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The Futility of Mandatory Arbitration Clauses in Canada: Putting the Last Nail in the Coffin

Eric Tucker

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The Futility of Mandatory Arbitration Clauses in Canada: Putting the Last Nail in the Coffin

*Eric Tucker**

At issue in the Supreme Court of Canada's recent decision in Uber Technologies *was the ability of platform operators to rely on mandatory arbitration clauses in their contracts with platform workers to avoid judicial enforcement of statutory employment rights — in this case, the Ontario* Employment Standards Act. *The Supreme Court agreed that the clause in question was unconscionable and therefore invalid, but declined to comment on whether it was, in addition, an illegal contracting-out of the Act's provisions. However, the Court's ruling does little to resolve the larger question of what legal space exists for mandatory arbitration clauses in employment contracts. This paper discusses why such clauses are, by and large, an exercise in futility, and cannot achieve their ostensible purpose of barring access to remedies for violations of statutory employment rights. The author builds on this argument to suggest that there is an underlying principle of public policy that precludes contracting-out of public enforcement mechanisms for protective employment laws in the absence of specific statutory authorization. Examples include the remedial regimes for workers' compensation and human rights claims. It follows that a prohibition against contracting-out of employment standards legislation simply instantiates the broader principle that private agreements cannot lawfully deny access to an administrative remedy to vindicate statutory employment rights. The author urges that what is already implicit in Canadian employment law be made explicit.*

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* Osgoode Hall Law School, York University. An earlier version of the article was presented at a conference, "Uber v. Heller: Can Unconscionability Principles Answer When Not to Enforce Arbitration Agreements?", organized by the Queen's University Centre for Law in the Contemporary Workplace and the Canadian Journal of Commercial Arbitration, 22 January 2021. I would like to thank the other panelists and the participants for their comments and questions as well as the Journal's two anonymous reviewers. I would also like to thank Cameron Penn, a JD student at Osgoode Hall Law School, York University, for his research assistance and Boris Bohuslawsky for his expert editing.

1. INTRODUCTION

The issue of mandatory arbitration agreements in Canadian employment contracts did not attract much attention until Uber drivers in Ontario commenced a class action asserting that they were employees for the purposes of the *Employment Standards Act, 2000*[1] (*ESA*), and claiming $400 million in lost wages resulting from Uber's violations of the Act. Uber moved to have the action stayed in favour of arbitration in the Netherlands, based on a mandatory arbitration clause in its agreement with drivers in Ontario. Uber was initially successful. The Court rejected the drivers' arguments that the clause amounted to an illegal contracting-out of the *ESA* or that it was unconscionable. In any event, the Court strongly favoured the well-established competence-competence principle that allows arbitrators to determine their jurisdiction in the first instance.[2] The Ontario Court of Appeal (ONCA) overruled the lower court, holding that the agreement was both an illegal contracting-out and unconscionable.[3] The Supreme Court of Canada (SCC) upheld the ONCA's judgment, but only on the ground of unconscionability, not commenting on whether the clause was an illegal contracting-out.[4]

The purpose of this article is not so much to comment on the SCC's judgment or its, in my view, limited impact on the future use of mandatory arbitration clauses in employment contracts. Rather, I want to make two arguments. The first is that prior to the SCC judgment in *Uber Technologies*, the Canadian employment law landscape already severely limited the use of mandatory arbitration clauses and this is unlikely to change. The SCC's judgment adds one additional restriction, which is that in the limited sphere in which they are available, grossly one-sided clauses will not be enforceable. The argument that current law already severely limits the use of mandatory

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1 *Employment Standards Act, 2000*, SO 2000, c 41 [*ESA*].

2 *Heller v Uber Technologies Inc*, 2018 ONSC 718.

3 *Heller v Uber Technologies Inc*, 2019 ONCA 1 [*Heller* ONCA]. For a favourable comment, see U Coiquaud & I Martin, "Access to Justice for Gig Workers: Contrasting Answers from Canadian and American Courts" (2020) 75:3 RI/IR 582, online: <https://doi.org/10.7202/1072349ar>.

4 *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber Technologies*].

arbitration clauses in employment contracts is not a novel one,[5] but it is one that needs to be updated — both to remind lawyers why these clauses were so little used in Canada prior to *Uber Technologies*, and to take account of developments in Canadian law that reinforce the restrictions on their use. My second argument builds on the first, by identifying an emergent principle of public policy that explains our practice of not allowing mandatory arbitration clauses to become the exclusive remedy to enforce statutory employment rights without express statutory authorization. I conclude that this principle should be formally recognized by the judiciary and made explicit in employment statutes.

I begin with the argument about the near-futility of mandatory arbitration clauses, by considering the two basic means available to workers not covered by collective agreements for enforcing their employment rights: civil litigation and statutory or administrative remedies. My basic question is whether mandatory arbitration clauses can displace these enforcement mechanisms. In the case of civil litigation, we need to differentiate between its use to enforce contract claims and common law rights, on the one hand, and statutory claims on the other. Statutory or administrative remedies are only available to enforce statutory employment rights.[6] In the context of the latter discussion, I begin to identify an underlying principle, first developed in the context of labour arbitration, that explains why we generally do not permit private arbitration to preclude access to statutory remedies absent express statutory authorization. Once that assessment is completed, I conclude by arguing that we ought to make explicit what is already implicit in Canadian employment law. However, before

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5 John-Paul Alexandrowicz, "A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada" (2002) 23:4 Comp Lab L & Pol'y J 1007.

6 This is true even for individuals challenging wrongful dismissals under the *Canada Labour Code*, RSC 1985, c L-2, ss 240 et seq [the *Code*]. The *Code* stipulates what remedies are available to a wrongfully dismissed employee pursuing a statutory claim; see *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 64. Similar provisions exist in Nova Scotia and Quebec. In Nova Scotia, a court has held that common law principles may nevertheless inform the statutory remedy: *Abridean International Inc v Bidgood*, 2017 NSCA 65 at para 53.

reaching these issues I want to say a few words about the inefficacy of unconscionability as a doctrine to regulate mandatory arbitration clauses.

2. UNCONSCIONABILITY

The Supreme Court of Canada based its judgment entirely on the ground that the mandatory arbitration clause in the Uber contract was unconscionable. Fair enough. Its terms were egregiously one-sided. Imposed as part of boilerplate contracts of adhesion that drivers must accept as a condition of going on the app, the arbitration clause required arbitration in the Netherlands, imposed outlandishly high filing fees, prohibited class actions, etc. These terms provide clear evidence that the purpose of Uber's mandatory arbitration clause was not to provide access to an alternative dispute resolution mechanism, but to deprive Uber drivers of any realistic means of enforcing their contracts or seeking protection of statutory employment rights they claimed applied to them.

While the Court's unconscionability analysis will no doubt be of great interest to contract theorists,[7] it does little to resolve the larger question of the legal space for mandatory arbitration clauses in employment contracts.[8] The problem with resolving the enforceability of such clauses on the ground of unconscionability is that it simply invites hiring entities to revise their mandatory arbitration clauses until they come up with one that is conscionable. And that, indeed, is what Uber did. They revised their mandatory arbitration clause so that it is notionally an opt-in clause that does not deprive drivers of access to statutory remedies and reduces the cost of pursuing arbitration

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7 For an informative discussion of the unconscionability doctrine prior to the SCC's judgment, see John Enman-Beech, "Unconscionable Inaccess to Justice" (2020) 96 SCLR (2d) 77.

8 The decision is also likely to renew attempts to use unconscionability to challenge other terms in employment contracts, such as termination clauses. Prior to *Uber Technologies*, such claims have rarely succeeded; see e.g. *Burton v Aronovitch Macaulay Rollo LLP*, 2018 ONSC 3018. Unconscionability claims were more likely to succeed in challenges to settlement agreements; see e.g. *Rubin v Home Depot Canada Inc*, 2012 ONSC 3053.

compared to the costs of suing in court. What is preserved is a bar to class actions.[9]

I do not know whether a court would hold that this clause is unconscionable. I also do not know whether to be conscionable a clause must allow workers to pursue statutory claims through the administrative remedies established for their vindication, a point apparently conceded by Uber.[10] As a practical matter, the SCC has simply kicked the can down the road, leaving it to future cases to determine the boundaries of a conscionable mandatory arbitration clause depending on its individual facts. If we are only concerned with mandatory arbitration clauses from a private law perspective, which is the source of unconscionability, in principle it should be possible to draft mandatory arbitration clauses, possibly including clauses that bar access to class actions or to administrative enforcement, that are conscionable. A stronger blow against the use of mandatory arbitration clauses in employment contracts could have been struck by an interpretation of the *ESA* that barred such clauses as unlawful contracting-out. In fact, that is the position in Ontario, where the ONCA decision stands, thus precluding mandatory arbitration clauses that prevent workers from seeking to enforce the *ESA* either through judicial or administrative enforcement. However, even if the Court had affirmed that part of the ONCA's judgment, it would not have resolved the question of whether mandatory arbitration clauses could bar access to other statutory enforcement mechanisms unless they too, expressly or by implication, prohibit contracting-out of the statutory scheme. I argue that this is the wrong foundation upon which to assess the legality of mandatory arbitration clauses that seek to bar access to statutory remedies. Rather, as I hope to demonstrate, there

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9 This observation is based on an affidavit, ONSC Court File No CV-17-567946-00CP, provided to the author from counsel representing Uber drivers in the continuing class action against Uber following *Uber Technologies*.

10 Justice Brown's alternative, striking the clause down on the ground that it violated public policy insofar as it barred access to justice in any forum, suffers from similar problems. Presumably, Uber's revised clause would not fall afoul of this public policy, but it still might bar access to statutory enforcement, unless that too was held to be void as against public policy. See *Uber Technologies*, *supra* note 4 at para 102. While there might be other reasons to prefer Brown's judgment, this is not one of them. See e.g. Alan Bogg, "'Labour Law is a Subset of Employment Law' Revisited" (2020) 43:2 Dal LJ 1 at 28-31.

is an emergent public law principle, already implicit in Ontario law, that access to statutory remedies is protected unless preclusions are expressly or by necessary implication permitted by statute. Therefore, we turn to an examination of the permitted scope of mandatory arbitration clauses under current Canadian (Ontario) law,[11] beginning first with civil litigation and then turning to statutory or administrative enforcement mechanisms.

3. CIVIL LITIGATION

In principle, workers might sue in court to enforce the terms of their individual contracts of employment and their statutory employment rights. However, as we shall see, unlike in the United States where a litigation model plays a major role in enforcing both common law and statutory rights,[12] workers in Ontario generally sue only to enforce contract claims, not statutory rights. So we begin with a consideration of the role of mandatory arbitration clauses in limiting access to judicial enforcement of contract claims, whether express or implied, before turning to statutory claims.

(a) Contract Claims

The principal cause of action in litigation brought by workers against employers is wrongful dismissal. According to the default position at common law, a Canadian employer can terminate an employee hired on a contract of indefinite duration for any reason (except an unlawful one) by providing reasonable notice. Summary dismissal without notice requires cause. Wrongful dismissal actions by employees may contest the employer's claim that there was just

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11 The focus is on Ontario statutes and case law. I have not attempted to conduct a comprehensive analysis of statutory labour rights enforcement in Canada. Hence, it may be the case that statutes in other jurisdictions provide greater scope for preclusion by arbitration clauses. If that is the case, then the need to enact legislation to make explicit the principle that private agreements cannot preclude access to statutory enforcement mechanisms is even more compelling.

12 Alan Hyde, "The Crisis in the US Litigation Model of Labour Enforcement" in Elizabeth Shilton & Karen Schucher, eds, *One Law for All: Weber v Ontario Hydro and Canadian Labour Law, Essays in Memory of Bernie Adell* (Toronto: Irwin, 2017) 301.

cause or challenge the length of notice or other termination benefits offered by the employer.[13] This is the bread-and-butter of civil litigation in employment law. Can a conscionable mandatory arbitration clause require employees to pursue wrongful dismissal claims through private arbitration and preclude access to judicial enforcement?

Under our current law, the answer to that question must surely be "yes." After all, freedom of contract allows the parties to bargain over the terms of their agreement. It is hard to see on what basis they could be precluded from bargaining over the procedures for the contract's enforcement. Of course, the parties must do this within the limits of general contract law, since unconscionable contracts or contracts that violate public policy are unenforceable. But our law concedes that mandatory arbitration contracts are neither *per se* unconscionable nor void as against public policy.

That leaves unanswered the question of whether we *should* prohibit mandatory arbitration clauses that prevent the employees from going to court to enforce their individual contracts of employment. My inclination is to not be overly concerned about such mandatory arbitration clauses. Although there is little empirical data on the incidence and role of arbitration clauses in individual employment contracts, the limited available evidence indicates that outside the context of platform work they have been uncommon. The very fact that researchers and worker advocates in Canada showed little interest in the topic prior to the *Uber Technologies* case supports this view. So does a review of reported case law, which indicates that mandatory arbitration clauses were mostly found in the employment contracts of senior executives and professionals, often where the employer was an American-based company.[14] It is likely that these

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13 For a general discussion of wrongful dismissal law in Canada, see Peter M Neumann and Jeffrey Sack, *eText on Wrongful Dismissal and Employment Law*, 1st ed (Lancaster House, 2012) (updated 2020, 11th update), online: CanLII, 2012 CanLIIDocs *1* <canlii.ca/t/nc>. See also Geoffrey England, Peter Barnacle & Innis M Christie, *Employment Law in Canada*, 4th ed (Toronto: LexisNexis, 2005) (loose-leaf updated 2021, Issue 100), ch 16.

14 It is possible that mandatory arbitration clauses are more widespread than the reported case law suggests, since low-paid workers are probably less likely to challenge them, but keep in mind that common law courts have reduced the importance of status in the calculation of reasonable notice, increasing workers' incentive to sue for wrongful dismissal damages.

were not unconscionable contracts of adhesion, but were agreements negotiated between sophisticated parties who made informed judgments that private arbitration was preferable because of the speed and privacy that it offered.[15] Moreover, because the most commonly litigated issue is wrongful dismissal, which is not amenable to class actions, employers have little need to insert contract clauses that preclude such actions.

Perhaps we should be concerned that mandatory arbitration clauses will be used to discourage terminated employees from seeking wrongful dismissal damages or to channel these claims into a dispute resolution system that will provide less generous awards. However, if that is the employer's goal, there is a more efficient way of achieving the result, which is to directly limit the notice period and related entitlements by contract to something less than what the common law would provide, but at least as much as the statutory minimum. In principle, such agreements are enforceable, although courts have made it difficult to draft such clauses by holding employers to a high standard in order to ensure that the agreement does not provide less than the statutory minimum and that its terms are clear and unambiguous.[16] Yet, despite strict scrutiny, some termination clauses are upheld and, over time, employer-side lawyers will probably learn how to write iron-clad ones.[17] Mandatory arbitration clauses would not be needed to achieve indirectly what can be achieved directly.

That still leaves us with the question of mandatory arbitration clauses in platform-mediated work contracts. After *Uber Technologies*, at the very least, these clauses must be conscionable. But should we even permit conscionable mandatory arbitration

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15 For one example of the context in which mandatory arbitration clauses have been litigated, see *Ross v Christian & Timbers, Inc*, [2002] OJ No 1609, 2002 CarswellOnt 1453. For a brief discussion of the reasons for including arbitration clauses in employment contracts, see Jennifer Wiegele, "Arbitration Clauses in Employment Contracts" (May 2013) at 2.1.14, online (pdf): *Kent Employment Law* <kentemploymentlaw.com/wp-content/uploads/2013/06/Arbitration-Clauses-in-Employment-Contracts.pdf>.

16 *Machtinger v HOJ Industries*, [1992] 1 SCR 986, 91 DLR (4th) 491 [*Machtinger*]; *Waksdale v Swegon North America Inc*, 2020 ONCA 391.

17 *Amberber v IBM Canada Ltd*, 2018 ONCA 571. Admittedly, writing enforceable termination clauses is still challenging. See e.g. *Andros v Colliers Macaulay Nicolls Inc*, 2019 ONCA 679.

clauses that bar access to the courts to enforce platform contract claims? Unlike mandatory arbitration clauses in the employment contracts of senior executives and professionals, such clauses are not the product of negotiation between two reasonably well-informed and resourced parties. Rather, they are boilerplate clauses imposed by the platform operator, presumably for its own advantage. But so too are the substantive terms of the contract, which as I have argued elsewhere are designed to enable the platform operator to exploit the labour of platform workers.[18] From this perspective, while mandatory arbitration clauses that limit access to the courts and prohibit class actions to enforce the terms of the contract are undesirable, they are the tip of an iceberg whose character and shape will not be substantially altered if they are disallowed. Moreover, the evil here is not the deprivation of the ability to enforce the terms of the contract, but the removal of the employees' ability to challenge misclassification in order to be able to gain access to protective statutory employment rights, a subject to which we will turn later.

(b) Statutory Claims

In Canada, unlike the United States, statutory employment rights are not normally enforceable in courts. Breach of a statute does not automatically give rise to a cause of action.[19] Therefore, the right to sue to enforce statutory rights depends on whether the legislature intended to provide such a right, and this is rarely found to be the case. However, there are exceptions. The *Uber Technologies* case itself is an example of an instance in which civil actions are permitted to enforce the *ESA*. In what follows, I argue that mandatory arbitration clauses to prevent civil litigation to enforce statutory employment rights are mostly unnecessary because such actions are rarely permitted in the first place. Second, in the context of the *ESA*, the principal goal of such clauses is to prevent class actions. While class actions

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18 Eric Tucker, "Towards a Political Economy of Platform Mediated Work" (2020) 101:3 Studies in Political Economy 185.

19 *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 143 DLR (3d) 9. For discussion, see Lewis N Klar, "Breach of Statute and Tort Law" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 31.

can be an important enforcement tool, they are available only in very limited circumstances. Finally, I argue that the *ESA*'s administrative enforcement system provides a substitute for class actions, although one that admittedly is also flawed.

Statutory employment rights are rarely enforceable in court. Two illustrations will suffice to make this point. The great majority of employees who are injured at work are covered by statutory workers' compensation schemes.[20] These statutes make workers' compensation the exclusive remedy, so that employees cannot bring a tort action against their employers even if the injury was caused by gross negligence.[21] In addition, the statute provides a complete code for compensation claims, including a system of appeals, and it is not possible to sue for statutory workers' compensation benefits or to sue the workers' compensation board for an alleged breach of its duty to pay compensation for work-related injuries. At best, one can invoke the courts' supervisory jurisdiction and seek judicial review of an unfavourable decision.

The second illustration is the prohibition against employment discrimination under human rights legislation.[22] The SCC has held that the statute provides a comprehensive framework for enforcing the legislation, leaving no scope for a civil cause of action for its breach. As well, the Court has held that there is no tort of discrimination. As a result, human rights violations committed by private employers cannot be pursued in court.[23]

Since we generally do not allow civil actions to enforce statutory employment rights in the first place, a mandatory arbitration clause to prevent judicial enforcement may seem pointless. However, as we

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20 For coverage rates, see "Detailed Key Statistical Measures (KSM) Report – 2019" (2019), online: Association of Workers' Compensation Boards of Canada <awcbc.org/en/statistics/ksm-annual-report/>.

21 *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sched A, ss 26-31 [*WSIA*]; see also England, Barnacle & Christie, *supra* note 13 at § 9.58.

22 See e.g. *Human Rights Code*, RSO 1990, c H.19 [*HRC*].

23 *Board of Governors of Seneca College v Bhadauria*, [1981] 2 SCR 181, 124 DLR (3d) 193. The small exception in Ontario is that if in a civil proceeding not based solely on an infringement of the *Human Right Code* a court finds that a party has unlawfully discriminated against another party to the proceeding, it may order monetary damages or direct non-monetary restitution for loss arising out of the infringement. See *HRC*, *ibid* at s 46.1.

know, in Ontario and most other Canadian jurisdictions, employees can sue for money that is owed as a result of a breach of the *ESA* (or the relevant employment standards legislation), including failure to pay the minimum wage, statutory holiday pay, vacation pay, etc.[24] The original basis for allowing such actions was that the provisions of the *ESA* were non-waivable implied terms of the contract of employment.[25] However, the *ESA* now clearly contemplates that employees have the option of suing in court or pursuing a complaint under the *ESA*.[26] Moreover, class actions have been successfully pursued with regard to misclassification and failure to pay overtime under various employment standards laws, including Ontario's *ESA*.[27] This is the strategy being used to challenge the (mis)classification of Uber drivers as independent contractors and to claim damages of $400 million for breaches of the *ESA*. Mandatory arbitration clauses that barred civil actions generally, and class actions in particular, would foreclose this valuable enforcement avenue if they were held to be valid.

Civil litigation and class actions to enforce statutory employment standards, where authorized by statute, clearly have a role to play in making these statutory rights real, and I argue later that we should protect the right to bring such actions. However, I think that it is also important to put into perspective the relative importance of

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24 For a general overview, see Neumann & Sack, *supra* note 13 at ch 20. British Columbia appears to be the only exception (see *Giza v Sechelt School Bus Service Ltd*, 2012 BCCA 18 at para 52), although class actions to enforce *ESA* violations may be permitted (see *Dominguez v Northland Properties Corp*, 2012 BCSC 328 at paras 229-237).

25 *Stewart v Park Manor Motors Ltd* (1967), [1968] 1 OR 234, 66 DLR (2d) 143 (CA); Stacey Reginald Ball, *Canadian Employment Law* (Toronto: Thomson Reuters Canada, 1996) (loose-leaf updated March 2021) at 22.100.6. Judicial enforcement of minimum standards may not be available in all Canadian jurisdictions.

26 *ESA*, *supra* note 1 at ss 8, 97-98.

27 See e.g. *Rosen v BMO Nesbitt Burns Inc*, 2013 ONSC 2144 (misclassification, unpaid overtime, $12 million settlement); *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 (overtime, over $50 million settlement) and *Fresco v Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (overtime), both decided under Part III of the *Code*, *supra* note 6. Ontario cases include *Walmsley v 2016169 Ontario Inc*, 2020 ONSC 1416 (misclassification, $2.5 million settlement) and *Eklund v Goodlife Fitness Centres Inc*, 2018 ONSC 4146 (unpaid hours and overtime, $7.5 million settlement).

class actions — arguably the major target of mandatory arbitration clauses — in enforcing the *ESA*, by taking into account the limited circumstances in which such actions can be brought as well as the availability of an administrative enforcement mechanism that could provide a class remedy.

There is, of course, the obvious point that class actions will only be certified where there is a common issue. Misclassification and company-wide hours-of-work policies are therefore candidates for class actions, and have been permitted to go forward. However, the majority of employment standards violations are not of this kind, but rather are individual claims based on their particular facts. The greatest number of claims are for unpaid wages, followed by termination pay violations.[28] Such violations are unlikely to be amenable to class actions because of the difficulty of establishing a common issue, and my research has not identified a reported class action based on these kinds of violations. Moreover, even when there are common issues and the prospects of success are good, class actions are only likely to be brought if the size of the damages award for the class is large enough to make the action economically worthwhile to law firms and/or third-party investors.[29] Given that the median monetary claim under the *ESA* is approximately $1,250.00,[30] a very large number of employees would need to be in the class before a law firm would be willing to take the case. In 2019, nearly 70 percent of employees in Canada worked for firms with fewer than 100 employees, while only

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28 Leah Vosko et al, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 66.

29 Camille Cameron, Jasminka Kalajdzic & Alon Klement, "Economic Enablers" in Deborah R Hensler, Christopher Hodges & Ianika Tzankova, eds, *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Northampton, Mass: Edward Elgar, 2016) 137 at 159: "While some lawyers choose to pursue a particular class action for ideological reasons, most decide to initiate a suit because of the likelihood of success coupled with the potential size of the damage award . . . . The economic incentive created by contingency fees is what drives class actions in Canada." To get a sense of the kinds of collective damages that attract class actions, see cases cited *ibid* at 137-168.

30 Vosko, *supra* note 28 at 64. The *ESA*, *supra* note 1 at s 111(1), only allows recovery of wages owing in the two years prior to the date of the complaint.

a little more than 10 percent worked for firms with 500 or more.[31] Thus, while class actions are a valuable instrument in some circumstances, they are unlikely to aid the vast majority of workers who suffer employment standards violations.

The second point is that the *ESA*'s administrative enforcement regime itself provides for class claims of a sort (at least in Ontario). To explain how this works, it is necessary to provide a brief overview of *ESA* enforcement. Basically, the *ESA* is enforced through a combination of reactive investigations and proactive inspections. Reactive investigations are triggered by complaints, while proactive inspections are conducted according to provincial and regional plans, or on the initiative of an individual Employment Standards Officer (ESO) based on tips or other intelligence. There is a bridge between reactive investigations and proactive inspections called "expanded investigations." If an ESO begins a complaint investigation and becomes aware that the violation complained of has been experienced by other employees of the same employer, the ESO is required to record it as an "expanded investigation event," which triggers a high-priority inspection.[32]

Thus, we can imagine two different scenarios. The first is that a single Uber driver files a complaint that she is misclassified as an independent contractor in violation of s. 5.1 of the *ESA* and that, as a result, she has not been paid the minimum wage, vacation pay, holiday pay, etc. The ESO begins an investigation and quickly realizes that this is not an individual problem, but one that affects all Uber drivers. The ESO records an "expanded investigation event" triggering a full inspection. Alternatively, an ESO could decide on her own initiative to inspect Uber to determine whether any of the above violations are occurring. Either way, the result is the same. An inspection is launched to determine whether Uber drivers are covered by the *ESA* and, if so, whether their rights have been violated.

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31 Innovation, Science and Economic Development Canada, "Key Small Business Statistics – 2020" (2020) at 2.2, online: <www.ic.gc.ca/eic/site/061.nsf/eng/h_03126.html#2.2>.

32 See Ontario Ministry of Labour, *Administrative Manual for Employment Standards* (Toronto: 2013) at 4.5.1-4.5.3 [*AMES*]. For discussion of inspections, see Vosko et al, *supra* note 28 at ch 2.

The ESO's powers of inspection include the authority to require the production of records, to remove or copy records, and to question any person on matters that may be relevant to the inspection or investigation. Persons in possession of requested records must provide them, and it is a violation of the *ESA* to hinder, obstruct, or interfere with an ESO conducting an investigation or inspection.[33] If the ESO makes a finding that the workers are employees, the ESO can also issue an order to pay that covers all the affected employees.[34] If necessary, forensic accountants can be brought in to assist in the calculation of what is owing.[35] If either the employer or the workers are dissatisfied with the ESO's order or failure to make an order, they can apply for a review by the Ontario Labour Relations Board, whose decision is subject to judicial review.[36]

There is more to the scheme, including the potential for employers to be penalized for their violations. But that is not my concern here. Rather, the point is that the very same collective claims that can be pursued through a class action can also be pursued through the administrative enforcement powers under the *ESA*. Moreover, this can be done at no cost to the workers making the claim and it can be done for small groups of workers for whom class actions would not be economically viable.

I want to be clear that I am not uncritical of the *ESA* enforcement regime. I have been involved in a multi-year, multi-disciplinary project studying *ESA* enforcement. Among many other problems, we found that an over-reliance on reactive enforcement works poorly for the most vulnerable workers who are the least likely to file complaints, and that a compliance orientation means that employers who violate the law can expect that in the overwhelming majority of cases, they will at worst be required to pay workers what they are owed, if the violations are detected, and will not be penalized.[37]

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33 *ESA*, *supra* note 1 at s 91.

34 *Ibid* at s 103(3).

35 See e.g. *550551 Ontario Ltd v Framingham* (1991), 4 OR (3d) 571, 82 DLR (4th) 731.

36 *ESA*, *supra* note 1 at ss 116, 119(14).

37 For a sample of our research findings, see Vosko et al, *supra* note 28; Eric Tucker et al, "Carrying Little Sticks: Is there a 'Deterrence Gap' in Employment Standards Enforcement in Ontario, Canada?" (2019) 35:1 Int'l J Comp Lab L & Ind Rel 1.

Regardless of the advantages and disadvantages of class actions compared to administrative investigations and inspections, the more important point is that even if a mandatory arbitration clause successfully barred civil suits and class actions to enforce the *ESA*, it would not foreclose access to an administrative remedy through which the class interests of a group of workers could be pursued. This assumes that the mandatory arbitration clause does not also bar access to statutory enforcement mechanisms, the question to which we now turn our attention.

4. STATUTORY ENFORCEMENT MECHANISMS

Can mandatory arbitration clauses lawfully prevent workers from accessing statutory enforcement mechanisms? As long as there is no general statutory prohibition or *per se* rule that such clauses are void as against public policy, we have to turn to each statute for an answer. Of course, we know that the ONCA held that a mandatory arbitration clause cannot preclude access to civil litigation or administrative enforcement of the *ESA*. I will return to that holding shortly, but first I want to consider whether mandatory arbitration clauses can preclude access to the statutory enforcement mechanisms of the two statutory schemes we have already considered, the *Workplace Safety and Insurance Act* (*WSIA*) and the *Human Rights Code*. Then, after returning to the *ESA*, I will use these examples to argue there is an implicit principle that private contracts cannot bar access to statutory enforcement regimes without express statutory authorization. As a result, the likelihood of a court finding that a mandatory arbitration clause precludes such access is low. Nevertheless, I recommend that this principle be made explicit through legislation.

As we noted earlier, the *WSIA* creates an exclusive remedial regime for employees of employers covered by the Act who suffer work-related injuries. Compensation is paid out of a state-administrated insurance fund financed by employer-paid premiums.[38] Employers are obliged to notify the board that administers the scheme of a work accident that requires health care or causes a wage loss, and the board determines whether the injury is compensable and the

38 In Ontario some employers self-insure but are otherwise subject to the rest of the scheme.

amount of compensation that is due.[39] The statute specifies that the board has exclusive jurisdiction to "examine, hear and decide all matters and questions, except where the Act provides otherwise"[40] and is vested with both investigative and adjudicatory powers.[41] Clearly, there is no space for arbitration to displace the exclusive jurisdiction of the board in the absence of an express statutory authorization, and there is none. Similarly, a mandatory arbitration clause in a contract cannot relieve the employer of its statutory duty to report work injuries. Private arbitration of workers' compensation claims and obligations is simply inconsistent with the scheme of the *WSIA*.

The human rights scheme in Ontario, among other jurisdictions, is enforced rather differently. Complaints or applications are made directly to the Human Rights Tribunal (HRT), where they are adjudicated based on evidence presented by the complainant and respondent.[42] Nevertheless, unlike the *WSIA*, the scheme is not incompatible with an arbitration clause. It is true that there is no duty to report, and the HRT is not given exclusive jurisdiction to adjudicate human rights complaints. Indeed, the province's labour relations legislation contains a provision empowering labour arbitrators to interpret and apply human rights and other employment-related statutes when adjudicating grievances under a collective bargaining agreement.[43] Therefore, unionized employees can pursue human rights complaints through the grievance process. However, it is also clear that grievance arbitration is not the exclusive forum available to unionized employees; they can also apply to the HRT. For example, in an early judgment from Alberta, upholding the jurisdiction of a board of inquiry to hear a human rights complaint made by a unionized employee, the Court held: "Neither the board of inquiry nor this Court can or should relieve a person who has contravened the Act from an order which would normally be made against him because

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39 *WSIA*, *supra* note 21 at ss 21, 43-66.

40 *Ibid* at s 118(1).

41 *Ibid* at ss 132, 135.

42 The tribunal is empowered to appoint a person to conduct an inquiry as part of the adjudication process (*HRC*, *supra* note 22 at s 44) but that is uncommon. Indeed, a search of HRTO decisions only identified decisions rejecting applications for an inquiry, largely on the basis that the normal production process was adequate. See e.g. *Kondos v RGIS Canada*, 2018 HRTO 322.

43 *Labour Relations Act, 1995*, SO 1995, c 1, Sched A, s 48(12)(j).

the complainant could have chosen to proceed by arbitration."[44] Although prior to 2006 the HRT had the power to refuse to hear a claim by a unionized employee on the basis that it would be better addressed in another forum, i.e. the grievance and arbitration process under a collective agreement, that power was removed. Sections 45 and 45.1 of Ontario's *Human Rights Code* now provide that the HRT may defer an application and may dismiss an application if "another proceeding has appropriately dealt with the substance of the application." While the power to dismiss only applies where the matter has already been brought in a different forum, the power to defer must be exercised according to the HRT's rules. Rule 14 gives the tribunal broad authority to defer consideration of an application, but that power is chiefly exercised on the ground that the matter is being dealt with in another proceeding. It does not seem to contemplate deferrals of matters over which the HRT has jurisdiction but that have not already been brought in another forum.[45] Therefore, it does not seem that the HRT would transform its power to defer into a power to compel a unionized employee to seek a remedy through grievance arbitration. It is also highly unlikely that a clause in a collective agreement requiring that all human rights complaints be pursued through arbitration would be enforceable, since that would involve contracting-out of a statutory enforcement mechanism and would usurp the powers of the HRT to determine whether to hear the case.

This interpretation of the statute is reinforced by Supreme Court of Canada jurisprudence. Although this jurisprudence generally supports the proposition that grievance arbitrators have a broad and exclusive jurisdiction over issues related to conditions of employment, provided those issues have an express or implicit connection to the collective agreement, the SCC has recognized that in some instances the arbitrator and a tribunal may have concurrent jurisdiction.[46]

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44 *Re Attorney-General for Alberta and Gares et al* (1976), 67 DLR (3d) 635 at 693, 1976 CanLII 1116 (AB QB) [*Gares*].

45 A human rights tribunal cannot hear a matter that by law must be determined elsewhere. See *Québec (Attorney General) v Québec (Human Rights Tribunal)*, 2004 SCC 40.

46 *Weber v Ontario Hydro*, [1995] 2 SCR 929, 125 DLR (4th) 583; *Québec (Commission des droit de la personne et des droits de la jeunesse) v Québec (Procureure générale)*, 2004 SCC 39; *Tranchmontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14.

While the existence of concurrent jurisdiction is said to depend on legislative intent, the quasi-constitutional nature of human rights has led the Court to favour wide accessibility to multiple forums for their enforcement. As a result, Canadian courts have refused to find that the principle favouring arbitral exclusivity applies to human rights complaints in the absence of clear and unequivocal statutory language.[47]

How, then, might a tribunal or a court address a mandatory arbitration clause that purported to prevent a non-unionized employee from bringing a human rights complaint before a statutory tribunal? I predict that such a clause would not be enforced. If the complaint was originally filed with a tribunal and its jurisdiction was challenged by the respondent, the tribunal would almost certainly conclude that it was required by statute to accept the complaint, since the statute did not permit it to dismiss the complaint based on a mandatory arbitration clause in the employment contract. Alternatively, if the employer applied to have the application deferred because of the mandatory arbitration clause, I suspect the HRT would reject the application since it typically exercises its power to defer when a proceeding has already been brought in another forum. Finally, if an employer went to court to enforce the arbitration clause and prohibit the tribunal from asserting jurisdiction, I expect that the court would refuse to do so, both because of the language of the statute and for the same reasons that courts have refused to find that grievance arbitrators enjoy exclusive jurisdiction: human rights are quasi-constitutional in nature and, therefore, wide accessibility to the statutory bodies created to protect them should be favoured, unless there is clear and unambiguous statutory language limiting access.

This brings us to the question of whether a mandatory arbitration clause can bar access to the *ESA*'s statutory enforcement mechanisms. As we know, the ONCA held that it could not. It did

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47 See e.g. *Naraine v Ford Motor Co of Canada* (2001), 400 DLR (4th) 526 (*sub nom Ontario (Human Rights Commission) v Naraine*) 2001 CanLII 21234 (ON CA). For an informative discussion, see Shelley McGill & Ann Marie Tracey, "Building a New Bridge over Troubled Waters: Lesson Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims" (2011) 20:1 Cardozo J Int'l & Comp L 1 at 32-45. On complications arising from concurrent jurisdiction, see Owen V Gray, "The Arbitration of Human Rights Issues in Canada" (January 2012), online: National Academy of Arbitrators <naarb.org/2012-437/>.

so on the basis that the *ESA* specifically prohibits contracting-out of or waiving an "employment standard," and that the investigative process provided by the statute is an "employment standard."[48] While that holding is conclusive for Ontario, it is framed in a way that is arguably restricted to the statute's language and may imply that arbitration clauses barring access to employment standards legislation in other jurisdictions might be enforceable, depending on whether the legislation in question specifically prohibits contracting-out of administrative enforcement of its provisions.[49] Nonetheless, I would argue that there is an implicit principle, reflected in Ontario employment legislation, that contracting-out of statutory enforcement mechanisms in protective employment laws is unlawful unless specifically authorized by statute.

As noted earlier, the *ESA* enforcement regime involves both reactive and proactive inspections. ESOs are empowered to enter any place without a warrant to investigate a possible contravention.[50] Inspections can take place without a complaint. Surely, no private agreement can oust the ESO's statutory authority to conduct proactive investigations. So, at the very least, an arbitration clause that purported to preclude enforcement officers from exercising the proactive powers of inspection must be void and of no effect. That leaves open the question of whether a private agreement can prevent an enforcement officer from acting on a complaint, even if that private agreement obligated workers to bring complaints before an arbitrator. Here again, I think that a court would be very reluctant to hold that private agreements can preclude the exercise of statutory rights or prevent government officials from exercising statutory powers that the complaint triggers. Rather, any such preclusion should depend on the existence of express statutory authorization to limit the right to file complaints and the power to investigate them.

The *ESA* provides a clear example of how this principle operates in practice. The *ESA* originally did not prevent workers covered

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48 *Heller* ONCA, *supra* note 3 at paras 28-36.

49 Based on this kind of reasoning, mandatory arbitration clauses ousting access to the complaints process in British Columbia have been upheld even after the SCC judgment in *Uber Technologies*; see *Wilson v Infracon Construction Inc*, 2020 BCSC 2074.

50 *ESA*, *supra* note 1 at s 91(1).

by a collective agreement from pursuing a claim. In 1974, the Act was amended to give the Director the discretion to refuse to institute a proceeding where a remedy was available under a collective agreement.[51] However, the Director did not exercise this discretion to preclude unionized employees from making *ESA* claims, and an officer's jurisdiction to issue an order against a unionized employer was upheld when challenged. In a statement approved by the Court, the referee rejected the employer's estoppel argument for barring the complaint on the basis of the collective agreement, stating that "the union is the exclusive bargaining agent of employees for the purposes of collective bargaining, not for purposes of complaining or not complaining, of a violation of the *Employment Standards Act*."[52]

In 1996, Ontario's newly-elected Conservative government amended the *ESA* to preclude unionized employees from accessing the statute's complaints regime. This limited unionized employees to grievance arbitration as their exclusive remedy, subject to the discretion of the Director to permit a complaint "if the Director considers it appropriate in the circumstances."[53] It is important to note, however, that the legislature did not choose to prevent ESOs from conducting proactive inspections of unionized firms. Although it is the policy of the Ministry not to inspect unionized workplaces except in exceptional circumstances, it has the power to do so.[54]

Clearly, in the absence of a statutory provision that requires unionized employees to pursue complaints through grievance arbitration, they would have a choice between complaining to an ESO or requesting the union grieve on their behalf. This mirrors the arrangement for enforcing human rights complaints. If the general principle favouring the resolution of disputes arising in the collective bargaining context through grievance arbitration does not displace the competing principle that workers have access to statutory

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51 *Employment Standards Act, 1974*, SO 1974, c 112, s 64.

52 *Leisure World Nursing Homes Ltd v Ontario (Director of Employment Standards)* (1980), 29 OR (2d) 144, 112 DLR (3d) 540 (Div Ct).

53 *ESA*, *supra* note 1 at s 99. There is no record of the Director permitting a complaint by a unionized worker to proceed.

54 The *AMES* permits inspections in exceptional circumstances and with the approval of the Director of Employment Standards, which must be sought through the regional program coordinator and manager. See *AMES*, *supra* note 32 at 4.7.1.

enforcement mechanisms absent express statutory stipulation, then surely a policy favouring private arbitration of employment disputes in the non-unionized context should be similarly limited.

I do not mean to suggest that the grievance arbitration system is flawless. While industrial pluralists touted grievance arbitration as a key component of industrial citizenship, which provides fair and just enforcement of agreements reached between parties with relatively equal bargaining power, critical scholars such as Daniel Drache and Harry Glasbeek have emphasized its role in making unions managers of discontent.[55] Even among those who are more supportive, there is recognition of growing delays.[56] Yet, despite these criticisms, grievance arbitration in the collective bargaining context is still generally viewed by those who accept industrial pluralist premises as providing a fair and effective system of dispute resolution. Private arbitration of employment disputes outside the unionized context has been subject to much harsher criticism, given that its terms are unilaterally imposed without a meaningful opportunity for negotiation, disputes are often wrapped in confidentiality so that neither the dispute nor its resolution are visible to the public, and American research has shown that very few cases are brought to arbitration.[57]

In sum, we should view the *ESA* not as an exception but as an instantiation of the principle that access to statutory enforcement and the exercise of statutory enforcement powers by public officials are displaced only by express statutory provision. This principle underlies the design of the workers' compensation and human

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55 HW Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45:4 Can Bar Rev 786; Daniel Drache & Harry Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: James Lorimer & Co, 1992), ch 7.

56 Hon Warren K Winkler, Chief Justice of Ontario, "Arbitration as a Cornerstone of Industrial Justice" (2011), online: Ontario Courts <www.ontariocourts.ca/coa/en/ps/speeches/2011-arbitration-cornerstone-industrial-justice.htm>; Bruce Curran, "Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Denied?" (2017) 72:4 RI 621; Kevin Banks, Richard Chaykowski & George Slotsve, "Labour Rights Arbitration in Canada: An Empirical Investigation of Efficiency and Delay in a Changed Legal Environment" (2020) 22:2 CLELJ 231.

57 For example, see Cynthia Estlund, "The Black Hole of Mandatory Arbitration Clauses" (2018) 96:3 NCL Rev 679; Katherine VW Stone & Alexander JS Colvin, "The Arbitration Epidemic, Briefing Paper #414" (7 December 2015), online: Economic Policy Institute <www.epi.org/publication/the-arbitration-epidemic/>.

rights regimes, and likely any protective statutory employment rights regime. Regardless of one's views about the desirability of requiring unionized employees to pursue *ESA* claims through grievance arbitration,[58] it is a clear example of the implicit principle that statutory authorization is needed to preclude access to the statutory complaint procedure.

5. CONCLUSION

Mandatory arbitration clauses can only have a limited effect in Canada. On the one hand, they purport to prevent workers from doing things that, with few exceptions (e.g. the *ESA*), they are not able to do (e.g. seek judicial enforcement of statutory employment rights), while on the other, they attempt to prevent workers from doing things they are legally entitled to do despite the clause (access statutory enforcement mechanisms). Moreover, even if a conscionable mandatory arbitration clause could preclude class actions to enforce *ESA* violations, the statute provides an administrative enforcement scheme that can, in principle, vindicate those class interests. The only remaining space in which a clause could operate is to preclude civil litigation of common law claims. While there is some scope for their operation in this context, as there was before *Uber Technologies*, there is little incentive to use mandatory arbitration directly to preclude class actions, since class actions are unlikely to be available for individual contract of employment disputes, or indirectly to limit wrongful dismissal damages, since this can be done directly by contractual waiver.

Faced with this legal landscape, why do employers bother to insert mandatory arbitration clauses? Apart from the employment contracts of elite employees, where there may be a mutual interest in having employment contract disputes resolved by arbitration rather than in the courts, the possible answers include: employer-side lawyers do not have a good understanding of the Canadian legal landscape, and have imported boilerplate language from other jurisdictions; employer-side lawyers are seeking to alter the legal landscape by carving out a larger space for such clauses; or employers are hoping that the presence of such clauses will deter workers from

58 Elizabeth Shilton, "Public Rights and Private Remedies: Reflections on Enforcing Employment Standards through Grievance Arbitration" (2017) 20:1 CLELJ 201.

exercising their legal rights by creating a false impression about how they can enforce those rights. None of these are good reasons for allowing them.

Moreover, as I have demonstrated, when we enact statutory labour rights, we also create statutory enforcement mechanisms to enable workers to vindicate such rights and are protective of access to those enforcement mechanisms. The issue of precluding access first arose in the context of unionized workers whose collective agreements were required by statute to have a provision for arbitration of disputes involving the interpretation or application of the collective agreement. However, as we saw earlier, the courts were hostile to the view that the availability of arbitration precluded access to the statutory enforcement mechanism. As stated in one decision: "Neither the board of inquiry nor this Court can or should relieve a person who has contravened the Act from an order which would normally be made against him because the complainant could have chosen to proceed by arbitration."[59]

While the policy is firmly, although not universally, embraced, the reasons for it have not been fully articulated. Below I sketch two related arguments.

We often think of employment as a private law matter, governed by the law of contract. But there is widespread recognition, including by the SCC, that employment is different. It is a relation of subordination in which one party, the employee, is subject to control by and is dependent on the other, the employer.[60] It is a relation that goes beyond mere commodity exchange to implicate the humanity of the workers. In the words of one oft-cited decision: "A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."[61] It is a relation marked by inequality of bargaining power, whose terms "rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does."[62] For all of

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59 *Gares*, *supra* note 44.

60 *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at paras 27, 28, 40, Abella J.

61 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 161, Dickson CJC, dissenting.

62 *Machtinger*, *supra* note 16 at 1003, Iacobucci J (quoting Katherine Swinton).

these reasons, courts on numerous occasions have, invoking public policy rationales, implied terms and conditions into the contract of employment.

The public dimension of employment law runs even deeper once we shift from the common law to statute. Courts have invoked the above-noted understanding of the reality of employment to favour readings of employment statutes that enhance their reach and efficacy. Equally important, the statutes themselves make it clear that employment is no longer considered a private matter between employees and employers but rather a public concern. Take the simple matter of payment of wages. It is the most fundamental obligation that an employer owes as a matter of private law, but the failure to pay wages is not merely a private harm for which an individual employee can seek a civil remedy. The *ESA* imposes a statutory obligation on employers to pay wages, and the failure to do so is a regulatory offence for which the employer can be prosecuted and, upon conviction, be fined or imprisoned.[63] Even though wage theft is no longer a crime, it is a regulatory offence, a public wrong for which deterrence is an important policy objective in sentencing.[64]

When we combine the protective dimension of employment law with the public nature of statutory obligations and their enforcement, we can readily understand why we should not and, as I have argued, do not allow private agreements to opt out of public enforcement regimes. The question of whether alternative remedies should be permitted is a matter for public determination, and thus it has been left to the legislature to make exceptions. As the previous discussion shows, legislatures have in some circumstances allowed or mandated unionized employees to seek remedies for statutory rights violations through grievance arbitration. The decision is presumably based on the view that grievance arbitration exists within a context in which severe imbalances of power have been mitigated and workers have a voice in negotiating the terms of arbitration clauses. Since power imbalances and lack of voice characterize most non-union employment, we have

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63 *ESA*, *supra* note 1 at ss 11, 132.

64 Eric Tucker, "When Wage Theft Was a Crime in Canada, 1935-1955" (2017) 54:3 Osgoode Hall LJ 933; *R v Cotton Felts Ltd*, 1982 CanLII 3695 (ON CA), [1982] OJ No 178.

not, and should not, permit mandatory arbitration clauses to deprive workers of access to statutory enforcement regimes.

The starting-point for legal analysis, therefore, should not be whether the statutory scheme explicitly precludes contracting-out of statutory enforcement, but whether it explicitly permits it. Currently, no employment statute does so. But rather than depend on canons of statutory interpretation to protect access to statutory remedies, legislatures should explicitly prohibit contracting-out of the enforcement mechanisms provided by employment statutes, unless this is expressly authorized. The preclusion of contracting-out of statutory enforcement mechanisms should extend to civil actions, including class actions, to enforce statutory employment rights where these mechanisms have been expressly or by implication authorized by the statutory scheme, as in the case of Ontario's *ESA*.[65]

In the absence of express authorization, it should be a regulatory offence to include a mandatory arbitration clause that purports to make arbitration the exclusive remedy for the enforcement of statutory employment rights, just as it now is a regulatory offence to misclassify an employee as an independent contractor.[66] Finally, we should create an explicit exception to the competence-competence principle, and provide that statutory decision-makers, not arbitrators, have the authority to decide in the first instance whether they have jurisdiction over a matter, including of course the question of whether a worker is covered by the scheme. In these ways we should put mandatory arbitration clauses in employment contracts out of their and our misery.

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65 *ESA*, *supra* note 1 at ss 97-98.

66 *Ibid* at s 5.1.