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TAB 4B

Annotated Employment Agreement Clauses 2022

The COVID-19 Pandemic and Life After *Uber*: The Need for Judicial Support for Arbitration Clauses in Employment Contracts

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The COVID-19 Pandemic and Life After *Uber*: The Need for Judicial Support for Arbitration Clauses in Employment Contracts

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"As a litigant, I should dread a lawsuit above all else, other than sickness and death."

Judge Learned Hand[2]

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[2] James N. Rosenberg et al. (eds.), "The Deficiencies of Trials to Reach the Heart of the Matter", in (1926) 3 Lectures on Legal Topics 89 at 105.

A. Introduction

There is a scene in the 1995 film *Heat* where Robert De Niro's character, Neil McCauley, a professional thief, is discussing his plans for an especially risky bank heist with his ally and fence, "Nate", who was played by Jon Voight. Nate advises Neil to abandon the job because there is "too much heat" coming from Al Pacino's character, Vincent Hanna, a tenacious LAPD lieutenant who is determined to capture Neil and his crew. However, Neil insists that it is "worth the stretch". In the scene's climax, Nate hits Neil with a portentous aphorism: "This guy can hit and miss. You can't miss once."

Nate might as well have been talking to a group of Ontario business owners about employment contracts. Employees have many tools at their disposal to defeat unfavorable contractual terms, whereas employers typically have only one shot to get it right. For example, courts in Ontario have said to employers time and again in cases like *Howard v. Benson Group Inc.*[3], *Wood v. Fred Deeley Imports Ltd*.[4], and more recently, *Waksdale v. Swegon North America Inc.*[5] (***Waksdale***), that if they are forced to decide between voiding an unpressurized termination clause and cash starving a dismissed employee, then, to borrow another line from *Heat*, "brother, you are going down."

However, the pro-employee sentiment baked into our courthouse walls is not all bad news for employers because it incentivizes the use of mandatory arbitration clauses, which, in this author's view, offer up a more expeditious and cost-effective means of

[3] 2015 ONSC 2638 (CanLII) (S.C.J.), rev'd 2016 ONCA 256 (CanLII), leave to appeal to SCC refused, 2016 CanLII 68016 (SCC).
[4] 2017 ONCA 158 (CanLII)
[5] 2020 ONCA 391 (CanLII). Courts in other provinces have adopted a more employer-friendly approach to termination clauses. See, for example, *Bryant v. Parkland School Division*, 2021 ABQB 391 (CanLII) and *Lawton v. Syndicated Services Inc.*, 2022 ABPC 3 (CanLII). In *Lawton*, the termination clause in issue consisted of a single sentence stating as follows: "Termination of this contract requires 4 weeks' notice." The Court found at paragraph 42 that the clause is "clear and unambiguous". However, the Court also relied on the fact that the employee had negotiated the clause. The Court also seems to have taken into account the employer's size and financial health. More specifically, the Court stated at paragraph 42 that "Mr. Lawton was bringing expertise to expand Syndicated with a Turnkey Operation. Due to the market conditions and the pandemic the venture failed. The company has been operating at a significant loss just to stay afloat for the past two years. This is a small business, not a multi-national business."

resolving employment disputes, especially non-complex wrongful dismissal claims – for example, straight notice cases. I would go so far as to say that employers who do not utilize arbitration clauses in their employment agreements are remiss.

In this paper I will argue that our courts should take a more liberal approach when determining the validity of arbitration clauses in private employment contracts with a view to encouraging employers and employees to take better advantage of alternative dispute resolution (**ADR**) mechanisms.[6] The COVID-19 pandemic has brought our civil justice system to its knees. ADR can therefore be a crucial relief valve in employment law litigation, which is, for the most part, not complex. However, and as I will explain, in order for ADR to play a substantially greater role in employment disputes, it must receive the unequivocal backing of the judiciary.

In Part B I make my case for more arbitration in employment disputes. I begin with a discussion of the arguments for and against private arbitration generally, and my take on them, followed by an overview of the ADR movement in Australia, which offers some valuable lessons for our own courts and legislatures. In Part C I will examine the law in Ontario governing the enforceability of arbitration agreements, discuss the impact of the Supreme Court of Canada's ruling in *Heller v. Uber Technologies Inc.*[7] (***Uber***) and explain the challenges posed by provincial employment law legislation in assessing the enforceability of arbitration clauses in employment agreements. In Part D I make a call for reform. I will conclude with a discussion of best practices when drafting arbitration agreements. I have included in appendices "A" and "B", respectively, examples of judicial treatment of arbitration clauses in employment contracts and a sample arbitration clause.

[6] This paper discusses arbitration in the context of provincially regulated employer-employee relationships in Ontario. I will not discuss private arbitration agreements in the federal realm.
[7] 2019 ONCA 1 (CanLII) (***Uber* COA**), aff'd *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII) (***Uber***).

Before moving on, I must acknowledge that pleading the virtues of ADR is hardly a novel pitch. Proponents of mandatory mediation in particular have been persistent in their push to expand the Ontario Mandatory Mediation Program to cover a greater number of jurisdictions.[8]

But despite the passionate work of ADR advocates, private arbitration has hitherto failed to gain a foothold in the non-unionized environment. I posit that there are two main reasons for this: (i) it can be difficult to draft an arbitration clause that does not violate provincial employment standards legislation – most notably the *Employment Standards Act, 2000*[9] (**ESA**), as we will see later in this paper; and (2) we are hardwired to resist change. Transitioning to a milieu in which private arbitration is ubiquitous requires a tectonic shift away from the current stasis and pits us against our innate tendency to focus on what we are giving up as opposed to what we are gaining.[10]

Fundamentally, lawyers and judges must look the Supreme Court of Canada's "culture shift" decree in *Hryniak v. Mauldin*[11] (***Hryniak***) directly in the eye and ask themselves: do we possess a genuine desire to consider alternative models of adjudication, or not? The Supreme Court has pressed our faces firmly against the glass. Will we choose to explore what is on the other side, or will we continue looking the other way? Will the pandemic be a catalyst for much needed reform, or will it simply tighten the Gordian Knot that is already choking out access to justice?

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[8] See, for example, Jennifer L. Egsgard, "Mandatory mediation in Ontario: Taking stock after 20 years", Ontario Bar Association (16 July 2020) online: <https://www.oba.org/Sections/Alternative-Dispute-Resolution/Articles/Articles-2020/July-2020/Mandatory-Mediation-in-Ontario-Taking-Stock-After?lang=en-ca> In 2019, the Ontario Bar Association administered two surveys to its members canvassing views about whether the Ontario Mandatory Mediation Program ought to be expanded outside of the existing three regions (Toronto, Ottawa and the County of Essex) to the rest of the province. The surveys showed that approximately 90% and 70% of respondents, respectively, favored expanding mandatory mediation.

[9] S.O. c. 41 (**ESA**)

[10] See Daniel Kahneman and Amos Tversky, "An Analysis of Decision under Risk", (1979) 47:2 Econometrica 263 at 279. I note tangentially that Daniel Kahneman won the 2002 Nobel Prize in Economic Sciences for his work on the psychology of judgment and decision-making under risk.

[11] [2014] 1 SCR 87

I obviously cannot answer these questions, but I think it is safe to say that a system in which private arbitration (and often by extension, mediation) assumes a primal role in the resolution of employment disputes cannot be any more dystopian than the status quo, in which civil suits are frequently mired in litigation purgatory. Wishful thinking, perhaps, but I reckon there is no harm in proselytizing for something better.

B. Making the Case for More Arbitration in Private Employment Disputes

(i) The Benefits of Arbitrating Employment Disputes

To begin, protracted public litigation is usually very risky for employers, both financially and reputationally. In *Waksdale* the Ontario Court of Appeal effectively took out a classified ad dissuading employers once and for all from engaging in drawn-out fights over contractual syntax.[12] The Court has now set the bar so high that only the most airtight contractual language will have any chance of withstanding judicial scrutiny (and history shows that despite the many pronouncements made by our courts concerning the interplay between the ESA and termination clauses, employers seem destined to continue getting caught in the tripwires of contract drafting).

Second, the pandemic has caused logjams at every portal to our civil justice system. And when the pandemic is finally over, it will likely take years to flush out the bottlenecks. Therefore, court time has become all the more precious and ought not be expended on uncomplicated disputes. Indeed, most wrongful dismissal claims, when distilled to their irreducible minimum, really involve one issue: the employer does not want to pay despite having no real defence.

Employers should therefore be motivated to invest in private resolution (i.e., pay now) rather than aggressive yet ultimately futile public litigation (i.e., pay a lot more later).

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[12] *Supra* note 5. It will be recalled that in *Waksdale* the Court held that that an otherwise enforceable "without cause" termination provision in an employment agreement is rendered unenforceable where the employment agreement also contains a "just cause" provision that contracts out of the ESA. The Court further held at paragraph 14 that a severability clause cannot save a defective just cause provision because "a severability clause cannot have any effect on clauses of a contract that have been made void by statute."

Strongarm tactics rarely yield significant savings and employers who are cavalier enough to pursue them in court will not be spared the rod.[13] As Justice Fred Myers recently put it in *Innocon Inc. v. Daro Flooring Constructions Inc.*[14], at paragraph 47, such behaviour is "just so embarrassing – if not to counsel, then to the court and to the profession." Hence, an arbitration agreement can ensure that the litigation process in our civil courts, which is typically very time-consuming and expensive, is not in and of itself used to leverage a resolution of a dispute.[15]

Third, a properly drafted arbitration agreement provides an expedited, customized and largely private and confidential dispute resolution process presided over by either a single arbitrator or panel of arbitrators possessing significant subject matter expertise[16]. And if an arbitration agreement does not already include a built-in early mediation

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[13] See, for example, *Gordon v. Altus*, 2015 ONSC 5663 (CanLII) (S.C.J.). Glass J. ordered the defendant employer to pay punitive damages of $100,000.00 for, among other things, pursuing a baseless cause defence at trial. Glass J. found at paragraph 39 that "The conduct of the Defendant corporation is outrageous because Altus got mean and cheap in trying to get rid of an employee as they approached arbitration for the determination of any adjustment in the asset purchase agreement price. They had a contracted process in place and chose to park it with an unfounded allegation to fire him. Altus paid Alan Gordon no money." Glass J. also ordered the employer to pay costs of $262,722.29.

[14] 2021 ONSC 7558 (CanLII)

[15] Milton Davis, "Arbitrations in Ontario – A Primer", presented at the Law Society of Upper Canada's Safeguarding Real Estate Transactions Conference (November 2005) at p. 5-22 online <https://foglers.com/uploads/press/file/388/Arbitration_in_Ontario_a_Primer.pdf> See also *Panimondo v. Shorewood Packaging Corporation*, 2009 CanLII 16744 (ON SC) (CanLII) (S.C.J.) at para. 67 where Strathy J. (as he then was) stated that an employer has "choices as to how it should treat its loyal employees who, through no fault of their own, will lose their jobs. In some of the cases to which I have referred, and others that have been before the court in recent years, employers have given the bare minimum statutory notice, thinking that economic duress will force many employees to find re-employment quickly and that many of those remaining will be too intimidated or too financially weakened to take legal action. The remainder will be beaten into submission by aggressive legal strategies. The social cost of this choice is obvious. The employer's other choice is to take the high road and to give the employees the reasonable notice to which they are entitled. This choice can be expensive, but its social benefit is equally obvious."

[16] Davis *ibid.* at pp. 5-13 – 5-14. I say "largely private and confidential" because the limits of privacy and confidentiality in arbitration are murky. Provincial arbitration statutes generally do not provide that arbitration is private and the relevant jurisprudence is unsettled. Case law in Canada is unclear as to whether the parties to a putatively private arbitration have an implied obligation to refrain from disclosing documents such as pleadings, transcripts, witness statements, etc. and whether there is a general obligation of confidence that extends to witnesses and other third parties. Furthermore, an exception to confidentiality may arise where disclosure is necessary for the protection of legitimate interests of an arbitrating party or to establish rights as against a third party, as well as in enforcement proceedings before a court. Whether or not documents tendered in private arbitration will be subject to a confidentiality and sealing order by the court ultimately depends on the facts of the case and whether there is an "important commercial interest" in maintaining confidentiality. See Daniel R. Bennett and Madelaine Hodgson, "Confidentiality in Arbitration: A Principled Approach", (2016 – 2017) 3 *McGill Journal of Dispute Resolution* 98 online: <https://mjdr.openum.ca/files/sites/154/2018/05/Bennett-Hodgson.pdf> and *2249492 Ontario Inc. v. Donato*, 2017 ONSC 4974 (CanLII) (S.C.J.).

process, an arbitral panel will almost always propose mediation at the outset of a dispute, especially one involving a narrow set of issues or a modest sum of money. Moreover, when an arbitration agreement is used properly and in good faith, an arbitration can often take place in a matter of months.

(ii) Countering the Counterarguments

The most common argument against arbitration clauses that I encounter is that they impede access to justice by requiring financially strapped employees to participate in a private pay-to-play format in which employers hold all the cards. I say that is simply not true. For example, the parties can agree that the employer will pay either a greater portion or all the arbitrator's fees while still ensuring that the employee has an equal vote in the selection of the arbitral panel. Alternatively, the parties can agree to have an arbitral panel assigned via a neutral appointment mechanism.[17] And as mentioned above, an arbitrator will almost always canvass mediation at the outset of a dispute, which is especially beneficial in jurisdictions where mediation is not mandatory under the *Rules of Civil Procedure*. Better yet, an arbitration agreement can require that mediation can be completed before any arbitral proceedings can begin.

Secondly, some argue that private arbitration stunts due process.[18] The pushback concerning potential abridgements of due process in private arbitration comes from "a mistaken confidence that long, drawn-out processes produce a feeling of fairness and justice."[19] No one would ever say that waiting on the phone for several hours to speak with a customer service representative produces a "deep sense of satisfaction" that one's

[17] For example, Rule 5.1 of the ADR Chambers Arbitration Rules states, among other things, "In the absence of any Arbitration Agreement appointing provisions or in the event that one or more of the Parties fails to appoint an arbitrator or panel within the times specified or within a reasonable period of time if no time is specified, the Appointing Committee shall appoint an arbitrator or panel for the Parties". See ADR Chambers Arbitration Rules online: <https://adrchambers.com/arbitration/rules/>

[18] See, for example, Thomas E. Carbonneau, "Arbitral Justice: The Demise of Due Process in American Law" (1995), 70 *Tul. L. Rev.* 1945 online: < https://elibrary.law.psu.edu/fac_works/256/>

[19] "Faster, cheaper with less process: Top 10 Arbitration Cambers", *Canadian Lawyer*, (13 May 2019) online: <https://www.canadianlawyermag.com/surveys-reports/boutique-firm-rankings/faster-cheaper-with-less-process-top-10-arbitration-chambers/276097>

concerns are being “carefully considered”. Most people will tell you that the experience results in nothing other than intense feelings of anger and frustration.

Third, there are those who say the opposite is true – i.e., that private arbitration is a canard and no less procedurally cumbersome than litigating in our civil courts.[20] I also disagree with this proposition. Any system of adjudication will be seen as faulty if it is held up to a standard of perfection. Furthermore, and empirical data aside, a system of adjudication, whether public or private, is only as effective as its users want it to be. If litigants and their counsel are reasonable and pragmatic with respect to issues around early mediation, pre-trial discovery and timetabling, then arbitration works very well. However, when litigants engage in tactical games and are serial obfuscators, then access to prompt justice will be impossible no matter where the battle is fought.

Next, there is the “repeat player bias” argument, which is that arbitrators are “either subconsciously or intentionally” biased towards employers because employers are more often the “repeat players” in private arbitration systems, usually foot the bill and have “superior knowledge about arbitrating disputes.”[21] I find this argument thoroughly unconvincing for four main reasons:

1. To say that arbitrators are merely the handmaidens of employers is not only very difficult, if not impossible, to prove, it is also incredibly insulting to the profession. Should employment lawyers who act primarily for employers be “conflicted out” of representing employees because of “repeat representation bias”?

2. Any potential for bias, or the reasonable apprehension of bias, can be overcome by ensuring that all parties to an arbitration agreement have an equal say in the selection of the arbitral panel, or alternatively, by using a neutral appointment

[20] See, for example, Todd B. Carver and Alberta A. Vondra, “Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does”, (May – June 1994) *Harvard Business Review* online: <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>
[21] Janna Giesbrecht-McKee, “The Fairness Problem: Mandatory Arbitration in Employment Contracts” (2014), 50:2 *Williamette Law Review* 259 at 269 – 270 online: <https://willamette.edu/law/resources/journals/review/pdf/volume-50/50-2-janna-me-format.pdf>

mechanism. The parties can also agree that they will each pay some portion of the arbitrator's fees.[22]

3. No one is arguing (as far as I am aware) that we should put the brakes on mandatory mediation because of "repeat player bias" amongst private mediators. If anything, our civil justice system needs to increase the number of repeat players in ADR by expanding the reach of mandatory mediation in civil proceedings. And,

4. Employee-friendly laws in Ontario, combined with the emergence of large employee-side law firms willing to work on a contingency fee basis, means that employees have access to competent counsel to represent them (and perhaps even fund them[23]) in arbitral proceedings.

Finally, it is crucial that employers avoid assessing the utility of arbitration agreements in the slipstream of *Uber* because, as I will argue in detail later in this paper, doing so could give rise to the misconception that drafting arbitration clauses is a fool's errand. Despite the many articles written about the *Uber* case, it was not especially complicated. The arbitration clause at issue in *Uber* was so blatantly one-sided and oppressive on its face that it stood little chance of surviving judicial scrutiny.[24]

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[22] I note in passing that it is a very common practice in mediations of wrongful dismissal claims for the employer to agree to pay 100% of the mediator's fees as part of any settlement.

[23] Hopefully, the many law firms who advertise to potential clients that they will "fight for their rights" are following through.

[24] *Uber supra* note 7. In *Uber*, Justices Abella and Rowe wrote the majority decision of the Court, which represented themselves, Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin and Kasirer. The majority dismissed Uber's appeal on the basis that the disputed arbitration is unconscionable. Justice Brown wrote a concurring judgment dismissing the appeal on the grounds that the arbitration clause is contrary to public policy. Justice Cote wrote her own dissenting decision. Justice Cote held that the appeal should be granted on the condition that Uber advances the funds needed by the plaintiff to initiate arbitration proceedings. I will discuss the *Uber* decision in depth in Part C.

(iii) The Way Forward: Adopting a 21st-Century Australian Mindset

Regardless of where one stands on the matter of arbitration clauses, it is an unassailable fact that civil courts and tribunals in Ontario were teetering on the brink before the COVID-19 pandemic and are even worse off now, as I will explain in more detail in Part D. We no longer have any choice but to sacrifice some measure of tradition at the altar of progress. As the Supreme Court of Canada said eight years ago in *Hryniak*, the "balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."[25] (emphasis added)

In this vein, we can learn a lot about how to do this by studying other jurisdictions. For instance, Australia has been leading the charge in the realm of ADR for the past quarter century. By the end of the 1990s, most states in Australia had introduced legislation giving courts the power to order non-consensual mediation, or "court-referred alternative dispute resolution" (**CADR**).[26] Australia now has a robust mediation market "with virtually no civil case going to trial without at least one round of mediation".[27]

Perhaps the most dramatic scheme was that introduced by the New South Wales legislature to abolish the long-established Workers Compensation Court. It was replaced by the Workers Compensation Commission using a mediation-arbitration process. A key feature was the use of mediators as arbitrators instead of members of the historically combative workers' compensation bar. "The adversarial culture changed immediately because of the cultural alignment between the Med/Arb process and practising mediators acting as the arbitrators".[28]

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[25] *Supra* note 11 at para. 2.
[26] Greg Rooney, "The Rise of Commercial Mediation in Australia - Reflections and the Challenges Ahead" (2016), 3:2 Journal of Mediation & Applied Conflict Analysis 99 at 104 online: <https://www.maynoothuniversity.ie/sites/default/files/assets/document/5.Rooney%20FinDS_0.pdf>
[27] *Ibid* at 99.
[28] *Supra* note 26 at 105.

Critically, the Australian judiciary has embraced CADR[29]. For example, in *Remuneration Planning Corp v Fitton*[30], Justice John Hamilton (as he then was) of the New South Wales Supreme Court noted at paragraph 3 that:

> "…This is an area in which the received wisdom has in my experience changed radically in a period of a few months. A short time ago there was general acceptance of the view…that there was no point in a mediation engaged in by a reluctant party. Of course, there may be situations where the Court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered."[31] (Emphasis added)

Alternative models of adjudication cannot thrive without the express sponsorship of the judiciary. Legislative initiatives, stump speeches and rally cries are not enough to overcome litigation bias because it is judges who ultimately interpret and apply the law. Without a "cultural alignment" between ADR initiatives and the judiciary, any "culture shift" of the sort contemplated by the Supreme Court of Canada in *Hryniak* is impossible. A

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[29] Nicky McWilliam, Alexandra Grey, Helen Zhang, Tracey Yeung & Dharmita Padhi, "Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary" (2017), The Australasian Institute of Judicial Administration Incorporated (**AIJA**) online <https://aija.org.au/wp-content/uploads/2019/08/AIJA-Court-Rererred-ADR.pdf> The AIJA is an incorporated association affiliated with Monash University in Melbourne, Australia. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. This study involved a survey of 104 judges sitting in various jurisdictions throughout Australia. The overall results indicated that judges have a positive view of court-referred alternative dispute resolution and perceive it to contribute to court efficacy.

[30] [2001] NSWSC 1208

[31] *Ibid.* at para. 3.

Prague Spring necessarily begins at the courthouse gates. As one Australian arbitrator explains:

> "It is a fate that has hung over the Family Court of Australia for a number of years because of the continued attachment by the family law judiciary to traditional adversarial processes despite having the most comprehensive pro ADR legislation and rules in Australia. This is an example of how legislation, by itself, cannot facilitate cultural change without genuine cooperation from the judiciary."[32] (emphasis added)

Our tendency towards litigation bias is easily exposed when one considers the following scenario: Assume there is a lawsuit in which the defendant is passionately arguing that the parties should mediate, and the plaintiff is equally adamant that the parties should litigate. Do we say that the plaintiff should not be compelled to negotiate against its will? Or do we say that the defendant should not be forced to fight against its will? I would venture to say that the immediate impulse of most lawyers in Ontario is to side with the plaintiff.

Indeed, the conventional wisdom in Ontario is that it is wrong to force an unwilling participant to negotiate.[33] However, the merit of such traditional approaches is becoming increasingly less compelling. The 20th-century Western commercial model of top-down fixed black letter contracts enforcing risk transference has been challenged by the far more nuanced modern reality of "interconnected commercial space".[34] The main drivers of this new reality "are the need to sustain commercial and individual relationships, embracing a sustainable balance between risk and reward, seeing conflict as an

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[32] *Supra* note 26 at 105.
[33] See, for example, *Schenk v. Valeant Pharmaceuticals International, Inc*., 2017 ONSC 5101 (CanLII) (S.C.J.) (Commercial List) at para. 4 where Myers J. stated "The plaintiff would like to proceed to mediation. The…defendants are not interested in doing so at this time. The plaintiff complains that time was wasted discussing possible mediation issues only to have the defendants back out at the last minute. I am not ordering mediation among commercial parties who do not want to mediate. In this case it would just waste time and money. The matter should be readied for trial. The parties are sophisticated and can engage in settlement discussions any time they choose to do so. I or another judge will be happy to assist if the parties wish. But trial preparation should not wait."
[34] *Supra* note 26 at 100.

opportunity for change and valuing the importance of soft management skills to bring everything together."[35]

As the experience of our Commonwealth cousin demonstrates, when litigants are required to spend sufficient time together inside a legal safe zone, as opposed to being forced to fight out in the open where egos and reputations are far more exposed, the motivation to compromise can overcome even the most stubborn parties.[36] And even if a resolution is not achieved at a mediation, the parties will have had to confront the unvarnished reality of their positions – i.e., undergo a "reality check", or a "test run", as it were. In my experience, this exercise is especially productive in wrongful dismissal actions because it narrows the issues in dispute (which are typically spartan to begin with), unloads a great deal of the emotional baggage fuelling the conflict, and perhaps most importantly, demonstrates to the parties sharply and in real time that there is no such thing as an "airtight case".[37]

C. The Law Governing the Enforcement of Arbitration Agreements

(i) Arbitral Jurisdiction Generally

Courts generally take a "hands off" approach to arbitration agreements because they are of the view that the terms of a contract freely entered into should be given effect, including contracts of adhesion. Furthermore, in the absence of any statutory limits on arbitration, courts generally defer to the jurisdiction of arbitral panels, meaning that they will order that any challenge to the validity of an arbitration agreement or to an arbitral panel's jurisdiction should first be determined by the arbitrator(s) – i.e., the "competence-competence" principle.[38] However, for the competence-competence rule to apply, there

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[35] *Supra* note 26 at 100.
[36] *Supra* note 26 at 100.
[37] In fact, I am not even sure what qualifies as a "very strong case".
[38] *Dell Computer Corp. v. Union des consommateurs,* [2007] 2 S.C.R. 801 and *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531.

must be an arbitration agreement affecting at least some of the parties and at least some of the issues.[39]

In Ontario, arbitral jurisdiction is enforced via the *Arbitration Act, 1991*[40] ("**AA**"). More specifically, section 7(1) of the AA states that where a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, then the court "shall", on the motion of another party to the agreement, stay the proceeding.[41]

In order for a claim to be be stayed pursuant to section 7(1) of AA the court has to be satisfied that there is an arbitration agreement that applies to the substance of the dispute in question. The court will therefore ask the following questions:

1. Is there an arbitration agreement?

2. What is the subject matter of the dispute?

3. What is the scope of the arbitration agreement?

4. Does the dispute arguably fall within the scope of the arbitration agreement?[42]

However, even if the court finds that a putative arbitration agreement covers the dispute, the AA gives it residual discretion to retain jurisdiction and decline to stay proceedings in five circumstances enumerated in section 7(2) of the Act:

1. If a party entered into the agreement while under a legal incapacity.

2. The arbitration agreement is "invalid".

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[39] *Rhinehart v. Legend 3D Canada Inc.*, 2019 ONSC 3296 (CanLII) (S.C.J.) at para 32.
[40] S.O. 1991, c. 17
[41] Interestingly, a "court" is not defined for the purposes of section 7 of the Act. Section 1 of the Act states that "'court', except in sections 6 and 7, means the Family Court or the Superior Court of Justice".
[42] *Haas v. Gunasekaram*, 2016 ONCA 744 (CanLII) at para. 17.

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.

The invalidity exemption is the one most often litigated on stay motions in employment cases.[43] The AA is silent on what principles a court should consider in exercising its discretion under section 7(2). Therefore, we must turn to the common law for guidance.

Up until *Uber*, courts could only deviate from the competence-competence rule where a challenge to an arbitrator's jurisdiction involved a question of law alone, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record."[44] A "superficial review" involves a determination of "whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties."[45]

A party challenging the validity of an arbitration clause is free to raise any argument it chooses. But the Supreme Court of Canada was very explicit in *Uber* that a challenge to arbitral jurisdiction must be *bona fide*. Courts retain wide discretion to weed out spurious objections and delay tactics. Challenges to arbitral jurisdiction that "unduly

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[43] See, for example, *Uber supra* note 7; *Leon v. Dealnet Capital Corp.*, 2021 ONSC 3636 (CanLII) (S.C.J.); and *Wilson v. Infracon Construction Inc.*, 2020 BCSC 2074 (CanLII) (B.C.S.C.). While the summary judgment exemption may seem like an appealing option for an employee seeking to avoid an arbitration clause, I would venture to say that given the horrendous backlogs caused by the COVID-19 pandemic, a court would be disinclined to find that a summary judgment motion is "more proper" than deferring to a valid arbitration agreement. The analysis required under section 7(2)5 is different from the one that applies on a motion brought pursuant to rule 20 of the *Rules of Civil Procedure*. The purpose of section 7(2) is to provide a limited exception to the mandatory requirement that courts enforce valid arbitration clauses. Section 7(2)5 will only apply where there are no genuine issues for trial, and therefore, no issues that require the assistance of an arbitrator – for instance, a default situation. If there are genuine issues for trial, then the court must defer to the arbitrator. See *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656 (CanLII) at paras. 34 – 39.

[44] *Uber supra* note 7 at para. 34, citing *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921.

[45] *Uber supra* note 7 at para. 36.

impair the conduct of the arbitration proceeding" will simply be referred to the arbitrator.[46] The Court went so far as to suggest in paragraph 42 of its ruling that a party who successfully enforces an arbitration agreement can claim damages for breach of contract.[47]

(ii) New Developments Following *Heller v. Uber Technologies Inc.*

In *Uber* the Supreme Court of Canada created an additional "accessibility" exemption that justifies departing from the general rule of arbitral referral.[48] This exemption will apply in cases where the terms of an arbitration agreement give rise to a "real prospect" that it would be "insulated from meaningful challenge", such as "where an arbitration is fundamentally too costly or otherwise inaccessible".[49]

Prior to *Uber*, the case law did not contemplate a scenario wherein a matter would never be resolved through arbitration if a stay were granted; it assumed that if a court does not decide an issue, then the arbitral panel will. This raised "obvious practical problems of access to justice that the Ontario legislature could not have intended when giving the courts the power to refuse a stay."[50]

To determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve, the court must: (1) first determine whether, assuming the facts pleaded are true, there is a genuine challenge to arbitral jurisdiction; and then (2) determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitral panel.[51] In determining the second question, the Court must engage in "some limited assessment of evidence" but "must not devolve into a mini-trial."[52] The Court went on to state in paragraph 45 that

[46] *Uber supra* note 7 at paras. 41 and 43.
[47] *Uber supra* note 7 at para. 42.
[48] *Uber supra* note 7 at para. 37
[49] *Uber supra* note 7 at paras. 39 and 44.
[50] *Uber supra* note 7 at para. 38.
[51] *Uber* supra note 7 at para. 44.
[52] *Uber supra* note 7 at para. 45.

both the court and counsel are responsible for ensuring that the hearing "remains narrowly focused":

> "The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains narrowly focused…In considering any attempt to expand the record, judges must remain alert to 'the danger that a party will obstruct the process by manipulating procedural rules' and the possibility of delaying tactics…"[53]

(iii) The Supreme Court of Canada's Decision in *Uber*

The arbitration clause at issue in *Uber* stated as follows:

> "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…"[54]

[53] *Uber supra* note 7 at para. 45.
[54] *Uber supra* note 7 at para. 8.

The clause was included in a 14-page standard form services agreement that the plaintiff, an Ontario resident, was required to digitally sign when he first logged into the Uber App to register as a driver. Mediation and arbitration had to take place in Amsterdam and would be governed by the substantive law of the Netherlands. The evidence indicated that the up-front cost to begin an arbitration according to the ICC Rules was approximately US$14,500, not including legal fees, lost wages, travel costs and other costs of participation. The services agreement was silent as to the cost of mediation and arbitration. The evidence further indicated that the plaintiff earned approximately $400 to $600 per week, or $20,800 to $31,200 per year, before taxes and expenses.[55]

The Supreme Court held that the arbitration clause is unconscionable because there was an inequality of bargaining power which resulted in an overwhelmingly improvident bargain for the plaintiff.[56] More specifically, the Court found that the plaintiff was powerless to negotiate any of the agreement's terms, the cost of initiating an arbitration alone was equal to the plaintiff's entire annual after-tax income and the clause said nothing about the costs of mediation and arbitration in the Netherlands. The Court concluded that "both the disadvantages faced by [the plaintiff] in his ability to protect his bargaining interests and…the unfair terms that resulted" rendered the arbitration clause unconscionable and therefore invalid.[57]

In its peroration the Court stated:

> "Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all…The

[55] *Uber supra* note 7 at paras. 5 – 12.
[56] *Uber supra* note 7 at para. 94. In this portion of its ruling, the Court endorsed a flexible two-part test for assessing unconscionability, requiring demonstration of (i) an inequality of bargaining power; and (ii) an improvident bargain. The Court explained that the "inequality of bargaining power" factor has no "rigid limitations" but is triggered where one party cannot adequately protect its interest in the contract process. Inequality of bargaining power may arise where a weaker party is deeply dependent on a stronger party or where only one party can understand and appreciate the full import of the relevant contractual terms. Similarly, "improvidence" cannot be "reduced to an exact science" and is to be assessed contextually. Courts must inquire into whether a stronger party has been unduly enriched or whether a weaker party has been unduly disadvantaged.
[57] *Uber supra* note 7 at para. 98.

> arbitration clause is the only way [the plaintiff] can vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory."[58]

Because the Court found the arbitration clause void on unconscionability grounds, it declined to rule on the second question raised on the appeal, which was whether the clause was void on the basis that it contracts out of the ESA.

The result in *Uber* is hardly surprising. But it begs many questions. For example, what is the approximate financial threshold for determining when arbitration is "realistically unattainable"? 100% of a person's annual after-tax income? Or 50%? Or some other ratio? What if an arbitration clause mandates that all proceedings take place via Zoom? Is that enough to overcome any "travel expense prejudice"? What if an employee is represented by legal counsel who is fronting some or all of their disbursements? If so, is this compellable evidence for the purposes of determining whether arbitration is "reasonably affordable" or "realistically attainable"? What if the arbitration clause requires mandatory mediation at the outset and before any arbitral proceedings? Does this suffice to provide access to justice? At what point does marshaling evidence of these facts result in the inquiry "devolving into a mini-trial"? Also, since *Uber* was argued in 2019, can or should the deleterious impact of the COVID-19 pandemic, and the terrible delays it has brought, play a role in a section 7(2) analysis?

All of that said, I do not think it is necessary or helpful to read *Uber* too granularly when drafting arbitration agreements. The Supreme Court's decision in *Uber* is essentially a "we know it when we see it" policy statement meant to ensure that arbitration agreements are reasonably fair and balanced. The bottom line is that employers who attempt to rely on arbitration clauses that have the effect of frustrating legal claims and significantly curtailing due process will be shown the door.

[58] *Uber supra* note 7 at para. 97.

(iv) Section 96 of the ESA

The question of whether a mandatory arbitration clause governed by Ontario law is itself a contravention of the ESA continues to be a hot button issue. More specifically, if a mandatory arbitration clause does not explicitly preserve an employee's ability to file a section 96 complaint with the Ministry of Labour, is it void on the basis that it amounts to a contracting out of the ESA contrary to section 5(1) of the Act? It will be recalled that sections 5 and 96 of the ESA state as follows:

> "**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.
>
> **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.
>
> […]
>
> **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."

As mentioned, the Supreme Court of Canada declined to rule on this issue in *Uber*. However, the Ontario Court of Appeal did. It found that Uber's arbitration clause "eliminates the right of the [plaintiff] (or any other driver) to make a complaint to the Ministry of Labour regarding the actions of Uber and their possible violation of the

requirements of the ESA."[59] In doing so, "it deprives the [plaintiff] of the right to have an [Employment Standards Officer] investigate his complaint."[60]

The Court rejected Uber's argument that section 96 is not an employment standard within the meaning of the ESA. According to Court, at paragraph 37, Uber's argument "invites an unduly narrow interpretation of s. 96 which would, if accepted, authorize employers to contract their employees out of s. 96, and thus…undermine the protective purpose of the ESA."[61]

While I agree with the result in *Uber*, I disagree with the Court of Appeal's findings regarding the section 96 issue. In my view, the findings of Cote J. at paragraph 299 of her dissent in *Uber* are apposite:

> "…the flaw in this argument is that the ability to file a complaint under s. 96 of [the ESA] is not an employment standard…[section 96] clearly does not require an employer to do — or prohibit an employer from doing — anything. It therefore does not provide for an employment standard."[62]

An "employment standard" is defined in section 1(1) of the ESA as follows:

> "'employment standard' means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee."

An enforcement mechanism laid out in general terms lacks the requisite specificity to qualify as a "standard" within the meaning of section 1(1) of the ESA. For example, it is easy to see how a provision requiring an employer to pay an employee no less than a specified hourly wage constitutes a clearly identifiable "employment standard": the

[59] *Uber* COA s*upra* note 7 at para. 41.
[60] *Uber* COA s*upra* note 7 at para. 41.
[61] *Uber* COA s*upra* note 7 at para. 37.
[62] *Uber supra* note 7 at para. 299.

employer is prohibited from paying the employee anything less than that amount, and it is unequivocally for the benefit of the employee.

On the other hand, the complaints and enforcement provisions contained in Part XXII of the ESA (which include section 96) do not spell out a complete code of minimum standards for the disposition of section 96 complaints. For example, the Act does not state that a complaint must be finally disposed of within a specific period of time, nor does it prescribe any baseline discovery rights. Rather, the ESA gives an employment standards officer (**ESO**) considerable discretion. For instance, section 101.1(1) states that an ESO "may" attempt to effect a settlement. Section 102(1) states that an ESO "may" require a meeting between an employee and employer. And section 102.1(1) states that an ESO "may require" an employer to provide evidence "within the time that he or she specifies".

Courts in other provinces have espoused Cote J.'s reasoning. For example, in *A-Teck Appraisals Ltd. v. Constandinou*[63] (***Constandinou***), the defendant employee argued that the arbitration clause in his employment contract was void on that basis that it contracts out of the investigation process contained in the British Columbia *Employment Standards Act*[64]*.* The clause stated as follows:

> " If the parties cannot resolve their differences by way of mediation within a reasonable time, they shall refer the dispute to the arbitration of a single arbitrator. If the parties agree upon one, otherwise, to three arbitrators, one to be appointed by each party and third to be chosen by the first two named before they enter upon the business of arbitration. The award and determination of the arbitrator or arbitrators or any two of the three arbitrators shall be binding upon the parties and their respective heirs, legal representatives, successors, and assigns. The arbitration shall be conducted pursuant to the provisions of the *Arbitration Act* (British Columbia)."[65]

[63] 2020 BCSC 135 (CanLII)
[64] R.S.B.C. 1996, c. 113
[65] *Supra* note 63 at para. 9

Humphries J. ruled that the clause is enforceable. Humphries J. found at paragraph 37 that while the Ontario Court of Appeal's decision in *Uber* had "some superficial application to the present situation" it is "not obvious that a statutory complaint/investigative mechanism becomes an employment standard itself rather than a procedure for enforcing employment standards."[66] *Constandinou* was subsequently followed in *Wilson v. Infracon Construction Inc*.[67]

Christening section 96 of the ESA a "minimum standard" creates a harmful double entendre; it swims against the tide not only of the rules of statutory interpretation, but also, in my view, access to justice. To the extent that section 96 possesses any of the characteristics necessary to qualify as an "employment standard" as contemplated by the ESA, it is by accident, and not by dint of any legislative intent.

Most problematically, the resulting analytical quagmire around what it means to "contract out" of section 96 has a profound chilling effect on ADR insofar as it requires employers to grapple with the meaning, intent and scope of the ESA's indeterminate enforcement provisions. For example, does a valid arbitration clause have to preserve an employee's appeal rights following an order made by an ESO? If so, to what extent or degree? What if an arbitration agreement is silent on any of these points, however immaterial that silence may be? If our experience with the jurisprudence regarding the enforceability of termination clauses in employment contracts is any guide, we are simply inviting more motions, more delays and even more costs, both direct and social.

Rather than espousing an analytical framework that pulls the door to ADR closed, courts should be swinging it wide open by incentivizing employers and employees to move their disputes (especially non-complex matters) out of our courthouses and tribunals, provided it is done on conscionable terms.

Declaring section 96 an employment standard is also impractical. More specifically, an employee who is bound by the terms of an arbitration clause does not lose their ability

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[66] *Supra* note 63 at para. 37.
[67] 2020 BCSC 2074 (CanLII)

to file a section 96 complaint because an arbitration is not a "civil proceeding" within the meaning of the ESA, and therefore, does not trigger the operation of sections 97 and 98 of the Act. It will be recalled that sections 97 and 98 of the ESA state as follows:

> "**When civil proceeding not permitted**
>
> **97** (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
>
> **Same, wrongful dismissal**
>
> (2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> […]
>
> **When complaint not permitted**
>
> **98** (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.
>
> **Same, wrongful dismissal**
>
> (2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment."

The Ontario Court of Appeal in *Uber* held at paragraph 33 that there is no reason to interpret an arbitration as a "civil proceeding" for the purposes of sections 97 and 98 of the ESA. "Indeed, the Courts of Justice Act…which applies to all civil proceedings in Ontario, defines both actions and applications as civil proceedings."[68] The Court of Appeal further held at paragraph 34 that "there is nothing in the ESA that suggests that there was any intention to include arbitrations within the usual meaning of the term 'civil proceeding'".[69]

Hence, an arbitration agreement can actually be strategically advantageous for employees. For example, take a self-represented employee who is unaware of the arbitration clause binding them and who files a section 96 complaint for unpaid wages. The employee will have done so without prejudicing their ability to claim additional amounts (after they retain counsel perhaps) via arbitration.[70] And what can an employer do about it? Nothing, because a private arbitrator does not have jurisdiction to stay a complaint that is before the Ministry of Labour.

Similarly, take an employee who is represented by counsel. The employee's lawyer could leverage a section 96 complaint to compel settlement discussions or an early mediation. If the employer refuses, it risks being stuck with orders and findings made by an ESO, in addition to the employee being able to arbitrate any remaining common law or other claims. Ideally, the parties would agree to some form of mediation-arbitration timetable in order to avoid costly procedural wrangling.

What is even worse is that section 96 is a red herring. In practice, employee counsel care very little, if at all, about preserving a client's ability to make a section 96 complaint because they are, quite understandably, more interested in lucrative common law claims.

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[68] *Uber* COA s*upra* note 7 at para. 33.
[69] *Uber* COA s*upra* note 7 at para. 34.
[70] It is important to remember that sections 97 and 98 of the ESA distinguish between complaints regarding entitlements to unpaid wages and claims for termination and severance pay. For a civil proceeding to be barred by operation of the Act, it must relate to the "same matter". For example, an employee may file a complaint regarding unpaid wages (e.g., overtime pay), and then commence a civil action for wrongful dismissal, since these proceedings do not involve the "same matter". See: Employment Standards Act Policy and Interpretation Manual online: <https://www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual/part-xxii-complaints-and-enforcement#section-2>

Disputes over the conservation of section 96 "rights" are really about lawyers fighting for control of the forum in which their clients' claims will be litigated with a view to gaining a perceived tactical advantage, or at least avoiding a perceived disadvantage.

(v) The Impact of Other Employment Legislation

Parties to arbitration agreements are also prohibited from contracting out of the Ontario *Human Rights Code*[71], the *Occupational Health and Safety Act*[72] and the *Workplace Safety and Insurance Act, 1997*[73]. The Supreme Court of Canada has found that this prohibition applies even if the applicable legislation does not expressly bar parties from contracting out of any or all of its provisions. More specifically, in *Ontario Human Rights Commission v. Etobicoke*[74], the Court found at page 213 that:

> "Although the [Human Rights Code] contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy."[75] (emphasis added)

And according to the Ontario Human Rights Commission:

> "A person cannot be required to 'contract out' of the protection of the *Human Rights Code*…This means that a person cannot agree to relinquish his or her right to file a human rights complaint, since such a right is

[71] R.S.O. 1990, c. H.19. See, for example, *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 SCR 202 (***Etobicoke***) at 213 and *Sprague v. Rogers Blue Jays Baseball Partnership dba Toronto Blue Jays Baseball Club*, 2017 HRTO 63 (CanLII) at para. 4.
[72] R.S.O. 1990, c. 0.1. See, for example, *Ontario (Ministry of Labour) v. Advanced Construction Techniques Ltd.*, 2016 ONCJ 482 (CanLII) (O.C.J.).
[73] S.O. 1997, c. 16, Sched. A. See, for example, *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845 (CanLII) at para. 11.
[74] *Etobicoke supra* note 70.
[75] *Etobicoke supra* note 71 at 213.

> guaranteed by section 32 of the *Code* to any person that believes that their rights have been infringed."[76] (emphasis added)

While the Ontario Court of Appeal was not required in *Uber* to determine whether there ought to be a distinction made between contracting out of the substantive protections set out in these other statutes and waiving their procedural enforcement mechanisms, I think it is very likely, based on precedent, that the Court would come to same conclusion it reached regarding section 96 of the ESA. For example, in *Fleming v. Massey et al.*[77], the Court of Appeal stated that:

> "[We] recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication."[78] (emphasis added)

D. A Call for Change

The current state of civil litigation in Ontario – i.e., crushing delays and incessant procedural hang-ups – requires that we reconsider the policy rationales underpinning the existing jurisprudence, some of which is decades old and most of which predates the pandemic. Romanticized notions of court-centric justice and "untouchable" employee rights must give way to the harsh reality that, within our present system, many of those "rights" are essentially abstract and illusory.

The precipitous decline of the Human Rights Tribunal of Ontario is illustrative. For example, during the period 2016 – 2017, the parties in 92 percent of Tribunal cases were

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[76] "Guide to Releases With Respect to Human Rights Complaints", Ontario Human Rights Commission, (30 May 2006) at 4 online: <http://www.owtlibrary.on.ca/Catalogued_PDF/ED%20290.pdf> See also *Mast v. North Toronto Christian School*, 2017 HRTO 661 (CanLII) at para. 9.
[77] 2016 ONCA 70 (CanLII).
[78] *Ibid* at para. 34.

offered a mediation date within five months of agreeing to mediation.[79] However, during the period 2019 – 2020, only 27 percent of cases received a mediation date within the same time frame, decline of 65 percent in only two years.[80] In my own experience, it has, in some instances, taken over a year to receive a mediation date.

Also during 2019 – 2020, and despite the Tribunal having the ability to conduct video-conference hearings, it only scheduled a first day of hearing in seven percent of cases within six months of them being ready to be heard.[81] By comparison, 38 per cent of hearing-ready cases had a first day scheduled within six months during the period 2017 – 2018.[82] Furthermore, in cases where a hearing had been completed, the parties waited for well over a year to receive a final decision.[83]

The Small Claims Court is suffering a similar fate. The pandemic has essentially shut it down.[84] This is a very serious problem considering that the Court houses nearly half of all civil claims in Ontario.[85] According to the most recent annual report by the Ontario Superior Court of Justice, in each of 2017 and 2018, nearly 60,000 cases were commenced in the Small Claims Court.[86]

When we combine these tragic developments with the fact that the number of self-represented litigants – who, overall, fare far worse than represented parties – is reaching epidemic levels across the country, can we honestly say that deferring to an objectively

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[79] Raj Anand, Kathy Laird and Rob Ellis, "Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government", The Global and Mail (29 January 2021), online: <https://www.theglobeandmail.com/opinion/article-justice-delayed-the-decline-of-the-ontario-human-rights-tribunal-under/>
[80] *Ibid.*
[81] *Supra* note 79.
[82] *Supra* note 79.
[83] *Supra* note 79.
[84] See the Order of Associate Chief Justice Faye McWatt, "Continued Suspension of Small Claims Court operations due to COVID-19" (October 28, 2021) online: <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/continued-suspension-scc-operations/> and Jon Woodward, "Huge backlog looms, fraudsters empowered amid Small Claims Court near-shutdown", *CTV News* (28 June 2021) online: <https://toronto.ctvnews.ca/huge-backlog-looms-fraudsters-empowered-amid-small-claims-court-near-shutdown-1.5489056>
[85] "The Superior Court of Justice: Enhancing Public Trust", Ontario Superior Court of Justice (2019) at p. 14 online: <https://www.ontariocourts.ca/scj/files/annualreport/2017-2018-EN.pdf>
[86] *Ibid*.

fair and reasonable arbitration agreement results in an employee being "robbed" of due process or sacrosanct procedural rights?[87] Clearly, these promised rights are not worth very much to the average employee in 2021.

Therefore, what have we got to lose by our courts shifting their stance and incentivizing the use of arbitration and early mediation clauses in private employment agreements? Can that be any worse than shepherding unwitting employees into the labyrinthian jurisdictional maze of overlapping social justice tribunals and provincial courts with all of their unique rules of practice and horrendous backlogs? Should we not free up some oxygen so that these tribunals and courts can have a chance to breathe?

If the legislature will not enact or incentivize reasonable – and dare I say, efficacious – alternative models of adjudication, as Australia has done, for example, then it falls to the judiciary to mobilize them, such as by facilitating greater use of ADR mechanisms in private employment contracts. In this author's view, the flexible test for conscionability prescribed by the Supreme Court of Canada in *Uber* is more than sufficient to ensure that this can be done fairly and equitably.

E. Drafting Effective Arbitration Clauses in Employment Contracts

As with any drafting exercise, the objective is to write terms in a way that maximizes the likelihood they will be enforced. In addition to the obvious requirement that an arbitration clause be fair, reasonable and "realistically accessible", as well as the usual

[87] See William McDowell and Usman M. Sheikh, "A Lawyer's Duty to Ensure Access to Justice", presented at The Advocates' Society's Symposium on Professionalism (January 2009) at 3, online: <https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteforCivilityandProfessionalism/Duty_to_Access_to_Justice.pdf> and "Finally, Canadian Data on Case Outcomes: SRL vs. Represented Parties", National Self-Represented Litigants Project (18 April 2016) online: < https://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties/> See also *C.A.T. v S.T.B*, 2020 BCSC 593 (CanLII) at para. 39; *Jonsson v. Lymer*, 2020 ABCA 167 (CanLII) at para. 8; *Grand River Conservation Authority v. Ramdas*, 2021 ONCA 815 (CanLII) at paragraph 47; and *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 (CanLII) at paragraph 46 where Brown J.A. described the prevalence of self-represented litigants as "the new reality of civil litigation."

axiom that there is no "one size fits all" formula, the following matters should be considered.

(i) The Ontario *Arbitration Act, 1991*

In Ontario, arbitrations are governed by the AA, which sets out both default and mandatory provisions for the conduct of arbitrations.[88] The Act applies to any arbitration conducted under an arbitration agreement, except those to which the *International Commercial Arbitration Act* applies.

An arbitration agreement is defined in the AA as an agreement, oral or written, between "two or more persons to submit to arbitration a dispute that has arisen between them."[89] Arbitration agreements are "independent contracts", meaning their validity is not tied to the fate of a primary or "main" agreement. If an arbitration agreement does not provide otherwise, the arbitral panel consists of a single arbitrator.[90]

In addition, the arbitral panel may make interim orders, and render a final decision, or "award". The AA makes arbitration awards legally enforceable and subject to limited appeal rights to, and review by, the courts.[91]

(ii) Scope

It is preferable to cast arbitral jurisdiction in broad terms, subject of course, to the strictures imposed by provincial employment legislation. Using overly specific or limiting language can result in costly preliminary squabbles over an arbitrator's jurisdiction and

[88] Section 3 of the Act permits parties to contract out of many of its provisions, including section 7.
[89] *Supra* note 40, s. 1.
[90] *Supra* note 40, s. 9.
[91] *Supra* note 40, s. 50.

contemporaneous proceedings in different fora.[92] The following are some typical examples of contractual language prescribing the scope of arbitral jurisdiction[93]:

- "Any dispute between the parties arising out of the construction, meaning or effect of any clause or matter contained in this agreement or of the rights and liabilities of the parties to the dispute shall be referred to arbitration."

- "All disputes and differences arising out of, or in relation to this agreement or its breach."

- "All legal disputes, differences, controversies, or claims arising under, out of or relating to, this agreement and any subsequent amendments of this agreement, including without limitation, its formation, validity, binding effect, interpretation, breach of termination as well as any non-contractual claims"

(iii) Early Mediation

The parties should consider whether they want mediation or negotiation to be a pre-condition to arbitration. Should the parties decide they wish to do this, they should specify the time periods in which those steps will be deemed to have been completed in order to ensure that it is clear when the arbitration clause may be invoked.[94] For example, the agreement could stipulate that a mediation must occur within 60 days, or as soon after that time as is reasonably possible, of the aggrieved party(ies) putting the other(s) on notice that there is a dispute. The parties should also indicate whether they consent to the mediator subsequently arbitrating their dispute (i.e., a med-arb).

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[92] Jennifer D. Wiegele, "Arbitration Clauses in Employment Contracts", presented at the 2013 Employment Law Conference, Continuing Legal Education Society of British Columbia (May 2013) at 2.1.15 online: < https://kentemploymentlaw.com/wp-content/uploads/2013/06/Arbitration-Clauses-in-Employment-Contracts.pdf> That said, it is not unusual for parties to carve out disputes concerning restrictive covenants, intellectual property and requests for injunctive relief. But again, what is ultimately appropriate or useful depends on the specific nature of the relationship between the parties.

[93] *Ibid.* at 2.1.15.

[94] *Supra note* 92 at 2.1.15 – 2.1.16.

(iv) Setting the Rules of the Game and Deciding Who Will Administer Them

The parties should select a set of procedural rules that will govern the arbitration process and decide whether their arbitration will be administered by an institution or not.[95] The protocols and procedures of the arbitration need not parrot the formalities of the courts.[96] Indeed, the freedom to pick and choose appropriate protocols and procedures is one of the most appealing features of arbitration.[97] When deciding on the procedural law to apply to the arbitration process, the parties may adopt a set of rules, they may create their own rules, or they may adopt a set of rules and modify them to suit their needs.[98]

As for the administration of the arbitration, the principal consideration here should be cost, efficiency and whether the rules of the administering centre are desirable to the parties.[99] An administering institution charges fees for its services and acts as a form of registry for the steps taken in the process and the documents and correspondence exchanged between the parties.[100] If the parties do not want to engage an administering institution, they must bear in mind that someone still needs to perform the administrative work and generally it will be the arbitrator(s), and inevitably, the cost of doing so will be passed on to the parties.[101] Regardless of the route taken, an arbitration agreement must clearly spell out the rules of engagement and how the arbitration will be managed.

(v) Confidentiality

To the extent that the arbitral rules chosen by the parties do not provide, or may not provide, the desired level of confidentiality, the agreement should make clear that all arbitral proceedings are private and confidential. The parties may also want to explicitly

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[95] *Supra* note 92 at 2.1.16.
[96] *Supra* note 15 at 5-3.
[97] *Supra* note 15 at 5-3.
[98] *Supra* note 92 at 2.1.16. There are many sets of procedural rules created by arbitral institutions throughout Canada, including ADR Chambers and the ADR Institute of Canada Inc.
[99] *Supra* note 92 at 2.1.16.
[100] *Supra* note 92 at 2.1.16.
[101] *Supra* note 92 at 2.1.16.

state that all the arbitrator's decisions, awards and corresponding reasons, both written and oral, are confidential. As I indicated earlier in this paper, this can be tricky terrain, so extra care should be taken.[102]

(vi) Remedies and Finality

Depending on the rules the parties have adopted or created, the issue of remedies may or may not have to be addressed.[103] The parties will want to ensure that there are terms setting out the scope and limit of the arbitrator's remedial jurisdiction. The parties should also indicate whether any order or award made by the arbitral tribunal can be appealed, and if so when and how. Furthermore, in light of the confusing state of the law regarding determining when an order is interlocutory versus final, the parties may wish to define these terms to suit their purposes.[104]

(vii) The *Uber* Challenge in Ontario

In the aftermath of *Uber*, the most significant challenge for employers in Ontario will be staying on the right side of provincial employment legislation. This is no mean feat. Employers must contract with extreme care, for as I said at the outset of this paper, they can fairly assume that they will get only one shot to do it right – they cannot "miss".

And while it is true that the Supreme Court of Canada held in *Uber* that arguments over the application of the competence-competence rule should not take place on the margins or "devolve into a mini-trial"[105], the safest course of action is to use express contractual language stating that all applicable employment legislation shall apply notwithstanding the arbitration agreement. For the reasons set out in Park B, it is this

[102] *Supra* note 16.
[103] *Supra* note 92 at 2.1.17.
[104] See, for example, *1476335 Ontario Inc. v. Frezza*, 2021 ONCA 732 at para. 16 where Brown J.A. called upon the Legislature to "awake and address this far-too-long-outstanding stain on our civil justice system". Brown J.A. went on to say that the Legislature needs to enact legislation that creates an unambiguous "bright line" explaining the difference between interlocutory and final orders.
[105] *Uber supra* note 7 at para. 45.

author's opinion that it is actually advantageous for parties to do so, or at least no more disadvantageous than submitting to the jurisdiction of our civil courts and tribunals.

F. Conclusion

Ontario's overtaxed civil justice system is badly in need of help. To the extent anyone disagrees, they need only read Ontario Superior Court Chief Justice Geoffrey Morawetz's May 13, 2020 notice to the profession, in which His Honour calls upon all counsel and parties "to engage in every effort to resolve matters. For civil proceedings, this includes attendance at mediation – whether prescribed or not".[106] (emphasis added).

However, when we view the remarks of Chief Justice Morawetz, as well as those of the Supreme Court of Canada in *Hryniak*, through the prism of *Uber* it is tempting to be cynical: Are our courts not talking out of both sides of their mouths? On the one hand, they are imploring lawyers and litigants to move away from no-holds-barred combat towards a more collaborative approach, and with the other, they have arguably put their thumb on the wrong end of the scale and espoused unforgiving interpretive ideologies that promote microlevel litigation, which, in turn, perpetuates the cycle of mistrust and recrimination between employers and employees. This is hard to square with the ongoing calls for "cultural shifts" in civil litigation.

However, and at the risk of sounding naïve, I prefer to evaluate these developments in a less poignant manner. When looked at in other ways, *Uber* is actually a positive force. For instance, there is a saying in politics that the key to a successful coup is a failed one because the failed attempt exposes the weaknesses in the targeted government.[107] In this respect, *Uber* highlights many of the cracks in the plaster of court-centric models of adjudication.

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[106] Consolidated Notice to the Profession, "Litigants, Accused Persons, Public and the Media", Ontario Superior Court of Justice, (May 13, 2020) online: <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>

[107] *The Axe Files with David Axelrod,* Ep. 473 – Barton Gellman.

Second, *Uber* shines a bright light on the deep cleavages between "ADR zealots" and "adjudication romantics". Due process is ultimately about striking the right balance, so having a clear understanding of where the outer limit of each side's position is gives us a better sense of where the appropriate middle ground ought to be.

Finally, these jurisprudential developments, combined with the nefarious effects of the pandemic, have dehydrated our civil litigation environment to the point that it is now dry kindling for reform. As I said in the introduction of this paper, it appears that we no longer have any choice but to sacrifice some measure of tradition in order to make meaningful progress towards greater access to justice.

Mark Twain once said that "a great lawyer knows the law; a clever one takes the judge to lunch."[108] A more compelling (and more ethical) view is that a great lawyer hires the judge without anyone ever knowing about it.

[108] While it should be unnecessary, I nevertheless acknowledge the ethical problems raised by this statement.

Appendix "A" – Examples of Judicial Treatment of Arbitration Clauses

Arbitration Clause	Enforceable?
"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…"	Court of Appeal for Ontario: **NO**. The clause contracts out of section 96 of the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 (**ESA**). The clause is also unconscionable because it is blatantly one-sided, there was significant inequality in bargaining power, and the plaintiff had no reasonable prospect of negotiating its terms: *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (CanLII). Supreme Court of Canada: **NO**. The clause is unconscionable. There was significant inequality in bargaining power, the bargain was improvident and the cost to the plaintiff made arbitration "realistically unattainable": *Heller v. Uber Technologies Inc.*, 2020 SCC 16 (CanLII).
"All disputes arising out of or in connection with this contract, or in respect of any legal relationship associated therewith or derived therefrom, will be referred to mediation and, if unsuccessful, finally resolved by arbitration under the statutes of the Province of Ontario…"	Ontario Superior Court of Justice: **YES**. The governing law clause of the agreement expressly preserves the plaintiff's rights as provided by the ESA. The clause does not purport to remove the plaintiff's right to make a complaint to the Ministry of Labour, in light of the fact that the agreement itself grants express primacy to the ESA. Reading the employment agreement as a whole, the arbitration clause does not foreclose the plaintiff from making complaints to the Ministry of Labour: *Leon v. Dealnet Capital Corporation*, 2021 ONSC 3636 (CanLII).[109]

[109] This decision is currently under appeal to the Ontario Divisional Court. The hearing of the appeal was pending as of the date of this paper. See *Leon v. Dealnet Capital Corporation*, 2021 ONSC 7192 (CanLII).

Arbitration Clause	Enforceable?
"…should any dispute arise with respect to your employment or the termination of that employment, we both agree that such dispute shall be conclusively resolved by final, binding and confidential arbitration in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association (AAA) in San Diego, rather than by a jury court or administrative agency."	Ontario Superior Court of Justice: **NO**. The court held that there was not a valid arbitration agreement between the parties. However, had it found the agreement applicable, the court would have voided the clause on the basis that it is an impermissible contracting out of the ESA. More specifically, the court held that the clause requires that any dispute that arises from the plaintiff's employment must be determined by arbitration in California, and there was no evidence in the record as to what remedy the plaintiff could expect to obtain if he were successful in an arbitration in California: *Rhinehart v. Legend 3D Canada Inc.,* 2019 ONSC 3296 (CanLII).

Arbitration Clause	Enforceable?
"All matters in difference between the parties in relation to this agreement, excepting matters related to Confidential information, Non-Competition, Non-Solicitation, and Injunctive Relief, shall be resolved as follows: (a) [mediation provision] (b) If the parties cannot resolve their differences by way of mediation within a reasonable time, they shall refer the dispute to the arbitration of a single arbitrator. If the parties agree upon one, otherwise, to three arbitrators, one to be appointed by each party and third to be chosen by the first two named before they enter upon the business of arbitration. The award and determination of the arbitrator or arbitrators or any two of the three arbitrators shall be binding upon the parties and their respective heirs, legal representatives, successors, and assigns. The arbitration shall be conducted pursuant to the provisions of the *Arbitration Act* (British Columbia)."	British Columbia Supreme Court: **YES**. While "the Ontario Court of Appeal is persuasive authority and its judgments should be viewed with respect, it is not obvious that a statutory complaint/investigative mechanism becomes an employment standard itself rather than a procedure for enforcing employment standards." More importantly, there was no evidence of unfairness: *A-Teck Appraisals Ltd. v. Constandinou*, 2020 BCSC 135 (CanLII).[110]
"…any dispute between the parties hereto in respect of the interpretation of this Agreement or otherwise arising under this Agreement which cannot be resolved . . . will be determined by arbitration".	British Columbia Supreme Court: **YES**. The court followed the reasoning in *A-Teck*. A legislative complaint mechanism is not a minimum requirement. Furthermore, to find the clause unenforceable on that basis would promote uncertainly in contractual relations: *Wilson v. Infracon Construction Inc.*, 2020 BCSC 2074 (CanLII)

[110] It is important to note here that section 15(2) of the British Columbia *Arbitration Act*, R.S.B.C. 1996, c. 55 (**Old Act**), which applied in this case, is almost identical to section 7(2) of the AA. Section 15(2) states that where an applicable arbitration agreement exists, "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed." On September 1, 2020, the Old Act was replaced by the *Arbitration Act*, S.B.C. 2020, c. 2. Section 7(2) of the new legislation contains language identical to that found in section 15(2) of the Old Act.

Appendix "B" – Sample Arbitration Clause

DISCLAIMER: The following sample clause is not meant to be legal advice. It should not be relied upon or copied without modification. Each client's circumstances are different and require careful consideration when drafting an arbitration clause. For example, an arbitration clause requiring that the employee and employer each pay 50% of the arbitrator's fees may run afoul of the conscionability test set out in *Uber* if the employee earns a very modest salary.

(a) Final and binding arbitration: Subject to paragraphs (b) and (c) below, any dispute arising out of or in any way related to this Agreement shall be resolved by way of final and binding arbitration, as set out more fully below. The scope of this clause includes, but is not limited to:

- Any dispute between the parties arising out of or related to Employee's employment with the Company, or the end of the Employee's employment for any reason.

- Any dispute between the parties arising out of the construction, meaning or effect of any clause or matter contained in this Agreement.

- Any dispute regarding the nature and scope of the arbitrator's jurisdiction.

- All disputes, differences, controversies, or claims arising under, out of or relating to this Agreement, and any subsequent amendments to this Agreement, including without limitation, its formation, validity, binding effect, interpretation, breach or termination as well as any non-contractual claims.

("**Dispute**" or "**Disputes**").

Subject to paragraphs (b) and (c) below, any and all Disputes shall be resolved by final and binding arbitration in the Province of Ontario in accordance with the following provisions:

- This arbitration agreement shall be governed exclusively by the laws of the Province of Ontario.

- The arbitrator shall have the jurisdiction to rule on any and all Disputes between the parties.

- In the event of a Dispute, the aggrieved party shall provide 10 days' written notice to the other party setting out the nature of the Dispute.

- If the parties are unable to resolve the Dispute, then it shall proceed to arbitration [**Consider adding a provision requiring that the parties complete a mediation before they can proceed to arbitration, and if so, clarify whether the parties consent to the mediator arbitrating the dispute if mediation is unsuccessful – i.e., a med-arb**].

- The arbitration shall take place via Zoom [**Alternatively, select a mutually convenient location that is reasonably accessible to all parties**].

- The arbitration shall be conducted before a single arbitrator chosen by the parties, or if the parties cannot agree on an arbitrator, then before a single arbitrator appointed by ADR Chambers Inc. in accordance with the ADR Chambers Arbitration Rules.

- The arbitration shall be governed by the substantive law of Ontario. Procedurally, the arbitration shall be governed by the ADR Chambers Arbitration Rules.

- The cost of the arbitrator's fees and disbursements, inclusive of taxes, shall be shared equally by the parties.

- The Employer shall be responsible for any filing fee(s) or claim initiation fee(s).

- Any award made by the arbitrator, including an award of costs, may be enforced in accordance with the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the regulations thereto, as amended from time to time.

- Any orders made by the arbitrator, whether interlocutory or final, shall be /final and binding and may not be appealed.

- All arbitral proceedings, including any reasons of the arbitrator, whether written or oral, are confidential and may not be disclosed by the parties in any fora or to any non-parties save and except for the parties' spouses and legal and financial advisors, or except as otherwise permitted at law.

(b) No Contracting Out: This arbitration agreement does not bar the Employee from pursuing, invoking or initiating any enforcement procedure, process, right or entitlement of any kind pursuant to the *Employment Standards Act, 2000*, S.O. 2000, c. 41, the *Human Rights Code*, R.S.O. 1990, c. H.19, the *Occupational Health and Safety Act*, R.S.O. c. O.1, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, and the regulations thereto, as they may be amended from time to time, or any other similar legislation. For further clarity, under no circumstances will this clause prohibit the Employee from pursuing any right or entitlement, whether procedural or substantive, pursuant to the legislation referred to in this clause.

(c) Exception: Despite this arbitration agreement, and subject to paragraph (b), the parties understand and agree that in the event of any alleged violation of any of the covenants, terms and provisions contained in this Agreement, the Employer shall be entitled to obtain from any court of competent jurisdiction interim and permanent injunctive relief and an accounting of all profits and benefits flowing from such violation, which rights and remedies shall be cumulative and in addition to any other rights, damages or remedies to which the Employer might otherwise be entitled.