Court of Appeal File No. C-65073

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

DAVID HELLER

Plaintiff (Appellant)

- and -

UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., AND RAISER OPERATIONS B.V.

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF/APPELLANT DAVID HELLER

April 9, 2018

CAVALLUZZO LLP
Barristers & Solicitors
474 Bathurst Street Suite 300
Toronto, ON M5T 2S6

Michael D. Wright, LSUC # 32522T
Tel: 416-964-1115
Fax: 416-964-5895

Danielle Stampley (in association), LSUC # 96487C
Tel: 416-655-3044 x. 2
Fax: 416-655-3044

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

Lior Samfiru, LSUC # 48609U
Stephen Gillman, LSUC # 680940
Tel: 416-861-9065
Fax: 416-361-0993

Lawyers for the Plaintiff (Appellant)

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

Linda Plumpton, LSUC# 38400A
Tel: 416-865-8193

Lisa Talbot, LSUC # 44672I
Tel: 416-865-8222

Sarah Whitmore, LSUC # 61104E
Tel: 416-865-7315

David Shiff, LSUC # 70748P
Tel: 416-865-8190
Fax: 416-865-7380

Lawyers for the Defendants (Respondents)

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PART I: STATEMENT OF APPEAL

1. This is an appeal from the Honourable Justice Perell's order dated January 30, 2018 staying the proposed class action of the Plaintiff/Appellant David Heller against the Defendants/Respondents, Uber Technologies Inc., Uber Canada Inc., Uber B.V., and Rasier Operations B.V. (collectively, the "Respondents" or "Uber"). Perell J. erred by staying the action in favour of an arbitration provision that requires putative class members like Mr. Heller to arbitrate disputes with Uber in the Netherlands.

PART II: OVERVIEW

2. Uber is a multi-national corporation operating in more than 29 countries. Through its technology, Uber connects riders seeking drivers and restaurants seeking delivery personnel. Uber sets the fares and fees the drivers and delivery personnel charge for their services and charges a fee per transaction. Downloading the technology is free, but if the drivers and delivery personnel do not work, Uber does not make money.

3. The Appellant, Mr. Heller, earns a living as a delivery person using one of Uber's applications, UberEATS. He earns about $400-600 a week using his own vehicle and working 40-50 hours (about $21,000-31,000 annually) delivering food for UberEATS.

4. This appeal is not about whether a mere arbitration provision in a contract renders it inoperable or unconscionable. Rather, this appeal is about whether, under Ontario law, an arbitration provision that requires Mr. Heller to pay up to $14,500 USD (almost $19,000 CDN) in filing and administrative fees, plus a mediator's fees, plus an arbitrator's fees, plus legal fees, plus travel to mandatory mediation and arbitration in the Netherlands, can preclude him from seeking adjudication of an alleged breach of minimum employment standards under the *Employment Standards Act* in Ontario on his and the Class's behalf.

5. Although arbitration clauses are regularly enforced in Canada and Ontario, they are not enforced where the legislature has expressed an intent to intervene on behalf of a vulnerable population—such as employees—and guarantee certain minimum rights that are undermined by the agreement. Likewise, courts will not enforce highly unfair bargains between parties that have vastly unequal bargaining power, especially when the weaker party seeks to enforce a fundamental right, such as the right to work.

6. The Motion Judge's determination that this action should be stayed ignored these principles and was grounded in several errors.

7. First, he collapsed his analysis of the subject matter of the dispute and the scope of the arbitration provision into the analysis of the scope of the term "commercial" under the *International Commercial Arbitration Act*. As a result, the Motion Judge wrongly determined Mr. Heller's claims were commercial, not employment-related, and fell within the scope of the arbitration provision and the *International Commercial Arbitration Act*.

8. Second, the Motion Judge ignored the *Employment Standards Act*'s remedial purpose, and wrongly concluded that the arbitration provision precluded Mr. Heller from seeking to enforce his rights under the *Act* in an Ontario court, despite the arbitration provision's requirement that disputes be resolved under the law of the Netherlands.

9. Third, the Motion Judge wrongly determined that the unfairness of the arbitration provision was insufficient to render it unconscionable—relying on the wrong legal test for unconscionability, requiring proof of Uber's intent to take advantage of Mr. Heller to establish an impermissibly high degree of unfairness.

10. Finally, the Motion Judge's consideration of the parties' relative bargaining power and the nature of their relationship was grounded in two palpable and overriding errors of

fact: (1) that Uber's internal complaint process allows for the resolution of most disputes in Ontario such that only "substantial" disputes would require arbitration in the Netherlands; and (2) that drivers collect their fees from riders, rather than Uber remitting payment to the drivers. Neither of these findings are supported by the record.

11. Moreover, Uber's control over the means of resolving disputes and collecting and remitting payment to drivers further establishes its disproportionate power over Mr. Heller and the putative Class Members and the unfairness of this arrangement.

12. On the basis of any one of these errors, Mr. Heller's appeal should be allowed, and his action should be permitted to proceed.

PART III: FACTS

A. Background

13. Mr. Heller resides in Ontario and provides services as a driver and delivery person for the Respondents, which are known collectively and individually as "Uber".

> *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 ["***Heller***"], at paras. 1, 7-10, **Appeal Book and Compendium** ("**Comp.**"), Tab 3, p. 11 (describing Respondents).

14. Mr. Heller is 35 years old and has a high school education. He earns approximately $400 to $600 a week based on 40 to 50 hours of work delivering food for UberEATS driving his own vehicle.

> Affidavit of D. Heller ("**Heller Aff.**"), at paras. 2-4, **Comp.**, Tab 7, pp. 127-128.

15. Mr. Heller brings this action on behalf of "[a]ny person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor, providing any of the services outlined in Paragraph 4 of the Statement of Claim pursuant to a Partner and/or independent contractor agreement" (the "Class" or "Class Members").

The putative Class Members work as Drivers and delivery personnel using Uber Apps.

Statement of Claim, at para. 8, **Comp.**, Tab 4, p. 37.

16. Uber has developed various software applications ("Apps"), which it operates around the world. The Apps relevant to this litigation connect users seeking transportation or food delivery with drivers and delivery persons nearby ("Uber Apps").

Affidavit of R. Van Der Woude ("**van der Woude Aff.**"), at paras. 3-6, **Comp.**, Tab 6, p. 61.

17. Uber App users (drivers, delivery persons and customers) download the Uber Apps to their smartphones. Uber uses GPS to connect customers seeking transportation using an App for Riders (the "Rider App") with Drivers using an App developed for drivers (the "Driver App"). The Rider App allows Riders to request rides at their location, track the Driver on the way to the location and then rate the Driver after the ride is completed.

van der Woude Aff., at paras. 6-8, **Comp.**, Tab 6, pp. 61-62.

18. Depending on the city, Riders can select among a variety of ride services using the Rider App, including six services in which individuals without municipal licenses transport Riders (like uberX and uberXL) and three services in which municipally licensed Drivers transport Riders who seek out drivers through the App (like UberBLACK and UberTAXI).

van der Woude Aff., at para. 9, **Comp.**, Tab 6, pp. 62-63.

19. UberEATS allows users ("Eaters") to order food from restaurants and have it delivered by nearby delivery personnel. The App displays each restaurant's menu, collects each Eater's order and transmits the orders to the restaurants. The restaurant updates the App as the food is prepared. Then, the App signals nearby delivery personnel that a delivery is available. Delivery personnel willing to deliver the order accept through the App, which provides his or her identifying information to the restaurant and the Eater.

After delivering the food, the delivery person confirms the delivery in the App, which collects the Eater's payment and remits payment to the restaurant.

van der Woude Aff., at paras. 19-26 and 33 **Comp.**, Tab 6, pp. 65-69.

B. The Relationship Between Uber and Drivers

(i) Forming the relationship

20. Uber requires Drivers to create an account online to access the Apps. After downloading the Driver App, Uber requires Drivers in Ontario (performing services by car) to provide copies of the following documents: (i) a valid driver's license; (ii) a valid vehicle registration; (iii) proof of eligibility to work in Canada; and (iv) valid insurance.

R. van der Woude Cross-Examination Undertakings, Under Advisements and Refusals ("**van der Woude Undertakings**"), at Q. 190, **Comp.**, Tab 9, p. 156.

21. Depending on the city they drive in and the type of service they are providing (*e.g.*, uberX or UberBLACK), Uber may require Drivers to provide additional documentation. Uber requires prospective Drivers to undergo criminal and driving-history screening through a third-party agency. After reviewing and verifying the Drivers' documentation and screening results, Uber activates their account.

van der Woude Undertakings, at Q. 190, **Comp.**, Tab 9, p. 156.

(ii) The service agreements

22. The first time a Driver or delivery person logs into the Uber App, he or she must agree to a services agreement, which appears on the smartphone screen. Drivers and delivery personnel accept by clicking "I agree", and confirming acceptance by clicking "YES, I AGREE" after reading the following: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS."

van der Woude Aff., at paras. 55-58, **Comp.**, Tab 6, pp. 75-76.

23. Uber's January 4, 2016 Driver service agreement with Mr. Heller is 14 pages. The November 29, 2016 UberEATS service agreement with Mr. Heller is 15 pages.

van der Woude Aff., at Exs. B, E **Comp.**, Tabs 6(A), 6(B) pp. 79, 111.

24. Uber requires Drivers and delivery personnel to participate in a rating system by which Riders and Eaters provide feedback after each ride or delivery. To continue using the Apps, Uber requires Drivers and delivery personnel to maintain a minimum average rating, which is set by Uber. Uber will deactivate the accounts of Drivers or delivery personnel who are unable to maintain that average.

van der Woude Aff., at Exs. B, E, ss. 2.5.1-2.5.2, **Comp.**, Tabs 6(A), 6(B), pp. 83, 115-116.

25. Uber determines the maximum fares Drivers receive for their work according to a base fare amount plus distance (based on GPS data obtained through the App), plus applicable time amounts. Uber collects the fares from Riders, provides Riders with a receipt, and remits payment periodically to Drivers, less Uber's fees.

van der Woude Aff., at Ex. B, ss. 4.1, 4.6, **Comp.**, Tab 6(A), pp. 100-102.

Transcript of Cross-Examination of D. Heller ("**Heller Trans.**"), at Exs. 4, 7, **Comp.**, Tabs 10(B), 10(D), pp. 164, 175.

26. Uber reserves the right to change the fare calculation at any time. It also reserves the right to adjust particular fares unilaterally without the Driver's input.

van der Woude Aff., at Ex. B, ss. 4.2-4.5, **Comp.**, Tab 6(A), p. 101.

27. For example, November 29, 2016, Uber revised the UberEATS delivery fees. To continue working through the App, delivery personnel had to agree to receive $2.90 for pick up services, $2.50 per drop off, and $1.05 per kilometre "based on the most efficient route between the restaurant and the eater, not actual kilometres travelled." Uber also revised its service fee, such that it collects 20-35% of the delivery fee.

Heller Trans., Ex. 3, **Comp.**, Tab 10(A), p. 162.

(iii) Dispute resolution under the service agreements

28. Drivers can report complaints to Uber through the Apps. Customer Service Representatives ("CSRs") in the Philippines first receive the complaints. If unresolved, they escalate the complaints to CSRs in Chicago, then to Uber's legal team.

Transcript of Cross-Examination of R. Van Der Woude ("**van der Woude Trans.**"), at Qs. 143-159, **Comp.**, Tab 8, pp. 147-159.

29. Drivers and delivery personnel may also attend in Ontario at an Uber "Greenlight Hub", which is a support centre staffed with Uber employees, to ask for assistance. However, Uber's employees will likely refer them to the in-App complaint mechanism.

van der Woude Trans., at Qs. 52, 53, 161, **Comp.**, Tab 8, pp. 146-147, 159.

30. Mr. Heller entered into a Driver service agreement with Rasier Operations B.V. on June 7, 2016, and an UberEATS agreement on December 15, 2016. Each agreement contains the following arbitration clause (the "Arbitration 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. . . .

van der Woude Aff., at para. 54, Exs. B, E, s. 15, **Comp.**, Tabs 6, 6(A), 6(B), pp. 75, 93, 126.

31. Under the *ICC Mediation Rules*, Drivers must pay a $2,000 USD non-refundable filing fee to initiate mediation proceedings against Uber. For disputes valued under $200,000 USD, Drivers must pay an additional administrative fee, which may be as much as $5,000 USD. These fees do not cover a mediator's fees or legal fees.

> *ICC Mediation Rules*, at Article 6(1) and Articles 1, 2, and 3 of the Appendix, **Appellant's Book of Authorities** ("**ABOA**"), Tab 1, pp. 12-13, 15, 20-21.

32. If the parties are unable to resolve their dispute through mediation within 60 days, they must proceed to arbitration under the *ICC Arbitration Rules*. A Driver and any party wishing to join the arbitration must each pay a $5,000 USD filing fee.

> van der Woude Aff.,at Exs. B, E, s. 15, **Comp.**, Tabs 6(A), 6(B), pp. 93, 126.
>
> *ICC Arbitration Rules*, at Article 4(4)(b), 7 and Articles 1(1) of Appendix III, **ABOA**, Tab 2, pp. 45, 70, 84.

33. Article 37 of the *ICC Arbitration Rules* further requires the parties to pay an advance on costs "in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties". The payment must be in cash, unless a party's share is greater than $500,000 USD, in which case the party may post a bank guarantee. The initial $5,000 USD filing fee is credited against the claimant's portion of this advance but is non-refundable.

> *ICC Arbitration Rules*, at Article 37 and Article 1(1)-(5) of Appendix III, **ABOA**, Tab 2, pp. 72-73, 84.

34. The administrative fee component of this advance is at least $2,500 USD per party for disputes valued at under $200,000 USD. These fees do not cover counsel fees, travel or other expenses related to participating in the arbitration.

> *See ICC Arbitration Rules*, at Article 38 and Articles 1-3 of Appendix III and scales, **ABOA**, Tab 2, pp. 73-74, 84-94.

35. Accordingly, the up-front administrative/filing-related costs for a Driver to

participate in the mediation-arbitration process prescribed in the Arbitration Clause is $14,500 USD. As an UberEATS delivery person, Mr. Heller earns about $20,800-31,200 a year, before taxes and expenses.

Heller Aff., at paras. 4-5, **Comp.**, Tab 7, p. 128.

36. The International Chamber of Commerce (the "ICC") sets the arbitrator's fees, which cannot be re-negotiated by the parties. The ICC also has the ability to require claimants to pay a provisional advance to cover part or all of the costs of the arbitration.

ICC Arbitration Rules, at Article 37(2) and Article 2(4) of Appendix III, **ABOA**, Tab 2, pp. 72, 86.

PART IV: ISSUES AND ARGUMENT

37. The issues on this appeal are:

A. the Motion Judge erred, as a matter of law, in applying the *International Commercial Arbitration Act* (the "*ICAA*") because the subject matter of the dispute is employment, and employment relationships are not considered "commercial" under Ontario law or the *ICAA*;

International Commercial Arbitration Act, 2017, SO 2017, c 2, Sch 5 ["***ICAA***"], **ABOA**, Tab 3, p. 112-126.

B. the Motion Judge erred, as a matter of law, in determining that the enforceability of the Arbitration Clause in this action should be determined in arbitration because it violates the *Employment Standards Act* (the "*ESA*" or the "*Act*") and is unenforceable as a matter of law;

Employment Standards Act, SO 2000, c 41 ["***ESA***"], **ABOA**, Tab 4, pp. 127-258.

C. the Motion Judge erred, as a matter of law, in determining that the arbitration agreement was not unconscionable;

D. the Motion Judge made a palpable and overriding error of fact in finding that most disputes between drivers and the Respondents can be dealt with by the dispute resolution mechanisms available in Ontario; and

E. the Motion Judge further made a palpable and overriding error of fact in finding that consumers pay drivers directly for services.[1]

A. The Nature of the Dispute is Employment, not Commercial

38. A court's jurisdiction to stay an arbitration is grounded in statute. The applicable statutory provision depends on whether the Arbitration Clause falls under the *ICAA* or the *Arbitration Act*. Under either statute, whether to stay an action in favour of arbitration depends on the subject matter of the dispute and the scope of the of the agreement.

> *Arbitration Act*, SO 1991, c 17, **ABOA**, Tab 5, pp. 25-280.
>
> *Haas v. Gunasekaram*, 2016 ONCA 744 ["***Haas***"], at para. 17, **ABOA**, Tab 6, pp. 287-288.

39. Perell J. erred in determining that Mr. Heller's dispute with Uber was commercial, and therefore that the *ICAA* applies. He collapsed the analysis of the subject matter of the dispute into his assessment of the scope of the arbitration agreement and which arbitration legislation applies.

> *Heller*, at paras. 45-48, **Comp.**, Tab 3, pp. 16-17

40. The Motion Judge further erred in his analysis of the applicable arbitration legislation by failing to consider the nature of the claims alleged, ignoring relevant Canadian jurisprudence distinguishing employment relationships from commercial

[1] Mr. Heller's Notice of Appeal included two additional grounds of appeal: whether the Motion Judge erred as a matter of law, in determining that the cause of action was "international" for the purpose of the *ICAA*, and in failing to find strong cause against enforcing the Arbitration Clause. Mr. Heller is no longer pursuing the former issue. He submits that the latter is subsumed within the unconscionability analysis.

relationships and relying on inapplicable precedents.

Heller, at paras. 45-48, **Comp.**, Tab 3, pp. 16-17

41. These are errors of law reviewed on a correctness standard.

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 ["***Sattva***"], at para. 53, **ABOA**, Tab 7, p. 333.

(i) The pith and substance test applies.

42. Mr. Heller's claims are only subject to arbitration if the subject matter of the dispute falls within the scope of the Arbitration Clause. The subject matter of a dispute depends on the pith and substance of the claims as alleged and detailed in the pleadings.

Haas, at paras. 21-22, **ABOA**, Tab 6, pp. 288-290.

43. Determining the pith and substance of the claims is a necessary part of construing an arbitration agreement and does not violate the competence-competence principle.

Haas, at para. 21, **ABOA**, Tab 6, pp. 288-289.

44. In *Haas*, this Court considered whether the pith and substance of the plaintiff's claims of misrepresentation, breach of fiduciary duty and oppression arose out of the shareholder agreement. The Court determined that, even though the claims were not for breach of contract, the allegations primarily relied on the defendants' failure to perform under the shareholder agreement, and therefore were subject to arbitration.

Haas, at paras. 26-27, **ABOA**, Tab 6, pp. 292-293.

45. In *Haas*, this Court noted that the pith and substance test derives from *Matrix*, in which the Court considered whether the plaintiff's claims were subject to a contractual forum selection clause. Specifically, *Matrix* involved a re-seller agreement between two companies (Matrix and Radiant Hospitality Systems Ltd. ("Radiant")), which, in relevant part, required the parties to litigate civil actions "relating to" the agreement in Texas under

Texas law. Matrix claimed damages against Radiant and two former employees who allegedly left Matrix, entered into an agreement to re-sell Radiant's product and solicited Matrix's customers. At the same time, Radiant allegedly terminated its agreement with Matrix in favour of the former Matrix employees' new business.

> *Matrix Integrated Solutions Ltd. v. Naccarato* ["***Matrix***"], at paras. 5-7, 2009 ONCA 593, **ABOA**, Tab 8, pp. 363-64.

46. In *Matrix*, the Court instructed that the pith and substance of a dispute depends on an examination of the statement of claim as a whole. The Court reviewed the claims and determined they were not "contractual in substance" because they "centred on a fiduciary relationship and the allegation that Radiant conspired with and knowingly assisted [the former employees] to breach their fiduciary obligations." The Court further concluded that the agreement was "merely part of the factual background" explaining the nature of the parties' relationship, but had "no direct bearing on the claims".

> *Matrix*, at paras. 10-11, 13, 14 **ABOA**, Tab 8, pp. 364-365 (*Matrix and Haas* cite *Precious Metal Capital Corp. v. Smith*, 2008 ONCA 577, **ABOA**, Tab 10, pp. 375-388, which looked to the Statement of Claim to determine the pith and substance of the dispute.).

47. As *Haas* and *Matrix* establish, jurisdiction depends on an analysis of the pleadings, not the merits. In *Seidel*, the Supreme Court recently considered whether to stay consumer class action claims in favour of arbitration. Although the Court did not expressly consider the "pith and substance" of the claims, this approach is consistent with the analytical framework of that case: it evaluates the nature of the rights asserted, not whether the claim would or could succeed.

> *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 ["***Seidel***"], **ABOA**, Tab 11, pp. 389-482.

48. Here, Mr. Heller alleges breaches of the *ESA*. Specifically, he has alleged that

Uber failed to properly classify him and the putative class members as employees, failed to advise them of their entitlement to minimum wage, failed to compensate them at minimum wage and failed to remit overtime pay in accordance with the *ESA*. These are alleged breaches of the *ESA*, not the service agreements. Accordingly, Mr. Heller has sought declaratory and injunctive relief to bring Uber in compliance with the *ESA*.

> *See* Statement of Claim, at paras. 1(e)-(g), 32-34, **Comp.**, Tab 4, pp. 33-34, 44-49.

49. Much like in *Matrix*, the service agreements provide a factual background for the parties' dispute, but the alleged *ESA* violations derive from the entitlements and protections created by the *Act*, not the agreements. Indeed, the service agreements explicitly purport to preclude the application of the *ESA* by providing that the law of the Netherlands, excluding its conflict of law rules, applies.

50. The Court does not need to consider whether Mr. Heller and the putative Class Members are employees to determine whether this dispute falls within the Arbitration Clause. If, at a later stage, a court determines that the putative Class Members are not employees protected by the *ESA*, the dispute will end, and the Class Members will be denied relief. There are no claims that would proceed otherwise.

51. In summary, an analysis of the pleadings reveals that this is an employment dispute asserting rights and benefits conferred by the *ESA*. The Arbitration Clause requires arbitration of disputes under the law of the Netherlands, excluding its rules on conflict of laws. Accordingly, the *Act* is an Ontario statute that will never be applied in an arbitration under this clause, and Mr. Heller's claims fall outside its scope. This Court could and, it is submitted, should reverse the stay on this basis alone.

52. Alternatively, the *ICAA* does not apply, and the motion to stay should have been

denied under the *Arbitration Act*.

(ii) In Canada, employment relationships are not "commercial."

53. The *ICAA* applies to matters arising out of arbitration agreements that are both commercial and international. Perell J. further erred by determining the parties' dispute was "commercial" under the *ICAA* by: (i) considering the nature of parties' relationship, rather than the nature of the rights asserted under the *ESA*; (ii) failing to consider the distinction between employment and commercial relationships that are well-established in Canadian law; and (iii) misinterpreting the relevant *ICAA* interpretive guidance.

> *ICAA*, at Part II, s. 5(3), **ABOA**, Tab 3, pp. 113-115.

54. The Claim alleges violations of the *ESA*. Accordingly, the dispute is inherently about employment relationships. Whether employment relationships are covered by the *ICAA* depends on whether Canadian courts recognize them as "commercial".

55. In 1986, Canada, with the provinces' consent, ratified the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "*Convention*") and adopted the *UNCITRAL Model Law on International Commercial Arbitration* (the "*Model Law*"). The *ICAA* is based on the *Model Law* and incorporates it.

> *Commission on International Trade Law, Report of the Secretary General*, UNGAOR, 2017, UN Doc. A/CN.9/909 ["***CITL Report***"], Status of conventions and model laws, Table K, at p. 14, **ABOA**, Tab 12, pp. 496-501.
>
> *CITL Report*, Enactments of model laws, at pp. 18-19, **ABOA**, Tab 12, pp. 500-501.
>
> *ICAA*, at Part II, ss. 4-6, **ABOA**, Tab 3, p. 113-114
>
> *Wellman v. TELUS Communications Co*., 2017 ONCA 433 ["***Wellman***"], paras. 69-70, **ABOA**, Tab 13, pp. 538-539.

56. When Canada ratified the *Convention*, it declared that it would only apply "to differences arising out of legal relationships, whether contractual or not, which are

considered as commercial under the laws of Canada. . . ."

> *CITL Report,* Status of conventions and model laws, at pp. 14, 18, **ABOA**, Tab 12, pp. 496, 500.

57. The Supreme Court and this Court have repeatedly emphasized the distinction between employment relationships and commercial relationships. Employers have superior bargaining power and information. Employment is of fundamental importance in our society, and yet many employees are unaware of their rights.

> *Machtinger v. HOJ industries Ltd.*, 1992 CanLII 102 (SCC) ["***Machtinger***"], pp. 997, 1003-1004, **ABOA**, Tab 14, pp. 571, 577-578.

58. For these reasons, our courts approach employment agreements and relationships differently than those of a commercial nature. Ontario courts imply a reasonable notice of termination requirement as a term of employment at common law. Ontario courts interpret employment agreements to protect employees. Employment relationships and employment agreements are not treated the same as a commercial relationships and commercial agreements in Ontario.

> *Machtinger*, at pp. 997, 1008-13 (*McLachlin J. concurring*), **ABOA**, Tab 14, pp. 571, 582.
>
> *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 ["***Wood***"], at para. 47, Tab 15, p. 605.
>
> *Christiansen v. Family Counselling Centre* (2001), 2001 CanLII 4698 (ON CA) ["***Christiansen***"], at para. 8, **ABOA**, Tab 16, p. 624-625.
>
> *Ceccol v. Ontario Gymnastics Fed.* (2001), 2001 CanLII 8589 (ON CA), ["***Ceccol***"] at paras. 47-49, **ABOA**, Tab 17, p. 647-648.

59. This body of law contradicts the Motion Judge's suggestion that collective agreements and "[i]ndividual contracts with professional athletes and entertainers" are "examples of employment relationships that could be considered commercial".

> *Heller*, at para. 48, **Comp.**, Tab 3, p. 17.

60. Collective agreements are not contracts of employment between employees and employers. Collective agreements are contracts between unions and employers. These agreements are inherently distinct from contracts between individual non-unionized employees and employers, and subject to an entirely separate labour relations statutory regime for that very reason. Moreover, the *ESA* expressly provides that it applies "as if it were part" of collective agreements in Ontario.

> *See Machtinger*, at p. 1003, **ABOA**, Tab 14, p. 577 (noting the *ESA*'s purpose is to remedy the unequal bargaining position of non-unionized workers).
>
> See *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, at ss. 2-6, 48-50 **ABOA**, Tab 18, pp. 656-657, 682-686.
>
> *See also Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, at paras. 39-40, **ABOA**, Tab 19, p. 780 (noting that arbitrations arising out of collective agreements are approached in accordance with labour relations legislation).
>
> *ESA*, at s. 99, **ABOA**, Tab 4, p. 228.

61. The record contains no evidence of contracts with professional athletes or entertainers. In any event, these examples are inapposite. Many professional athletes and entertainers have sought the benefit of collective bargaining agreements.

> *See, e.g.*, *Orca Bay Hockey Limited Partnership v. National Hockey League*, 2006 CanLII 21166 (BC LRB), **ABOA**, Tab 20, pp. 829-869.
>
> *Yashin v. National Hockey League*, 2000 CanLII 22620 (ON SC), **ABOA**, Tab 21, pp. 870-884.

62. The Ontario jurisprudential distinction between employment and commercial relationships is consistent with *Model Law* interpretive guidance. "Commercial" relationships under the *Model Law* include a range of transactions. However, the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* notes that "not all relations related to business are commercial". In particular,

employer-employee relationships have been found to be non-commercial.

> *CITL, Report of the Secretary General*, UNGAOR, 1985, UN Doc. A/CN.9/264, at Chapter II.C, Chapter I, Article 1, p. 6, **ABOA**, Tab 22, pp. 896-899.
>
> *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* ["***2012 Digest***"], at p. 10, para. 8, **ABOA**, Tab 23, p. 1001.

63. Canadian courts considering the *ICAA*'s applicability have cited and adopted this limitation on its scope. Indeed, this Court determined in *Patel*, a case involving allegations of wrongful dismissal and negligent misrepresentation, that "labour and employment disputes" are not considered commercial under the *ICAA*, "despite their relation to business".

> *See Ross v. Christian & Timbers Inc.*, 2002 CanLII 49619 (ONSC), at para. 11, **ABOA**, Tab 24, p. 1228.
>
> *See also Carter v. McLaughlin*, 1996 CanLII 7962 (ONCJ.GD), at para. 18, **ABOA**, Tab 25, p. 1240.
>
> *Patel*, at para. 18, **ABOA**, Tab 9, p. 373.
>
> *See also Borowski v. Heinrich Fiedler Perforiertechnik GmbH*, 1994 CanLII 9026 (ABQB), at paras. 24-31, **ABOA**, Tab 26, pp. 1250-1252.

64. Accordingly, if the pith and substance of the parties' dispute, as set out in the Statement of Claim, is employment-related, it is not commercial and falls outside the scope of the *ICAA*.

65. Rather than consider whether the pith and substance of the Statement of Claim was commercial and the applicable definitions of commercial under the law, Perell J. relied on the service agreements' text, which denies any employment relationship between the parties, to support his conclusion that the dispute is commercial. Just as they cannot contract out of the *ESA*, employees cannot simply agree that they are independent contractors, and contractual language to that effect carries little weight.

Heller, at paras. 45-48, **Comp.**, Tab 3, p. 16-17

Braiden v. Lay-Z-Boy Canada Limited, 2008 ONCA 464, para. 33, **ABOA**, Tab 27, p. 1268-1269.

B. The Arbitration Clause Impermissibly Displaces the *ESA*

66. A challenge to an arbitrator's jurisdiction should generally be resolved by the arbitrator, except where the challenge is based solely on a question of law or a mixed question of fact and law that can be determined by a superficial consideration of documentary evidence.

Seidel, at para. 29, **ABOA**, Tab 11, pp. 415-416.

67. The Arbitration Act grants courts the jurisdiction to consider threshold questions of enforceability when a party applies for a stay in favour of arbitration. Section 7(2) of the Arbitration Act, in relevant part, authorizes Ontario courts to decline a stay and referral to arbitration if the arbitration agreement is invalid or if the dispute is not capable of being the subject of arbitration under Ontario law.[2]

Arbitration Act, at s. 7, **ABOA**, Tab 5, pp. 263-264.

68. Whether the ESA, unconscionability or public policy precludes Uber from enforcing the Arbitration Clause in this proceeding is a question of law. A Motion Judge's conclusion on a question of law in this context is reviewed for correctness.

Seidel, at para. 30, **ABOA**, Tab 11, p. 416.

Sattva, at para. 53, **ABOA**, Tab 7, p. 333.

69. Perell J. concluded that the plain language of the *ESA* does not preclude exclusive

[2] Article II(3) of the *ICAA* also authorizes Ontario courts to decline a stay and referral to arbitration where the arbitration agreement is "null and void, inoperative or incapable of being performed". (**ABOA**, Tab 3, p. 115). If this Court determines that this act applies, the Appellant submits the agreement is inoperative because it is invalid under the *ESA* and/or unconscionable.

arbitration clauses like the one in Uber's service agreements because it does not "expressly" oust them. He incorrectly determined that "whether employment claims are arbitrable is an issue subject to the competence-competence principle", rather than a matter of statutory interpretation. This conclusion is rooted in an incorrect application the Supreme Court's holding in *Seidel* and this Court's decision in *Wellman*.

Heller, at paras. 57, 59, 65, **Comp.**, Tab 3, p. 19.

Seidel, at para 3-5 **ABOA**, Tab 11, pp. 402-403.

Wellman, at para. 25, **ABOA**, Tab 13, pp. 521-522.

70. In *Seidel*, the Court held that the *Business Practices and Consumer Protection Act* (the "*BPCPA*") precluded the enforcement of an arbitration clause in Seidel's (the representative plaintiff) contract with TELUS. The Court did not rely on express language, but rather considered the broad, remedial purpose of the legislation and determined the "usual rationales for arbitration" were incompatible with that objective.

Business Practices and Consumer Protection Act, SBC 2004, c 2 ["***BPCPA***"], **ABOA**, Tab 28, p. 1278-1381.

Seidel, at paras. 31-40, **ABOA**, Tab 11, pp. 416-422.

71. Binnie J. described the relevant inquiry as whether the legislation "manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to 'private and confidential' mediation/arbitration and if, so, under what circumstances". In *Wellman*, this Court succinctly restated this rule: "the enforceability of an arbitration clause depends on the legislative context and whether the legislature intended to limit the freedom to arbitrate."

Seidel, 2011 SCC 15, para. 2, **ABOA**, Tab 11, pp. 401-402.

Wellman, 2017 ONCA 433, paras. 81-82, **ABOA**, Tab 13, p. 544.

72. The *BPCPA* provides that "[a]ny waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act." The *Seidel* Court interpreted this to mean that "to the extent the arbitration clause purports to take away a right, benefit or protection conferred by the *BPCPA*, it will be invalid".

BPCPA, at s. 3, **ABOA**, Tab 28, p. 1288.

Seidel, at para. 31, **ABOA**, Tab 11, pp. 416-417.

73. Similarly, s. 5(1) of the *ESA* provides that "no employer or agent of any employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void." Accordingly, any arbitration agreement that deprives an employee of rights or benefits conferred by the *ESA* is invalid.

ESA, at s. 5(1), **ABOA**, Tab 4, p. 139.

74. In *Seidel*, the Supreme Court recognized that the *BPCPA* "is all about consumer protection", and therefore it is interpreted "generously" in favour of consumers. With these principles in mind, the Court determined that private arbitration was antithetical to the legislature's intent to provide consumers and consumer advocates with the right to enforce the *BPCPA* and deter its contravention. The Court observed that, though the arbitrator could consider whether TELUS had breached the *BPCPA*, the public interest would not be as well-served by confidential arbitrations that could not provide the range of relief allowed under the legislation.

Seidel, 2011 SCC 15, paras. 33-40, **ABOA**, Tab 11, p. 418-422.

75. The Supreme Court has recognized that "[t]he general intention of [the *ESA*] is the protection of employees" and remedying the unequal bargaining power between individual employees, particularly non-unionized employees, and their employers.

Accordingly, the *ESA* is interpreted in a way that encourages employers to comply with its minimum requirements and extend its protections to as many employees as possible. Likewise, when considering employment agreements, courts should prefer the interpretation that gives the greater benefit to the employee.

Machtinger, at p. 1003, **ABOA**, Tab 14, p. 577 (internal citations omitted).

Ceccol, at paras. 47-49, **ABOA**, Tab 17, p. 647-648.

Christiansen, at para. 8, **ABOA**, Tab 16, p. 624-625.

76. Mr. Heller is seeking to enforce minimum employment standards under the *ESA*. He has alleged, among other things, that Uber has violated *ESA* standards by failing to pay the minimum wage, to pay overtime, and to properly document hours worked. The Statement of Claim seeks both monetary and declaratory relief.

ESA, at ss. 15, 22, 23, **ABOA**, Tab 4, p. 144-146, 155-157, 159-160.

77. Here, the Arbitration Clause goes further than the agreement at issue in *Seidel*. It ousts the application of the *ESA* entirely by requiring the application of the law of the Netherlands (excluding its rules on conflicts of laws) to disputes or controversies arising in connection with the service agreements. Accordingly, even if an arbitrator determined that Mr. Heller were an employee, the *ESA* would not apply. This is a prohibited attempt to contract out of the *Act*.

van der Woude Aff., at Exs. B, E, s. 15, **Comp.**, Tabs 6(A), 6(B), pp. 93, 126.

78. Moreover, even if the *ESA* were applicable under the Arbitration Clause (the evidence is to the contrary), the Arbitration Clause further contravenes the *Act* by providing that arbitration is the exclusive and final remedy to parties to the service agreements. Beyond guaranteeing employees certain minimum entitlements, the *ESA* provides a complaints mechanism administered by the Ministry of Labour. The Arbitration

Clause impermissibly denies putative employees access to that remedy.[3]

ESA, at s. 96, **ABOA**, Tab 4, p. 227.

79. Uber has reached out into Ontario to reap an economic benefit from its citizens and residents, who undisputedly engage in work to generate that benefit—whether they are legally employees or contractors has not yet been determined. However, Uber charges the Drivers a percentage of the fees they generate. If they do not drive, Uber does not make money. Now Uber seeks to rely on a contract of adhesion to prevent these Drivers from determining their rights.

van der Woude Aff., at Ex. B, ss. 4.1, 4.6, **Comp.**, Tab 6(A), p. 85, 86.

80. "[E]mployment is of central importance in society". The *ESA*, much like the *BPCPA* (and the *Class Proceedings Act*), seeks to deter malfeasance. Perhaps more importantly, the *ESA* attempts to ensure that employees know their rights by requiring employers to inform employees of the *Act*'s guarantees and provide accurate records.

Machtinger, at p. 1002, **ABOA**, Tab 14, p. 576.

ESA, at Parts II and VI, **ABOA**, Tab 4, pp. 136-137, 140-141.

81. Likewise, the *ESA* prohibits employers from extracting agreements from employees that provide lesser benefits. To ensure enforcement of these rights, the *Act* prohibits reprisals, and shifts the burden of proving that workers are not employees to employers. Legislation that goes to these lengths to protect vulnerable individuals engaging in work should be interpreted at least as purposefully as the legislation protecting consumers in *Seidel*.

ESA, at ss. 5, 5.1, 74, **ABOA**, Tab 4, pp. 139, 204-205.

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[3] It is of no moment that Mr. Heller does not seek to complain through this process. This Court has established that any construction of an agreement that violates the *ESA* is void. *See Wood*, at para. 47, **ABOA**, Tab 15, p. 605.

82. As set out above, whether Mr. Heller and the Class Members are employees as a matter of law is irrelevant at this stage. The Statement of Claim seeks to rely on the *ESA*'s protections. If the putative Class Members are not employees, they will be denied a remedy under the *ESA*. If they are employees, they are entitled to the rights and benefits provided under the *ESA*.[4]

83. This Arbitration Clause purports to oust the *ESA* and is therefore invalid.

C. The Arbitration Clause is Unconscionable

84. The doctrine of unconscionability relieves vulnerable parties from "the harsh impact of unfair terms in boilerplate or "adhesion contracts". A determination of unconscionability involves a two-part analysis: a finding of inequality of bargaining power and a high degree of unfairness.

> *Douez v. Facebook*, 2017 SCC 33 ["***Douez***"], at paras. 114-115, **ABOA**, Tab 29, p. 1431-1432 (*Abella J. concurring*) (internal citations omitted).
>
> *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809 ["***Birch***"], at paras. 42-45, **ABOA**, Tab 30, p. 1470-1472
>
> *Norberg v. Wynrib*, 1992 CanLII 65 (SCC) ["***Norberg***"], at p. 256, **ABOA**, Tab 31, p. 1520.

85. In reaching his conclusion that the Arbitration Clause is not unconscionable, Perell J. applied a novel three-part test, which required additional evidence of "the defendant knowingly taking advantage of the vulnerable plaintiff". Although he conceded that there was an inequality of bargaining power, he found insufficient proof that Uber had preyed on or taken advantage of Mr. Heller and the putative Class Members. The Motion Judge's test appears to require proof of intent on Uber's part. That is not the standard.

> *Heller*, at paras. 26-29, **Comp.**, Tab 3, p. 13-14.

[4] For this reason, the Court could also arguably deny the stay under s. 7(5) of the *Arbitration Act*, on the basis that the matter is a proper one for summary judgment.

86. In applying the incorrect legal test, the Motion Judge committed an error of law. The question of whether the agreement evidenced a "high degree of unfairness" is a question of mixed law and fact. Extricable questions of law are reviewed on a correctness standard, and findings of fact are reviewed on a clear and overriding error standard.

Birch, at paras. 42-45, **ABOA**, Tab 30, pp. 1470-1472.

87. Here, the inequality of bargaining power is apparent. Uber is a large, multi-national corporation with offices in the Netherlands, the United States, and Canada. It has a sophisticated corporate structure through which it operates in more than 120 cities in 29 countries and partners with more than 60,000 restaurants.

See Douez, at para. 111, **ABOA**, Tab 29, p. 1430 (*Abella J. concurring*).

van der Woude Aff**.**, at paras. 28-39, **Comp.**, Tab 6, p. 68-70.

88. Mr. Heller, on the other hand, is a thirty-five-year-old individual working as a driver and delivery person. Mr. Heller has a high school degree and attended a few college courses for less than a semester. He has no legal knowledge or experience.

Heller Aff., at paras. 1-9, **Comp.**, Tab 7, p. 127-128; Heller Trans., at Qs. 7-10, **Comp.**, Tab 10, p. 160-161.

89. A "high degree of unfairness" may also be described as an abuse of bargaining power. In *Birch*, the Court considered whether fines levied by unions against members who crossed the picket line met this threshold. The Court found the following evidence demonstrated a high degree of unfairness: (i) the fines were 454% greater than the damages suffered by the union, (ii) they were imposed during a time of financial hardship and (iii) the only jurisdiction authorizing such fines limited them to a worker's net pay.

Birch, at paras. 45, 52-56, **ABOA**, Tab 30, pp. 1472, 1474-1475.

90. Much like in *Birch*, the outsized expense of the mediation-arbitration process

compared to the likely size of a Driver's dispute evidences a high degree of unfairness. A Driver who participates in a mediation and arbitration under the *ICC Rules* will have to pay the following fees: (i) a $2,000 USD non-refundable filing fee to initiate mediation; (ii) an additional administrative fee as much as $5,000 USD; a $5,000 USD filing fee to initiate the arbitration; and an additional administrative fee of at least $2,500 USD.

> *ICC Mediation Rules*, at Article 6(1) and Articles 1-2 of the Appendix, **ABOA**, Tab 1, pp. 15, 20-21.
>
> *ICC Arbitration Rules*, at Article 4(4)(b), 7 and Articles 1(1)-(5), of Appendix III, **ABOA**, Tab 2, pp. 45, 70, 84.

91. In total, a Driver will pay somewhere between $9,500 and $14,500 USD in administrative and filing fees just to get in the game. Some of this amount will be credited against another unknown amount—an advance on costs fixed by the ICC Court—which shall be "an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties". The payment must be in cash.

> *ICC Arbitration Rules*, at Article 37 and Article 1(1)-(5) of Appendix III, **ABOA**, Tab 2, pp. 72-73, 84.

92. As an UberEATS delivery person, Mr. Heller works 40-50 hours per week and earns between $400 and $600. He earns between $20,800 and $31,200 a year before expenses. Any dispute resolution process that requires a Driver like Mr. Heller to pay 46% to 69% of his annual earnings just to be able to initiate (not conclude) a dispute resolution process demonstrates a high degree of unfairness.

> Heller Aff., at paras. 4-5, **Comp.**, Tab 7, p. 128.

93. Perell J. erred in determining that these costs were not prohibitive by comparing them to the putative Class Members' alleged damages of $400 million. Unconscionability

is assessed on a case-by-case basis. The issue is whether this agreement is highly unfair with reference to Mr. Heller and Uber.

Heller, at para. 71, **Comp.**, Tab 3, p. 21.

94. Moreover, consideration of the collective value of the Class Members' claims is premature. The relative size of a class claim compared to cost of litigation is properly a component of the preferability analysis under the class certification test. That analysis would have to take into account the cost of a collective action in arbitration, which requires each party to the proceeding to pay an additional fee of $5,000 USD.

See AIC Limited v. Fischer, 2013 SCC 69, **ABOA**, Tab 32, pp. 1585-1617 (considering barriers to access to justice in preferability analysis).

See also Griffin v. Dell Canada Inc., 2010 ONCA 29, at para. 12, **ABOA**, Tab 33, p. 1628 (approving of considering stay at certification motion).

ICC Arbitration Rules, at Article 4(4)(b), 7 and Articles 1(1) of Appendix III, **ABOA**, Tab 2, pp. 45, 70, 84.

95. The arbitration location further evidences a high degree of unfairness. Although *Douez* addressed whether a party had strong cause to avoid a forum selection clause, the Supreme Court's analysis focuses on "fairness between the parties" and is therefore instructive. *Douez* considered whether Facebook's forum selection clause requiring parties to submit to California jurisdiction was enforceable in a context in which the parties (consumers and a multi-national technology corporation) had unequal bargaining power and a contract of adhesion.

Douez, at paras. 29, 33-39, **ABOA**, Tab 29, p. 1404-07.

96. After noting the importance of holding parties to their bargain, the Court recognized that public policy and the protection of weaker parties may fetter the freedom of contract when necessary. The Court noted that forum selection clauses often operate

to defeat consumer claims and weighed the relative convenience as part of its fairness analysis. The requirement that the plaintiff travel to the home of Facebook to advance her claim supported a finding of unfairness.

Douez, at paras. 52-55, 62, 73-75, **ABOA**, Tab 29, pp. 1410-14, 1417.

97. In her concurrence, Abella J. considered research describing "deterrent effects of geography", which arise from the "burdens" of retaining counsel in a foreign jurisdiction, travel, long-distance communication, and complications related to preparation from afar. These burdens are especially onerous where the claims are of low value. She found Facebook's attempt to gain a "home court advantage" evidence of unconscionability.

Douez, at paras. 101-102, 115-116, **ABOA**, Tab 29, p. 1424-26, 1431.

98. Here, the Arbitration Clause provides that "[t]he Place of the arbitration shall be Amsterdam, The Netherlands". Mr. Van der Woude's evidence is that Uber chose the Netherlands as "the seat" to resolve its disputes because it operates and is located there. On cross-examination, Mr. Van der Woude reiterated that the Netherlands was "the most beneficial" to Uber from "a convenience point of view".

van der Woude Aff., at Exs. B, E, s. 15, **Comp.**, Tabs 6(A), 6(B), pp. 93, 126.

van der Woude Trans., at Qs. 209-210, **Comp.**, Tab 8, p. 152.

99. The Netherlands is not convenient or beneficial to Mr. Heller. His evidence is that he could not afford to travel there, hire counsel or pay his share of the costs advance.

Heller Aff., at paras. 14-15, **Comp.,** Tab 7, p. 129.

D. Uber Controls Dispute Resolution

100. To support his determination that the Arbitration Clause is not highly unfair, the Motion Judge found that "most grievances or disputes between Drivers and Uber can be dealt with by the dispute resolution mechanisms readily available from Ontario and that it

will be a substantial dispute that entails arbitration in the Netherlands." This finding is simply not supported by the record.

Heller, at para. 70, **Comp.**, Tab 3, p. 21.

101. The record demonstrates that Drivers can lodge complaints with Uber through the Apps. Uber provides an internal process for escalating these complaints within the company. First, CSRs in the Philippines receive the complaints. If the issue is not resolved, they escalate it to CSRs in Chicago. If these CSRs cannot resolve the issue, they may escalate it to Uber's legal team.

van der Woude Trans., at Qs. 143-159, **Comp.**, Tab 8, pp. 147-150.

102. Mr. Van der Woude claims "there have been no complaints or disputes raised by an 'Uber Partner' in Ontario that have been incapable of resolution and therefore risen to the level of triggering the arbitration clause". However, there is no evidence in the record of the outcomes of issues escalated to the legal team.

van der Woude Undertakings, at Qs. 214-215, **Comp.**, Tab 9, p. 157.

103. Mr. Heller's evidence was that he complained about losses of $2/per transaction. A record of one of Mr. Heller's complaints shows him requesting payment for an incentive of $3. The fact that these disputes were resolved through an internal dispute resolution mechanism has no bearing on whether the types of claims alleged in this action would or could be resolved in the same way.

Heller Aff., at paras. 12-13, **Comp.,** Tab 7, p. 129.

Heller Trans., at Ex. 5, **Comp.**, Tab 10(C), p. 164.

104. Even if Mr. Heller brought a claim for one year's worth of minimum wage damages based on 40 hours or work a week at $400 a week, his claim would be worth $8,320 ($4 x 40 hours x 52 weeks). For two years, his claim would be $16,620.

105. The administrative costs of the Arbitration Clause's dispute resolution process are grossly excessive in comparison. Uber has provided no evidence of comparable claims resolved through the internal complaint process.

106. Nothing in the record suggests that Uber would simply agree to Mr. Heller's complaint through its internal complaints process, and no evidence supports the Motion Judge's finding that only a "substantial dispute" would go to arbitration in the Netherlands. From a practical perspective, that is certainly likely. The costs are too prohibitive for anyone to proceed to arbitration over moderate amounts. Unfortunately, "substantial" means something entirely different to a person like Mr. Heller earning between $20,800 and $31,200 a year than it means to Uber.

Heller, at para. 70, **Comp.**, Tab 3, p. 21.

Heller Aff., at paras. 4-5, **Comp.**, Tab 7, pp. 128.

107. Moreover, Uber controls this process. If a Driver is unhappy with Uber's response, he or she can choose to accept Uber's decision or, according to Uber, arbitrate. With respect, it is absurd to suggest that the unfairness of the arbitration regime could possibly be mitigated by a process entirely controlled by Uber.

E. Uber Collects Fees on Behalf of Drivers and Unilaterally Sets Fares

108. In paragraph 13, the Motion Judge incorrectly finds that Riders pay the Driver through the App. This is a clear and overriding error.

Heller, at para. 13, **Comp.**, Tab 3, p. 12.

109. The service agreements clearly provide that Uber determines the fares Drivers receive for their services and collects the fares from Riders. Uber provides Riders with a receipt, and remits the fares periodically to Drivers, less Uber's fees. Uber reserves the right to change the fare calculation at any time. It also reserves the right to adjust

particular fares and its fees unilaterally without the Driver's input.

van der Woude Aff., at Ex. B, ss. 4.1-4.6, **Comp.**, Tab 6(A), p. 85-86

Heller Trans., at Exs. 3, 4, 7, **Comp.**, Tabs 10(A), 10(B), 10(D), pp. 162, 164, 175.

110. Additionally, Uber requires Drivers and delivery personnel to participate in a rating system. To continue using the Uber Apps, Uber requires Drivers and delivery personnel to maintain a minimum average rating, which is set by Uber in its sole discretion. If a Driver or delivery person is unable to achieve that average, Uber will deactivate their account. Uber's unilateral exercise of discretion further emphasizes the inequality of bargaining power and high degree of unfairness in this relationship.

van der Woude Aff., at Ex. B, ss. 2.5.1-2.5.2, Ex. E, ss. 2.5.1-2.5.2, **Comp.**, Tabs 6(A), 6(B), pp. 93, 126.

111. Under the circumstances, the Arbitration Clause is unconscionable. The action should not be stayed.

PART V: PART V – ORDER SOUGHT

112. Mr. Heller respectfully requests that the Court issue an Order:

(a) setting aside the order of Perell J.;

(b) lifting the stay in the action;

(c) granting the Appellant his costs of this appeal and of the motion below; and

(d) granting such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2018.

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Michael D. Wright
Danielle Stampley

SCHEDULE A

LIST OF AUTHORITIES

1 *ICC Mediation Rules*

2 *ICC Arbitration Rules*

3 *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5

4 *Employment Standards Act*, SO 2000, c 41

5 *Arbitration Act*, SO 1991, c 17

6 *Haas v. Gunasekaram*, 2016 ONCA 744

7 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53

8 *Matrix Integrated Solutions Ltd. v. Naccarato*, 2009 ONCA 593

9 *Patel v. Kanbay International Inc.*, 2008 ONCA 867

10 *Precious Metal Capital Corp. v. Smith*, 2008 ONCA 577

11 *Seidel v. TELUS Communications Inc.*, 2011 SCC 15

12 *Commission on International Trade Law, Report of the Secretary General*, UNGAOR, 2017, UN Doc. A/CN.9/909

13 *Wellman v. TELUS Communications Co*., 2017 ONCA 433

14 *Machtinger v. HOJ industries Ltd.*, 1992 CanLII 102 (SCC)

15 *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158

16 *Christiansen v. Family Counselling Centre of Sault Ste. Marie and District* (2001), 2001 CanLII 4698 (ON CA)

17 *Ceccol v. Ontario Gymnastics Federation* (2001), 2001 CanLII 8589 (ON CA)

18 *Labour Relations Act*, 1995, SO 1995, c 1, Sch A

19 *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40

20 *Orca Bay Hockey Limited Partnership v. National Hockey League*, 2006 CanLII 21166 (BC LRB)

21 *Yashin v. National Hockey League*, 2000 CanLII 22620 (ON SC)

22 *Commission on International Trade Law, Report of the Secretary General*, UNGAOR, 1985, UN Doc. A/CN.9/264

23 *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*

24 *Ross v. Christian & Timbers Inc.*, 2002 CanLII 49619 (ONSC)

25 *Carter v. McLaughlin*, 1996 CanLII 7962 (ONCJ.GD)

26 *Borowski v. Heinrich Fiedler Perforiertechnik GmbH*, 1994 CanLII 9026 (ABQB)

27 *Braiden v. Lay-Z-Boy Canada Limited*, 2008 ONCA 464

28 *Business Practices and Consumer Protection Act*, SBC 2004, c 2

29 *Douez v. Facebook*, 2017 SCC 33

30 *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809

31 *Norberg v. Wynrib*, 1992 CanLII 65 (SCC)

32 *AIC Limited v. Fischer*, 2013 SCC 69

33 *Griffin v. Dell Canada Inc.*, 2010 ONCA 29

SCHEDULE B
TEXT OF RELEVANT STATUTORY PROVISIONS

1 *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5

Part II
The Model Law

Interpretation

4 Except as otherwise provided in this Act, words and expressions used in this Part have the same meaning as the corresponding words and expressions in the Model Law.

Application of Model Law

5 (1) Subject to this Act, the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006, set out in Schedule 2, has force of law in Ontario.

Same

(2) With respect to article 7 of the Model Law, option I applies in Ontario; option II does not.

Same

(3) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Act.

Interpretation of Model Law

6 (1) For the purposes of subsection 5 (1), the words and expressions listed in Column 2 of the following table, as used in the provisions of the Model Law set out in Column 1 of the table, shall be read as the words and expressions listed in the corresponding row of Column 3 of the table.

Table

Column 1	Column 2	Column 3
article 1 (1)	"agreement in force between this State and any other State or States"	"an agreement that is in force in Ontario between Canada and any other country or countries"
articles 1 (2), 17 J, 27, 34 (2) (a) (i), 34 (2) (b) (ii), and	"this State"	"Ontario"

36(1) (b) (ii)		
article 1 (3)	“different States” and “the State”	“different countries” and “the country”, respectively
article 1 (5)	“any other law of this State”	“any other law of Ontario or laws of Canada that are in force in Ontario”
articles 34 (2) (b) (i), and 36 (1) (b) (i)	“the law of this State”	“the law of Ontario and any laws of Canada that are in force in Ontario”
article 35 (2)	“this State”	“Canada”

Same, “court” or “competent court”

(2) “Court” or “competent court”, when used in the Model Law in reference to an Ontario court, shall be read as a reference to the Superior Court of Justice unless the context requires otherwise.

Use of extrinsic material

(3) In applying the Model Law, recourse may be had to,

(a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3 – 21 June 1985) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);

(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (U.N. Doc A/CN.9/264); and

(c) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4).

[…]

Article II

[…]

3 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

2 *Employment Standards Act*, SO 2000, c 41

Part II
Posting Of Information Concerning Rights And Obligations

Minister to prepare poster

2 (1) The Minister shall prepare and publish a poster providing such information about this Act and the regulations as the Minister considers appropriate. 2004, c. 21, s. 1.

If poster not up to date

(2) If the Minister believes that the poster prepared under subsection (1) has become out of date, he or she shall prepare and publish a new poster. 2004, c. 21, s. 1.

Material to be posted

(3) Every employer shall post and keep posted in at least one conspicuous place in every workplace of the employer where it is likely to come to the attention of employees in that workplace a copy of the most recent poster published by the Minister under this section. 2004, c. 21, s. 1.

Where majority language not English

(4) If the majority language of a workplace of an employer is a language other than English, the employer shall make enquiries as to whether the Minister has prepared a translation of the poster into that language, and if the Minister has done so, the employer shall post and keep posted a copy of the translation next to the copy of the poster. 2004, c. 21, s. 1; 2014, c. 10, Sched. 2, s. 1 (1).

Copy of poster to be provided

(5) Every employer shall provide each of his or her employees with a copy of the most recent poster published by the Minister under this section. 2014, c. 10, Sched. 2, s. 1 (2).

Same – translation

(6) If an employee requests a translation of the poster into a language other than English, the employer shall make enquiries as to whether the Minister has prepared a translation of the poster into that language, and if the Minister has done so, the employer shall provide the employee with a copy of the translation. 2014, c. 10, Sched. 2, s. 1 (2).

When copy of poster to be provided

(7) An employer shall provide an employee with a copy of the poster within 30 days of the day the employee becomes an employee of the employer. 2014, c. 10, Sched. 2, s. 1 (2).

Same – transition

(8) If an employer has one or more employees on the day section 1 of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act, 2014* comes into force, the employer shall provide his or her employees with a copy of the poster within 30 days of that day. 2014, c. 10, Sched. 2, s. 1 (2).

[…]

Part III
How This Act Applies

[…]

No contracting out

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

Greater contractual or statutory right

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply. 2000, c. 41, s. 5 (2).

No treating as if not employee

5.1 (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. 2017, c. 22, Sched. 1, s. 5.

Onus of proof

(2) Subject to subsection 122 (4), if, during the course of an employment standards officer's investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer. 2017, c. 22, Sched. 1, s. 5.

[…]

Part IV
Continuity Of Employment

Sale, etc., of business

9 (1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have

been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. 2000, c. 41, s. 9 (1).

Exception

(2) Subsection (1) does not apply if the day on which the purchaser hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the seller and the day of the sale. 2000, c. 41, s. 9 (2).

Definitions

(3) In this section,

"sells" includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning. 2000, c. 41, s. 9 (3).

Predecessor Acts

(4) For the purposes of subsection (1), employment with the seller includes any employment attributed to the seller under this section or a provision of a predecessor Act dealing with sales of businesses. 2000, c. 41, s. 9 (4).

New building services provider

10 (1) This section applies if the building services provider for a building is replaced by a new provider and an employee of the replaced provider is employed by the new provider. 2000, c. 41, s. 10 (1).

No termination or severance

(2) The employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the replaced provider shall be deemed to have been employment with the new provider for the purpose of any subsequent calculation of the employee's length or period of employment. 2000, c. 41, s. 10 (2).

Exception

(3) Subsection (2) does not apply if the day on which the new provider hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the replaced provider and the day on which the new provider began servicing the premises. 2000, c. 41, s. 10 (3).

Predecessor Acts

(4) For the purposes of subsection (2), employment with the replaced provider includes any employment attributed to the replaced provider under this section or under a provision of a predecessor Act dealing with building services providers. 2000, c. 41, s. 10 (4).

[…]

Part VI
Records

Records

15 (1) An employer shall record the following information with respect to each employee, including an employee who is a homeworker:

1. The employee's name and address.

2. The employee's date of birth, if the employee is a student and under 18 years of age.

3. The date on which the employee began his or her employment.

3.1 The dates and times that the employee worked.

3.2 If the employee has two or more regular rates of pay for work performed for the employer and, in a work week, the employee performed work for the employer in excess of the overtime threshold, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay.

Note: On January 1, 2019, subsection 15 (1) of the Act is amended by adding the following paragraphs: (See: 2017, c. 22, Sched. 1, s. 8 (2))

3.3 The dates and times that the employee was scheduled to work or to be on call for work, and any changes made to the on call schedule.

3.4 Any cancellations of a scheduled day of work or scheduled on call period of the employee, as described in subsection 21.6 (2), and the date and time of the cancellation.

4. The number of hours the employee worked in each day and each week.

5. The information contained in each written statement given to the employee under subsection 12 (1), section 12.1, subsections 27 (2.1), 28 (2.1), 29 (1.1) and 30 (2.1) and clause 36 (3) (b).

6. REPEALED: 2002, c. 18, Sched. J, s. 3 (7).

Homeworkers

(2) In addition to the record described in subsection (1), the employer shall maintain a register of any homeworkers the employer employs showing the following information:

1. The employee's name and address.

2. The information that is contained in all statements required to be provided to the employee described in clause 12 (1) (b).

3. Any prescribed information. 2000, c. 41, s. 15 (2).

Exception

(3) An employer is not required to record the information described in paragraph 3.1 or 4 of subsection (1) with respect to an employee who is paid a salary if,

(a) the employer records the number of hours in excess of those in his or her regular work week and,

(i) the number of hours in excess of eight that the employee worked in each day, or

(ii) if the number of hours in the employee's regular work day is more than eight hours, the number in excess; or

(b) sections 17 to 19 and Part VIII (Overtime Pay) do not apply with respect to the employee. 2000, c. 41, s. 15 (3); 2017, c. 22, Sched. 1, s. 8 (4).

Meaning of salary

(4) An employee is considered to be paid a salary for the purposes of subsection (3) if,

(a) the employee is entitled to be paid a fixed amount for each pay period; and

(b) the amount actually paid for each pay period does not vary according to the number of hours worked by the employee, unless he or she works more than 44 hours in a week. 2000, c. 41, s. 15 (4).

Retention of records

(5) The employer shall retain or arrange for some other person to retain the records of the information required under this section for the following periods:

1. For information referred to in paragraph 1 or 3 of subsection (1), three years after the employee ceased to be employed by the employer.

2. For information referred to in paragraph 2 of subsection (1), the earlier of,

    i. three years after the employee's 18th birthday, or

    ii. three years after the employee ceased to be employed by the employer.

3. For information referred to in paragraph 3.1, 3.2 or 4 of subsection (1) or in subsection (3), three years after the day or week to which the information relates.

Note: On January 1, 2019, paragraph 3 of subsection 15 (5) of the Act is amended by striking out "paragraph 3.1, 3.2 or 4"and substituting "paragraph 3.1, 3.2, 3.3, 3.4 or 4". (See: 2017, c. 22, Sched. 1, s. 8 (6))

4. For information referred to in paragraph 5 of subsection (1), three years after the information was given to the employee.

5. REPEALED: 2002, c. 18, Sched. J, s. 3 (8).

Register of homeworkers

(6) Information pertaining to a homeworker may be deleted from the register three years after the homeworker ceases to be employed by the employer. 2000, c. 41, s. 15 (6).

Retain documents re leave

(7) An employer shall retain or arrange for some other person to retain all notices, certificates, correspondence and other documents given to or produced by the employer that relate to an employee taking pregnancy leave, parental leave, family medical leave, organ donor leave, family caregiver leave, critical illness leave, child death leave, crime-related child disappearance leave, domestic or sexual violence leave, personal emergency leave, emergency leave during a declared emergency or reservist leave for three years after the day on which the leave expired. 2006, c. 13, s. 3 (1); 2007, c. 16, Sched. A, s. 2; 2009, c. 16, s. 1; 2014, c. 6, s. 1; 2017, c. 22, Sched. 1, s. 8 (7, 8).

Retention of agreements re excess hours

(8) An employer shall retain or arrange for some other person to retain copies of every agreement that the employer has made with an employee permitting the employee to

work hours in excess of the limits set out in subsection 17 (1) for three years after the last day on which work was performed under the agreement. 2004, c. 21, s. 2.

Retention of averaging agreements

(9) An employer shall retain or arrange for some other person to retain copies of every averaging agreement that the employer has made with an employee under clause 22 (2) (a) for three years after the last day on which work was performed under the agreement. 2004, c. 21, s. 2.

Part VIII
Overtime Pay

Overtime threshold

22 (1) Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold. 2000, c. 41, s. 22 (1); 2011, c. 1, Sched. 7, s. 1; 2017, c. 22, Sched. 1, s. 13 (1).

Same, two or more regular rates

(1.1) If an employee has two or more regular rates for work performed for the same employer in a work week,

(a) the employee is entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold; and

(b) the overtime pay for each hour referred to in clause (a) is one and one-half times the regular rate that applies to the work performed in that hour. 2017, c. 22, Sched. 1, s. 13 (2).

Averaging

(2) An employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement, if any, to overtime pay if,

(a) the employee has made an agreement with the employer that his or her hours of work may be averaged over periods of a specified number of weeks;

(b) the employer has received an approval under section 22.1 that applies to the employee or a class of employees that includes the employee; and

(c) the averaging period does not exceed the lesser of,

(i) the number of weeks specified in the agreement, and

(ii) the number of weeks specified in the approval. 2004, c. 21, s. 6 (1).

Same, pending approval

(2.1) Despite subsection (2), an employee's hours of work may be averaged for the purpose of determining the employee's entitlement, if any, to overtime pay even though the employer has not received the approval described in clause (2) (b), if,

(a) the employee has made an agreement described in clause (2) (a) with the employer;

(b) the employer has served on the Director an application for an approval under section 22.1;

(c) the application is for an approval that applies to the employee or to a class of employees that includes the employee;

(d) 30 days have passed since the application was served on the Director;

(e) the employer has not received a notice that the application has been refused;

(f) the employer's most recent previous application, if any, for an approval under section 22.1 was not refused;

(g) the most recent approval, if any, received by the employer under section 22.1 was not revoked; and

(h) the employee's hours of work, pending the approval, are averaged over separate, non-overlapping, contiguous periods of not more than two consecutive weeks. 2004, c. 21, s. 6 (1).

Transition: certain agreements

(2.2) For the purposes of this section, each of the following agreements shall be treated as if it were an agreement described in clause (2) (a):

1. An agreement to average hours of work made under a predecessor to this Act.

2. An agreement to average hours of work made under this section as it read on February 28, 2005.

3. An agreement to average hours of work that complies with the conditions prescribed by the regulations made under paragraph 7 of subsection 141 (1) as it read on February 28, 2005. 2004, c. 21, s. 6 (1).

Term of agreement

(3) An averaging agreement is not valid unless it provides for an expiry date and, if it involves an employee who is not represented by a trade union, the expiry date shall not be more than two years after the day the agreement takes effect. 2000, c. 41, s. 22 (3).

Agreement may be renewed

(4) Nothing in subsection (3) prevents an employer and employee from agreeing to renew or replace an averaging agreement. 2000, c. 41, s. 22 (4).

Existing agreement

(5) An averaging agreement made before this Act comes into force that was approved by the Director under the *Employment Standards Act* is valid for the purposes of subsection (2) until,

(a) one year after the day this section comes into force; or

(b) if the employee is represented by a trade union and a collective agreement applies to the employee,

(i) the day a subsequent collective agreement that applies to the employee comes into operation, or

(ii) if no subsequent collective agreement comes into operation within one year after the existing agreement expires, at the end of that year. 2000, c. 41, s. 22 (5); 2001, c. 9, Sched. I, s. 1 (4).

Transition: application for approval before commencement

(5.1) If the employer applies for an approval under section 22.1 before March 1, 2005, the 30-day period referred to in clause (2.1) (d) shall be deemed to end on the later of,

(a) the last day of the 30-day period; and

(b) March 1, 2005. 2004, c. 21, s. 6 (2).

Agreement irrevocable

(6) No averaging agreement referred to in this section may be revoked before it expires unless the employer and the employee agree to revoke it. 2000, c. 41, s. 22 (6).

Time off in lieu

(7) The employee may be compensated for overtime hours by receiving one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay if,

(a) the employee and the employer agree to do so; and

(b) the paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's agreement, within 12 months of that work week. 2000, c. 41, s. 22 (7).

Where employment ends

(8) If the employment of an employee ends before the paid time off is taken under subsection (7), the employer shall pay the employee overtime pay for the overtime hours that were worked in accordance with subsection 11 (5). 2000, c. 41, s. 22 (8).

Changing work

(9) If an employee who performs work of a particular kind or character is exempted from the application of this section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee's position require him or her to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by him or her in a work week unless the time spent by the employee performing that other work constitutes less than half the time that the employee spent fulfilling the duties of his or her position in that work week. 2000, c. 41, s. 22 (9).

[…]

Part IX
Minimum Wage

Minimum wage

23 (1) An employer shall pay employees at least the minimum wage. 2000, c. 41, s. 23 (1); 2014, c. 10, Sched. 2, s. 2 (1).

Room or board

(2) If an employer provides room or board to an employee, the prescribed amount with respect to room or board shall be deemed to have been paid by the employer to the employee as wages. 2000, c. 41, s. 23 (2).

Determining compliance

(3) Compliance with this Part shall be determined on a pay period basis. 2000, c. 41, s. 23 (3).

Hourly rate

(4) Without restricting the generality of subsection (3), if the minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,

(a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the minimum wage; and

(b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the minimum wage. 2000, c. 41, s. 23 (4); 2014, c. 10, Sched. 2, s. 2 (2-4).

Change to minimum wage during pay period

23.0.1 If the minimum wage rate applicable to an employee changes during a pay period, the calculations required by subsection 23 (4) shall be performed as if the pay period were two separate pay periods, the first consisting of the part falling before the day on which the change takes effect and the second consisting of the part falling on and after the day on which the change takes effect. 2017, c. 22, Sched. 1, s. 14.

[…]

Part XVIII
Reprisal

Reprisal prohibited

74 (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

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(a) because the employee,

(i) asks the employer to comply with this Act and the regulations,

(ii) makes inquiries about his or her rights under this Act,

(iii) files a complaint with the Ministry under this Act,

(iv) exercises or attempts to exercise a right under this Act,

(v) gives information to an employment standards officer,

Note: On April 1, 2018, clause 74 (1) (a) of the Act is amended by adding the following subclauses: (See: 2017, c. 22, Sched. 1, s. 41)

(v.1) makes inquiries about the rate paid to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),

(v.2) discloses the employee's rate of pay to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),

(vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

(vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the *Retail Business Holidays Act*,

(viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee. 2000, c. 41, s. 74 (1).

Onus of proof

(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer. 2000, c. 41, s. 74 (2).

[…]

Part XXII
Complaints And Enforcement

Complaints

Complaints

96 (1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director. 2000, c. 41, s. 96 (1).

Effect of failure to use form

(2) A complaint that is not filed in a form approved by the Director shall be deemed not to have been filed. 2000, c. 41, s. 96 (2).

Limitation

(3) A complaint regarding a contravention that occurred more than two years before the day on which the complaint was filed shall be deemed not to have been filed. 2001, c. 9, Sched. I, s. 1 (18).

Enforcement Under Collective Agreement

When collective agreement applies

99 (1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,

(a) when the collective agreement is or was in force;

(b) when its operation is or was continued under subsection 58 (2) of the *Labour Relations Act, 1995*; or

(c) during the period that the parties to the collective agreement are or were prohibited by subsection 86 (1) of the *Labour Relations Act, 1995* from unilaterally changing the terms and conditions of employment. 2000, c. 41, s. 99 (1).

Complaint not permitted

(2) An employee who is represented by a trade union that is or was a party to a collective agreement may not file a complaint alleging a contravention of this Act that is enforceable under subsection (1) or have such a complaint investigated. 2000, c. 41, s. 99 (2).

Employee bound

(3) An employee who is represented by a trade union that is or was a party to a collective agreement is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement. 2000, c. 41, s. 99 (3).

Membership status irrelevant

(4) Subsections (2) and (3) apply even if the employee is not a member of the trade union. 2000, c. 41, s. 99 (4).

Unfair representation

(5) Nothing in subsection (3) or (4) prevents an employee from filing a complaint with the Board alleging that a decision of the trade union with respect to the enforcement of this Act contravenes section 74 of the *Labour Relations Act, 1995*. 2000, c. 41, s. 99 (5).

Exception

(6) Despite subsection (2), the Director may permit an employee to file a complaint and may direct an employment standards officer to investigate it if the Director considers it appropriate in the circumstances. 2000, c. 41, s. 99 (6).

3 ***Arbitration Act*, SO 1991, c 17**

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment. 1991, c. 17, s. 7 (2).

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court. 1991, c. 17, s. 7 (3).

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect. 1991, c. 17, s. 7 (4).

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters. 1991, c. 17, s. 7 (5).

No appeal

(6) There is no appeal from the court's decision. 1991, c. 17, s. 7 (6).

4 ***Labour Relations Act*, 1995, SO 1995, c 1, Sch A**

Purposes And Application Of Act

Purposes

2 The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

2. To recognize the importance of workplace parties adapting to change.

3. To promote flexibility, productivity and employee involvement in the workplace.

4. To encourage communication between employers and employees in the workplace.

5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.

6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.

7. To promote the expeditious resolution of workplace disputes. 1995, c. 1, Sched. A, s. 2.

Non-application

3 This Act does not apply,

(a) to a domestic employed in a private home;

(b) to a person employed in hunting or trapping;

(b.1) to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*;

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

(d) to a member of a police force within the meaning of the *Police Services Act*;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 3 (d) of the Act is amended by striking out "police force within the meaning of the *Police Services Act*" at the end and substituting "police service within the meaning of the *Police Services Act, 2018*". (See: 2018, c. 3, Sched. 5, s. 30)

(e) except as provided in Part IX of the *Fire Protection and Prevention Act, 1997*, to a person who is a firefighter within the meaning of subsection 41 (1) of that Act;

(f) to a member of a teachers' bargaining unit within the meaning of the *School Boards Collective Bargaining Act, 2014*, except as provided by that Act and by the *Protecting the School Year Act, 2015*, or to a supervisory officer, a principal or a vice-principal within the meaning of the *Education Act*;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 3 (f) of the Act is repealed and the following substituted: (See: 2015, c. 11, s. 20 (2))

(g) REPEALED: 2006, c. 35, Sched. C, s. 57 (2).

(h) to an employee of a college of applied arts and technology;

(i) to a provincial judge; or

(j) to a person employed as a labour mediator or labour conciliator. 1995, c. 1, Sched. A, s. 3; 1997, c. 4, s. 83; 1997, c. 31, s. 151; 2002, c. 16, s. 20; 2006, c. 35, Sched. C, s. 57 (2); 2014, c. 5, s. 50; 2015, c. 11, s. 20 (1).

Certain Crown agencies bound

4 (1) This Act binds agencies of the Crown other than,

(a) agencies in which are employed Crown employees as defined in the *Crown Employees Collective Bargaining Act, 1993*; and

(b) colleges of applied arts and technology established under the *Ontario Colleges of Applied Arts and Technology Act, 2002*. 2006, c. 35, Sched. C, s. 57 (3).

Crown not bound

(2) Except as provided in subsection (1), this Act does not bind the Crown. 1995, c. 1, Sched. A, s. 4 (2).

Freedoms

Membership in trade union

5 Every person is free to join a trade union of the person's own choice and to participate in its lawful activities. 1995, c. 1, Sched. A, s. 5.

Membership in employers' organization

6 Every person is free to join an employers' organization of the person's own choice and to participate in its lawful activities. 1995, c. 1, Sched. A, s. 6.

Contents of Collective Agreements

Arbitration

48 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable. 1995, c. 1, Sched. A, s. 48 (1).

Same

(2) If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain a provision to the following effect:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chair. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chair within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chair governs. 1995, c. 1, Sched. A, s. 48 (2).

Where arbitration provision inadequate

(3) If, in the opinion of the Board, any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection (2) is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection (1), but, until so modified, the arbitration provision in the collective agreement or in subsection (2), as the case may be, applies. 1995, c. 1, Sched. A, s. 48 (3).

Appointment of arbitrator by Minister

(4) Despite subsection (3), if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make the appointments that are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement. 1995, c. 1, Sched. A, s. 48 (4).

Appointment of settlement officer

(5) On the request of either party, the Minister may appoint a settlement officer to endeavour to effect a settlement before the arbitrator or arbitration board appointed under subsection (4) begins to hear the arbitration. However, no appointment shall be made if the other party objects. 1995, c. 1, Sched. A, s. 48 (5); 1998, c. 8, s. 7.

Payment of arbitrators

(6) Where the Minister has appointed an arbitrator or the chair of a board of arbitration under subsection (4), each of the parties shall pay one-half the remuneration and expenses of the person appointed, and, where the Minister has appointed a member of a board of arbitration under subsection (4) on failure of one of the parties to make the appointment, that party shall pay the remuneration and expenses of the person appointed. 1995, c. 1, Sched. A, s. 48 (6).

Time for decision

(7) An arbitrator shall give a decision within 30 days after hearings on the matter submitted to arbitration are concluded. 1995, c. 1, Sched. A, s. 48 (7).

Same, arbitration board

(8) An arbitration board shall give a decision within 60 days after hearings on the matter submitted to arbitration are concluded. 1995, c. 1, Sched. A, s. 48 (8).

Same

(9) The time described in subsection (7) or (8) for giving a decision may be extended,

(a) with the consent of the parties to the arbitration; or

(b) in the discretion of the arbitrator or arbitration board so long as he, she or it states in the decision the reasons for extending the time. 1995, c. 1, Sched. A, s. 48 (9).

Oral decision

(10) An arbitrator or arbitration board may give an oral decision and, if he, she or it does so, subsection (7) or (8) does not apply and the arbitrator or arbitration board,

(a) shall give the decision promptly after hearings on the matter are concluded;

(b) shall give a written decision, without reasons, promptly upon the request of either party; and

(c) shall give written reasons for the decision within a reasonable period of time upon the request of either party. 1995, c. 1, Sched. A, s. 48 (10).

Orders re decisions

(11) If the arbitrator or arbitration board does not give a decision within the time described in subsection (7) or (8) or does not provide written reasons within the time described in subsection (10), the Minister may,

(a) make such orders as he or she considers necessary to ensure that the decision or reasons will be given without undue delay; and

(b) make such orders as he or she considers appropriate respecting the remuneration and expenses of the arbitrator or arbitration board. 1995, c. 1, Sched. A, s. 48 (11).

Powers of arbitrators, chair of arbitration boards, and arbitration boards

(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,

(a) to require any party to furnish particulars before or during a hearing;

(b) to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing;

(c) to fix dates for the commencement and continuation of hearings;

(d) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and

(e) to administer oaths and affirmations,

and an arbitrator or an arbitration board, as the case may be, has power,

(f) to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

(g) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to the arbitrator or the arbitration board, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;

(h) to authorize any person to do anything that the arbitrator or arbitration board may do under clause (g) and to report to the arbitrator or the arbitration board thereon;

(i) to make interim orders concerning procedural matters;

(j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement. 1995, c. 1, Sched. A, s. 48 (12).

Restriction re interim orders

(13) An arbitrator or the chair of an arbitration board shall not make an interim order under clause (12) (i) requiring an employer to reinstate an employee in employment. 1995, c. 1, Sched. A, s. 48 (13).

Power re mediation

(14) An arbitrator or the chair of an arbitration board, as the case may be, may mediate the differences between the parties at any stage in the proceedings with the consent of the parties. If mediation is not successful, the arbitrator or arbitration board retains the power to determine the difference by arbitration. 1995, c. 1, Sched. A, s. 48 (14).

Enforcement power

(15) An arbitrator or the chair of an arbitration board, as the case may be, may enforce the written settlement of a grievance. 1995, c. 1, Sched. A, s. 48 (15).

Extension of time

(16) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for

the extension and that the opposite party will not be substantially prejudiced by the extension. 1995, c. 1, Sched. A, s. 48 (16).

Substitution of penalty

(17) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances. 1995, c. 1, Sched. A, s. 48 (17).

Effect of arbitrator's decision

(18) The decision of an arbitrator or of an arbitration board is binding,

(a) upon the parties;

(b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision;

(c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and

(d) upon the employees covered by the agreement who are affected by the decision,

and the parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision. 1995, c. 1, Sched. A, s. 48 (18).

Enforcement of arbitration decisions

(19) Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may file in the Superior Court of Justice a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such. 1995, c. 1, Sched. A, s. 48 (19); 2000, c. 38, s. 7.

Procedure

(20) The *Arbitration Act, 1991* does not apply to arbitrations under collective agreements. 1995, c. 1, Sched. A, s. 48 (20).

Referral of grievances to a single arbitrator

49 (1) Despite the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Request for references

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after 30 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

Same

(3) Despite subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after 14 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

Minister to appoint arbitrator

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

Same

(5) Where a request or more than one request concerns several differences arising under the collective agreement, the Minister may in his or her discretion appoint an arbitrator under subsection (4) to deal with all the differences raised in the request or requests.

Settlement officer

(6) The Minister may appoint a settlement officer to confer with the parties and endeavour to effect a settlement prior to the hearing by an arbitrator appointed under subsection (4).

Powers and duties of arbitrator

(7) An arbitrator appointed under subsection (4) shall commence to hear the matter referred to him or her within 21 days after the receipt of the request by the Minister and the provisions of subsections 48 (7) and (9) to (20) apply with all necessary modifications to the arbitrator, the parties and the decision of the arbitrator.

Oral decisions

(8) Upon the agreement of the parties, the arbitrator shall deliver an oral decision forthwith or as soon as practicable without giving his or her reasons in writing therefor.

Payment of arbitrator

(9) Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

Approval of arbitrators, etc.

(10) The Minister may establish a list of approved arbitrators and, for the purpose of advising him or her with respect to persons qualified to act as arbitrators and matters relating to arbitration, the Minister may constitute a labour-management advisory committee composed of a chair to be designated by the Minister and six members, three of whom shall represent employers and three of whom shall represent trade unions, and their remuneration and expenses shall be as the Lieutenant Governor in Council determines. 1995, c. 1, Sched. A, s. 49.

Consensual mediation-arbitration

50 (1) Despite any grievance or arbitration provision in a collective agreement or deemed to be included in the collective agreement under section 48, the parties to the collective agreement may, at any time, agree to refer one or more grievances under the collective agreement to a single mediator-arbitrator for the purpose of resolving the grievances in an expeditious and informal manner.

Prerequisite

(2) The parties shall not refer a grievance to a mediator-arbitrator unless they have agreed upon the nature of any issues in dispute.

Appointment by Minister

(3) The parties may jointly request the Minister to appoint a mediator-arbitrator if they are unable to agree upon one and the Minister shall make the appointment.

Proceedings to begin

(4) Subject to subsection (5), a mediator-arbitrator appointed by the Minister shall begin proceedings within 30 days after being appointed.

Same

(5) The Minister may direct a mediator-arbitrator appointed by him or her to begin proceedings on such date as the parties jointly request.

Mediation

(6) The mediator-arbitrator shall endeavour to assist the parties to settle the grievance by mediation.

Arbitration

(7) If the parties are unable to settle the grievance by mediation, the mediator-arbitrator shall endeavour to assist the parties to agree upon the material facts in dispute and then shall determine the grievance by arbitration.

Same

(8) When determining the grievance by arbitration, the mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as he or she considers appropriate.

Time for decision

(9) The mediator-arbitrator shall give a succinct decision within five days after completing proceedings on the grievance submitted to arbitration.

Application

(10) Subsections 48 (12) to (19) apply with respect to a mediator-arbitrator and a settlement, determination or decision under this section. 1995, c. 1, Sched. A, s. 50.

5 ***Business Practices and Consumer Protection Act*, SBC 2004, c 2**

Waiver or release void except as permitted

3. Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

Court of Appeal File No. C-65073

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

DAVID HELLER

Plaintiff (Appellant)

- and -

UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., AND RAISER OPERATIONS B.V.

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

I estimate that **2 hours** will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 9th day of April, 2018.

CAVALLUZZO LLP
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Michael D. Wright – LSUC No. 32522T
Tel: 416-964-5513
Fax: 416-964-5895

Danielle E. Stampley (in association) – LSUC No. 96487C
Tel: 416-655-3044 x. 2
Fax: 416-655-3044

Lawyers for the Appellant

DAVID HELLER

Plaintiff (Appellant)

-and-

UBER TECHNOLOGIES INC., UBER CANADA INC., UBER B.V., AND RAISER OPERATIONS B.V.

Defendants (Respondents)

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PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPELLANT

CAVALLUZZO LLP
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Michael D. Wright – LSUC No. 32522T
Tel: 416-964-5513
Fax: 416-964-5895

Danielle E. Stampley (in association) – LSUC No. 96487C
Tel: 416-655-3044 x. 2
Fax: 416-655-3044

AND

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

Lior Samfiru – LSUC No. 48609U
Stephen Gillman – LSUC No. 68094O

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

Lawyers for the Plaintiff (Appellant)