history of the tension between legislated minimum employment standards and the principle of freedom to contract:

> …legislatures recognized the danger which laissez faire capitalism presented at the manufacturing workplace: unconstrained injury to life and limb, the cheapening of workers' lives, the denigration of worker dignity, were too great a price to pay so that the illusion of freedom of contract might triumph at the workplace. So legislatures stepped in to trim back the sails of freedom of contract, and thereby ameliorate its more devastating impacts on workers' lives…
>
> The ESA, elements of which can be traced back to late 19th and early 20th c. legislation, comes within that class. Of course its legislative garb has been updated throughout the years to mirror those minimal conditions of employment deemed essential to protect the safety, health and dignity of workers in any particular era.[5]

(ii) *ESA* sections and interpretation: clear compliance required

12. The *ESA* prohibits treating a person who is an employee as if the person is not an employee.[6]

13. Save certain exceptions, if a person meets the definition of "employee" in the *ESA*, and performs their work in Ontario, then that person is entitled to the minimum "employment standards" in the *ESA*.[7]

14. The *ESA* prohibits contracting out of its minimum standards. The *ESA* is a legislated public policy constraint on the freedom to contract. The *ESA* is remedial legislation and courts favour an

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[4] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, para 43.

[5] *Sense Appeal Brands Inc. (c.o.b. Sense Appeal Coffee Roasters),* [2015] OESAD No 924, para 18; See a brief legislative history of the *ESA* in an excerpt from *Changing Workplaces Review: Special Advisors' Interim Report* (Ministry of Labour, 2016), 5.1.

[6] *ESA*, S.O. 2000, c. 41, s. 5.1(1). For clarification, the Attorney General has no position on whether the Plaintiff is an employee under the *ESA*.

[7] *ESA*, S.O. 2000, c. 41, ss. 1, 3.

interpretation that "encourages employers to comply with the minimum requirements of the Act".[8]

15. In determining whether a contractual provision contracts out of the *ESA*, the Ontario Court of Appeal in *Wood* held that the contractual provision as applied must "clearly satisfy" the *ESA*. If it does not, the contractual provision is void. In other words, where the clause properly applied could result in an *ESA* violation, it does not clearly satisfy the *ESA*, and is therefore void. It is not sufficient that the contractual provision could potentially satisfy the *ESA* depending on the circumstances.[9]

16. Courts do not fix unlawful contractual provisions by reading them down to comply with the *ESA*, even where there is a severability clause.[10] If the only consequence for an unlawful contractual provision is for a court to read it down to be lawful, then there is no incentive to draft a lawful contractual provision in the first place. Rather, to encourage employers to comply with the *ESA*, courts simply assess the contractual provision as against the *ESA*. Where the provision contracts out of the *ESA* it is void. Even offers by the employer not to rely on the contractual provision in the specific court action do not remedy an unlawful clause.[11]

17. These interpretive and application principles are in recognition of the fundamental importance of work in a person's life and the power imbalance in such contractual relationships as distinct from standard commercial contracts.[12]

18. This Court should reject the suggestion that where an arbitration clause contracts out of the *ESA*, it should merely be "read down" to comply with the *ESA*. Different interpretation and application principles for the *ESA* depending on the contractual provision that contacts out of the *ESA* should be rejected.

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[8] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, pp 1003-04 ("*Machtinger*"); *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, paras 25-28 ("*Wood*").
[9] *Wood*, 2017 ONCA 158, paras 64-69; *Andros v Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679, paras 5, 8, 26, 32 ("*Andros*").
[10] *North v Metaswitch Networks Corp*, 2017 ONCA 790, paras 2, 24, 30-37, 40-45 ("*North*").
[11] *Machtinger*, [1992] 1 S.C.R. 986, pp 1003-04; *Wood*, 2017 ONCA 158, paras 5, 21, 25-28, 43-47; *North*, 2017 ONCA 790, paras 30-37; *Andros*, 2019 ONCA 679, paras 5, 20; *ESA*, S.O. 2000, c. 41, s. 5.
[12] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, para 91; *Machtinger*, [1992] 1 SCR 986, pp 1002-03; *Wallace v United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 SCR 701, paras 90-94; *Wood*, 2017 ONCA 158, para 26.

(iii) The form of arbitration clause at issue excludes the *ESA*

19. Interpretation of the arbitration clause, which is part of a standard form contract, is a question of law that can be determined by this Court.[13] The arbitration clause excludes the *ESA*.

20. Unlike a court, a privately-appointed arbitrator has no "inherent jurisdiction". His or her jurisdiction only comes from the parties' agreement.[14]

21. The governing law provision contained in the arbitration clause requires the application of the Netherlands law "exclusively". The governing law provision is not subject to the mandatory local law where the worker performs his or her work (e.g. the *ESA*, the *Occupational Health and Safety Act* ("*OHSA*"), the *Workplace Safety and Insurance Act, 1997* ("*WSIA*"), the *Human Rights Code* ("*HRC*"), etc.).[15]

22. It is possible that under the Netherlands' conflict of laws rules, the law of Ontario, including the *ESA*, would apply to this dispute. However, the governing law provision is drafted to explicitly exclude the Netherlands' conflict of laws rules, thereby precluding any possible application of Ontario law.[16]

23. Finally, the arbitration rules selected in this form of arbitration clause, the Rules of Arbitration of the International Chamber of Commerce ("ICC"), specify that the parties may agree upon the rules of law to be applied (as in this case), and only in the absence of any such agreement shall the arbitrator determine which rules of law to apply.[17] Since the rules of law have been set out in the arbitration clause the arbitrator has no power to decide otherwise under the ICC Rules.

24. Notably, the UNCITRAL Model Law incorporated into the *ICAA* states that the "arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties

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[13] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, para 43.
[14] *Seidel v TELUS Communications Inc.*, 2011 SCC 15, para 39; *Cricket Canada v Bilal Syed*, 2017 ONSC 3301, para 35; J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd Ed. (Huntington, NY: JurisNet, LLC, 2011), p 159, Attorney General of Ontario's Book of Authorities and Legislation ("AGOBA"), Tab 1.
[15] *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1; *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A; *Human Rights Code*, R.S.O. 1990, c. H.19.
[16] *Douez v Facebook, Inc.*, 2015 BCCA 279, para 84, rev'd on other grounds, 2017 SCC 33. See also Stephen G.A. Pitel & Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at pp 229-230, 287, AGOBA, Tab 3; J. Kenneth McEwan Q.C. & Ludmila B. Herbst, *Commercial Arbitration in Canada*: *A Guide to Domestic and International Arbitrations*, (Toronto: Thomson Reuters Canada Limited, 2017) at 8:20, AGOBA, Tab 2.
[17] Rules of Arbitration of the International Chamber of Commerce, Article 21.

as applicable to the substance of the dispute". The *Arbitration Act* contains the same requirement.[18]

25. There is no merit to an argument that this Court requires evidence on the law of the Netherlands to interpret and apply the arbitration clause for the purposes of making a finding of invalidity under s. 7(2) of the *Arbitration Act.* There is no requirement for such evidence in applying ss. 7(1) or (2) to the arbitration clause. Indeed, although the Appellants argue that the dispute falls within the scope of the arbitration clause for the purposes of s. 7(1) of the *Arbitration Act*, there is no evidence on the law of the Netherlands for that argument. The meaning of the arbitration clause is clear and unambiguous: the arbitrator must apply the law of the Netherlands and has no legal authority to apply the law of another jurisdiction, including the Ontario *ESA*.

(iv) Arbitration clauses excluding the *ESA* do not clearly satisfy the *ESA* and are thereby void for *ESA* claims

26. The Ontario Court of Appeal assumed that the Plaintiff was an employee and briefly addressed the governing law provision in the arbitration clause, stating that as an Ontario resident, the Plaintiff "is statutorily entitled to the minimum benefits and protections of Ontario's laws", and "[h]e should not be left in a situation where those benefits and protections are set by the laws of another country".[19]

27. If it is assumed that a worker making an *ESA* claim is an employee under the *ESA*, or in situations where a worker's employment status is not disputed, then the form of arbitration clause at issue is invalid for *ESA* claims because it contracts out of all of Ontario's employment standards by requiring the law of the Netherlands to apply exclusively.

28. However, this Court does not need to assume that a worker making an *ESA* claim is an employee, or determine whether a worker is an employee, to determine whether the *ESA* invalidates arbitration clauses with governing law provisions requiring the application of foreign law.

29. The *ESA* requires clear compliance with its employment standards. Since this form of arbitration clause precludes a determination of a claim under the *ESA*, it does not clearly satisfy the *ESA* and is thus void for *ESA* claims.

30. In fact, under the form of arbitration clause at issue, a worker's employment status under

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[18] *ICAA*, Schedule 2, (UNCITRAL Model Law on International Commercial Arbitration), Article 28; *Arbitration Act*, S.O. 1991, c. 17, s. 32(1)(2).
[19] Court of Appeal's Reasons, *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, para 46.

the *ESA*, and whether they have the right to its employment standards, can never be determined, because the arbitrator can only apply the law of the Netherlands. A worker who meets the definition of employee under the *ESA* and is entitled to its standards would not receive them. Indeed, a procedural stay of this court action amounts to a substantive determination of the merits of the *ESA* claim because the arbitrator cannot decide the *ESA* claim. Under this form of arbitration clause, there is no forum for a worker to make an *ESA* claim.

31. Furthermore, while the governing law provision is unambiguous, even if some possibility existed for the arbitrator to apply Ontario law including the *ESA*, this mere possibility is insufficient since contractual provisions must "clearly satisfy" the *ESA*.

(v) Supporting jurisprudence

32. Similar facts to the present case were considered by the England and Wales High Court (Queen's Bench Division) which found an arbitration clause void because its governing law provision contracted out of mandatory local law. In *Accentuate Ltd. v. Asigra Inc.*, the Court considered whether to stay a civil proceeding concerning an alleged breach of a Master Reseller Agreement ("MRA"). The MRA contained an arbitration clause which provided that all disputes be settled by arbitration in Toronto. The MRA explicitly selected Ontario law and the federal laws of Canada as the governing law.

33. The High Court refused to grant the stay on the basis that the MRA's arbitration clause would have the effect of contracting out of the mandatory provisions of European Union ("EU") legislation. Mr. Justice Tugendhat found that:

> The [European Court of Justice's] decision in [*Ingmar GB Ltd. v. Eaton Leonard Inc.*] requires this court to give effect to the mandatory provisions of EU law, notwithstanding any expression to the contrary in the part of the contracting parties. In my judgment this must apply as much to an arbitration clause providing for both a place and a law other than a law that would give effect to the [EU legislation], as it does to the simple choice of law clause that was under consideration in *Ingmar*.
>
> Accordingly, the arbitration clause would be "null and void" and "inoperative" within the meaning of s. 9(4) of the [*UK Arbitration Act 1996*]…[20]

34. Canadian courts have similarly refused to stay civil actions in favour of foreign proceedings on the basis that, notwithstanding a governing law provision selecting foreign law, employment

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[20] *Accentuate Ltd. v Asigra Inc.*, [2009] EWHC 2655, paras 88-89, 96; *Ingmar GB Ltd. v Eaton Leonard Inc.*, C-381/98 [2000] ECR I-9325, paras 25-26. See also: *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296, paras 81-83.

standards legislation is mandatory, including in circumstances where the worker's employment status was disputed.[21]

35. The Ontario Superior Court of Justice in 2002 in *Ross* did stay an action for wrongful dismissal on the basis of an arbitration clause that selected Ohio law as the governing law. However, *Ross* is distinguishable because: a) the arbitration clause did not explicitly exclude Ohio's conflict of laws rules so Ontario law could have potentially applied; b) the decision was prior to the Court of Appeal's decision in *Wood* requiring clear compliance with the *ESA*; c) the contract did not include an indemnity to nullify all employment standards; and d) the Court relied heavily on the fact that the employee was sophisticated and bargained for the contract.[22]

36. By way of comparison it is inconceivable that workers in Ontario could be subject to the health and safety or human rights laws of a foreign jurisdiction instead of the *OHSA*, the *WSIA*, or the *HRC*, etc. Indeed, in *Fleming* the Ontario Court of Appeal quashed a liability wavier that contracted out of the *WSIA* even in the absence of an applicable "no contracting out" section. After reviewing the history of statutory advancements for the protection of workers, the Court held that such a wavier was unenforceable on grounds of public policy (i.e. the *WSIA*).[23] Similarly, workers in Ontario are protected by the *ESA* and those rights cannot be taken away through a private arbitration clause specifying the governing law as that of a foreign jurisdiction.

(vi) The form of arbitration clause does not provide a greater right or benefit

37. Subsection 5(2) of the *ESA* provides for an exception to the general rule against contracting out: contractual provisions that "directly relate to the same subject matter as an employment standard" may contract out of the employment standard in the *ESA* if the contractual provision provides a greater right or benefit.[24]

38. First, the Appellants, who would bear the onus of establishing that this exception applies,

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[21] *Farough v Financial Control Industries Inc.*, 2007 BCPC 351, paras 15, 29-35; *Petrook v Natruzzi Americas Inc*, 2013 ONSC 4508, paras 34-37. See also: *Karmali v Donorworx Inc*, 2015 ABQB 105, paras 55-56.

[22] *Ross v Christian and Timbers, Inc.* [2002] OJ No 1609, paras 24-27. But see: *Houston v Exigen (Canada) Inc.*, 2006 NBQB 29, paras 10-13.

[23] *Fleming v Massey*, 2016 ONCA 70, paras 13 to 28, 34, and 56.

[24] *ESA*, S.O. 2000, c. 41, s. 5; *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 87.

have not met this onus, or even taken the position that s. 5(2) applies.[25] Second, the governing law provision in the arbitration clause is not a contractual provision "directly relating to the same subject matter as an employment standard" so s. 5(2) of the *ESA* does not apply. Third, this form of arbitration clause is qualified by a form of indemnity that effectively eliminates any remedies under the *ESA* if a worker making an *ESA* claim is an employee under the *ESA*.

(C) The *ESA* invalidates arbitration clauses with qualifying indemnities that exclude remedies under the *ESA*[26]

39. The arbitration clause at issue is qualified by a form of indemnity that effectively prevents an arbitration from resulting in any remedy based on the *ESA*:

> 13.2…Where, by implication of mandatory law or otherwise, you may be deemed an employee, agent or representative of Company, you undertake and agree to indemnify, defend (at Company's option) and hold Company and its Affiliates harmless from and against any claims by any person, entity, regulators or governmental authorities based on such implied employment, agency or representative relationship.[27]

40. Having regard to this form of indemnity, resort to arbitration, the only permissible binding dispute resolution process in the contract, is pointless. The end result of any arbitration for an employment claim is pre-determined by the indemnity. If the employer is unsuccessful in the arbitration, then the worker has to indemnify and hold the employer harmless.

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[25] *O.N.A. v. Queen Elizabeth Hospital*, 1991 CarswellOnt 687 (Div. Ct.), para 9. See also the approach to the onus regarding exceptions to employment standards under the *ESA*: *Saad v. Bookham (Canada) Inc.*, 2006 CarswellOnt 10453 (OLRB), para 14; *Re National Grocers Co. and UFCW, Local 1000A*, 2018 CarswellOnt 16210 (Arb.), para 115.

[26] It is proper for this Court to consider the effect of the indemnity on the arbitration clause in determining whether the arbitration clause contracts out of the *ESA*: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, paras 40 and 41.

[27] Services Agreement, Affidavit of R van der Woude, Ex. B, Appellants' Record, Tab 9, p 46 (s. 13.2). Three of the four other relevant standard form agreements contain equivalent indemnities relating to employment claims: see Services Agreements, Affidavit of R van der Woude, Exs. C-E, Appellants' Record, Tab 9, pp 68 (s. 2.2.1), 89 (s. 13.2), and 121-22 (s. 13.2). The fourth contains a similar indemnity that includes employment claims: Transportation Provider Service Agreement, Affidavit of R van der Woude, Ex. A, Appellants' Record, Tab 9, p 27 (under the heading "Taxes").

41. Since the form of arbitration clause, qualified by the indemnity provision, cannot result in any award under the *ESA*, it contracts out of the *ESA* and is thus invalid in respect of *ESA* claims.[28]

42. Indeed, in requiring indemnification from any award based on the *ESA*, the Appellants in substance do not agree to be bound by any arbitral determination of the Plaintiff's *ESA* rights.

43. The requirement to indemnify and defend the Appellants from any claim based on an employment relationship is also properly characterized as a prohibited reprisal under s. 74 of the *ESA*. Such an indemnity intimidates workers from attempting to exercise rights under the *ESA* and penalizes a worker if those rights are proved.[29]

44. Finally, this form of indemnity, in purporting to require indemnification of any award by a regulator or governmental authority, provides a strong disincentive to workers to report any perceived contravention of the *ESA* to the Ministry of Labour, and purports to supersede any enforcement of the *ESA* by the Ministry of Labour.

(D) Conclusion

45. The form of arbitration clause specifying a foreign law, and as qualified by an indemnity, is a contractual template to circumvent Ontario legislation.

46. If the Court allows the appeal granting a stay, the Plaintiff will be required to initiate arbitration proceedings in Amsterdam to enforce his potential Ontario *ESA* rights where the arbitrator cannot apply the Ontario *ESA*. Even if the arbitrator could apply the *ESA*, the indemnity effectively prohibits the award of any *ESA* remedy. The arbitration clause is not an arbitration clause, but rather, for *ESA* claims, an immunity clause.

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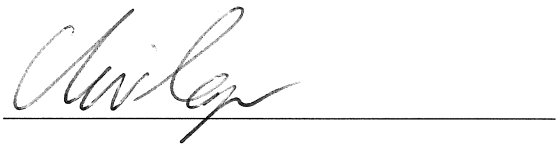

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[28] Notably, in *Seidel*, this Court found that the fact that an arbitration could not award the remedies provided for in the statute was a factor in finding that the statute overrode the arbitration agreement (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, para 39).

[29] *ESA*, S.O. 2000, c. 41, s. 74.

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