

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

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

**APPELLANTS**  
(Respondents)

- and -

**DAVID HELLER**

**RESPONDENT**  
(Appellant)

- and -

**YOUNG CANADIAN ARBITRATION PRACTITIONERS, ARBITRATION PLACE, DON VALLEY COMMUNITY LEGAL SERVICES, CANADIAN FEDERATION OF INDEPENDENT BUSINESS, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, INCOME SECURITY ADVOCACY CENTRE and PARKDALE COMMUNITY LEGAL SERVICES, ATTORNEY GENERAL OF ONTARIO, UNITED FOOD AND COMMERCIAL WORKERS CANADA, WORKERS' HEALTH AND SAFETY LEGAL CLINIC, MONTREAL ECONOMIC INSTITUTE, CANADIAN AMERICAN BAR ASSOCIATION, CHARTERED INSTITUTE OF ARBITRATORS (CANADA) INC. and TORONTO COMMERCIAL ARBITRATION SOCIETY, CANADIAN CHAMBER OF COMMERCE, INTERNATIONAL CHAMBER OF COMMERCE, CONSUMERS COUNCIL OF CANADA, COMMUNITY LEGAL ASSISTANCE SOCIETY, and ADR CHAMBERS INC.**

**INTERVENERS**

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**FACTUM OF THE INTERVENER**  
**WORKERS' HEALTH AND SAFETY LEGAL CLINIC**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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**WORKERS' HEALTH AND SAFETY  
LEGAL CLINIC**  
2000 - 180 Dundas Street West, Box 4  
Toronto, ON M5G 1Z8  
Fax: 416-971-8834

**Kevin Simms**  
Tel: 416-971-8832 ex. 203

**SUPREME ADVOCACY LLP**  
100 - 340 Gilmour Street  
Ottawa, ON K2P 0R3  
Fax: 613-695-8580

**Marie-France Major**  
Tel: 613-695-8855 ex. 102  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

Email: [simmsk@lao.on.ca](mailto:simmsk@lao.on.ca)

**John Bartolomeo**

Tel: 416-971-8832 ex. 202

Email: [bartolj@lao.on.ca](mailto:bartolj@lao.on.ca)

**Chetan Muram**

Tel: 416-971-8832 ex. 201

Email: [muramc@lao.on.ca](mailto:muramc@lao.on.ca)

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

**TORYS LLP**

Barristers and Solicitors  
79 Wellington Street West, Suite 3000  
Box 270, TD South Tower  
Toronto, ON M5K 1N2  
Fax: 416-865-7380

**Linda M. Plumpton**

Tel: 416-865-8193

Email: [lplumpton@torys.com](mailto:lplumpton@torys.com)

**Lisa Talbot**

Tel: 416-865-8222

Email: [ltalbot@torys.com](mailto:ltalbot@torys.com)

**Sarah Whitmore**

Tel: 416-865-7315

Email: [swhitmore@torys.com](mailto:swhitmore@torys.com)

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

**Agent for the Intervener,  
Workers' Health and Safety Legal Clinic**

**GOWLING WLG (CANADA) LLP**

2600 - 160 Elgin Street  
Ottawa, ON K1P 1C3  
Fax: 613-788-3587

**Jeffrey W. Beedell**

Tel: 613-786-0171

Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

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

**WRIGHT HENRY LLP**

602-200 Wellington Street West  
Toronto, ON M5V 3C7  
Fax: 416-964-8281

**Michael D. Wright**

Tel: 416-306-8280  
Email: mwright@wrighthenry.ca

**Danielle E. Stampley**

Tel: 416-306-8272  
Email: dstampley@wrighthenry.ca

**SAMFIRU TUMARKIN LLP**

350 Bay Street, 10th Floor  
Toronto, ON M5H 2S6  
Fax: 416-361-0993

**Lior Samfiru**

Tel: 416-861-9065  
Email: lior.samfiru@stlawyers.ca

**Stephen Gillman**

Tel: 416-861-9065  
Email: stephen.gillman@stlawyers.ca

**Counsel for the Respondent,  
David Heller**

**OSLER, HOSKIN & HARCOURT LLP**

100 King Street West  
1 First Canadian Place  
Suite 6200, P.O. Box 50  
Toronto, ON M5X 1B8  
Fax: 416-862-6666

**Eric Morgan**

Tel: 416-862-5871  
Email: emorgan@osler.com

**PERLEY-ROBERTSON, HILL &  
MCDOUGALL LLP**

1400-340 Albert Street  
Ottawa, ON K1R 0A5  
Fax: 613-238-8775

**MICHAEL SOBKIN**

331 Somerset Street West  
Ottawa, ON K2P 0J8  
Fax: 613-288-2896

**Michael J. Sobkin**

Tel: 613-282-1712  
Email: msobkin@sympatico.ca

**Agent for the Respondent,  
David Heller**

**OSLER, HOSKIN & HARCOURT LLP**

Suite 1900  
340 Albert Street  
Ottawa, ON K1R 7Y6  
Fax: 613-235-2867

**Geoffrey Langen**

Tel: 613-787-1009  
Email: glangen@osler.com

**Agent for the Intervener,  
Young Canadian Arbitration Practitioners**

**John Siwiec**

Tel: 613-566-2814

Email: [jsiwiec@perlaw.ca](mailto:jsiwiec@perlaw.ca)

**Counsel for the Intervener,  
Young Canadian Arbitration Practitioners**

**BORDEN LADNER GERVAIS LLP**

1200-200 Burrard Street  
Waterfront Centre  
P.O. Box 48600  
Vancouver, BC V7X 1T2  
Fax: 604-687-1415

**Robert Deane**

Tel: 604-640-4250

Email: [rdeane@blg.com](mailto:rdeane@blg.com)

**Craig Chaisson**

Tel: 604-640-4221

Email: [cchaisson@blg.com](mailto:cchaisson@blg.com)

**BORDEN LADNER GERVAIS LLP**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Suite 3400  
Toronto, ON M5H 4E3  
Fax: 416-367-6749

**Hugh Meighen**

Tel: 416-367-6324

Email: [hmeighen@blg.com](mailto:hmeighen@blg.com)

**Counsel for the Intervener,  
Arbitration Place**

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
1300-100 Queen Street  
Ottawa, ON K1P 1J9  
Fax: 613-230-8842

**Karen Perron**

Tel: 613-369-4795

Email: [kperron@blg.com](mailto:kperron@blg.com)

**Agent for the Intervener,  
Arbitration Place**

**MONKHOUSE LAW**

220 Bay Street  
Suite 900  
Toronto, ON M5J 2W4  
Fax: 888-501-7235

**Andrew Monkhouse**

Tel: 416-907-9249 x 225  
Email: [andrew@monkouselaw.com](mailto:andrew@monkouselaw.com)

**Alexandra Monkhouse**

Tel: 416-907-9249 x 211  
Email: [alexandra@monkouselaw.com](mailto:alexandra@monkouselaw.com)

**Counsel for the Intervener,  
Don Valley Community Legal Services**

**CANADIAN FEDERATION OF  
INDEPENDENT BUSINESS (CFIB)**

National Affairs and Partnerships  
1202-99 Metcalfe Street  
Ottawa, ON K1P 6L7

**Anthony Daimsis**

Tel: 613-562-5800 Ext. 3211  
Fax: 613-562-5124  
Email: [adaimsis@uottawa.ca](mailto:adaimsis@uottawa.ca)

**Counsel for the Intervener,  
Canadian Federation of Independent  
Business**

**SAMUELSON-GLUSHKO CANADIAN  
INTERNET POLICY & PUBLIC  
INTEREST CLINIC**

University of Ottawa, Faculty of Law  
57 Louis Pasteur Street  
Ottawa, ON K1N 6N5  
Fax: 613-562-5417

**Marina Pavlovic**

Tel: 613-562-5800 Ext. 2675  
Email: [marina.pavlovic@uottawa.ca](mailto:marina.pavlovic@uottawa.ca)

**Cynthia Khoo**

**SUPREME LAW GROUP**

900-275 Slater Street  
Ottawa, ON K1P 5H9  
Fax: 613-691-1338

**Moira S. Dillon**

Tel: 613-691-1224  
Email: [mdillon@supremelawgroup.ca](mailto:mdillon@supremelawgroup.ca)

**Agent for the Intervener,  
Don Valley Community Legal Services**

**UNIVERSITE D'OTTAWA**

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

**David Fewer**

Tel: 613-562-5800 Ext. 2558  
Fax: 613-562-5417  
Email: [david.fewer@uottawa.ca](mailto:david.fewer@uottawa.ca)

**Agent for the Intervener,  
Canadian Federation of Independent  
Business**

**UNIVERSITE D'OTTAWA**

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

**David Fewer**

Tel: 613-562-5800 Ext. 2558  
Fax: 613-562-5417  
Email: [david.fewer@uottawa.ca](mailto:david.fewer@uottawa.ca)

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

Tel: 437-886-5854  
Email: [ckhoo@cynthiakoo.ca](mailto:ckhoo@cynthiakoo.ca)

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

**INCOME SECURITY ADVOCACY  
CENTRE**

1500-55 University Ave.  
Toronto, ON M5J 2H7  
Fax: 416-597-5821

**Nabila Qureshi**

Tel: 416-597-5820 Ext. 5156  
Email: [qureshn@lao.on.ca](mailto:qureshn@lao.on.ca)

**Karin Baqi**

Tel: 416-597-5820 Ext. 5157  
Email: [baqikr@lao.on.ca](mailto:baqikr@lao.on.ca)

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

**PARKDALE COMMUNITY LEGAL  
SERVICES**

1229 Queen Street West  
Toronto, Ontario  
M6K 1L2

**John No**

Tel: (416) 531-2411 Ext: 227  
Fax: (416) 531-0885  
E-mail: [noj@lao.on.ca](mailto:noj@lao.on.ca)

**Counsel for the Interveners, Parkdale  
Community Legal Services**

**GOLDBLATT PARTNERS LLP**

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

**Colleen Bauman**

Tel: 613-482-2463  
Fax: 613-235-3041  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

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

**GOLDBLATT PARTNERS LLP**

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

**Colleen Bauman**

Tel: 613-482-2463  
Fax: 613-235-3041  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

**Agent for the Interveners, Parkdale  
Community Legal Services**

**ATTORNEY GENERAL OF ONTARIO**

720 Bay Street  
8th Floor  
Toronto, ON M7A 2S9  
Fax: 416-326-4181

**Christopher P. Thompson**

Tel: 416-605-3857  
Email: Christopher.P.Thompson@ontario.ca

**Counsel for the Intervener,  
Attorney General of Ontario**

**GOLDBLATT PARTNERS LLP**

20 Dundas Street West  
Suite 1039  
Toronto, ON M5G 2C2  
Fax: 416-591-7333

**Steven Barrett**

Tel: 416-977-6070  
Email: sbarrett@goldblattpartners.com

**Counsel for the Intervener,  
United Food and Commercial Workers  
Canada**

**OSLER, HOSKIN & HARCOURT LLP**

100 King Street West  
1 First Canadian Place, Suite 6200  
Toronto, ON M5X 1B8  
Fax: 416-862-4235

**Robert Carson**

**Lauren Harper**  
Tel: 416-862-4235  
Email: rcarson@osler.com

**Counsel for the Intervener,  
Montreal Economic Institute**

**JURISTES POWER**

130 rue Albert  
bureau 1103  
Ottawa, ON K1P 5G4  
Fax: 613-702-5573

**Maxine Vincelette**

Tel: 613-702-5573  
Email: mvincelette@juristespower.ca

**Agent for the Intervener,  
Attorney General of Ontario**

**GOLDBLATT PARTNERS LLP**

500-30 Metcalfe St.  
Ottawa, ON K1P 5L4  
Fax: 613-235-3041

**Colleen Bauman**

Tel: 613-482-2463  
Email: cbauman@goldblattpartners.com

**Agent for the Intervener,  
United Food and Commercial Workers  
Canada**

**OSLER, HOSKIN & HARCOURT LLP**

Suite 1900  
340 Albert Street  
Ottawa, ON K1R 7Y6  
Fax: 613-235-2867

**Geoffrey Langen**

Tel: 613-787-1009  
Email: glangen@osler.com

**Agent for the Intervener,  
Montreal Economic Institute**

**CAZA SAIKALEY LLP**

350-220 avenue Laurier Ouest  
Ottawa, ON K1P 5Z9  
Fax: 613-565-2087

**Alyssa Tomkins**

Tel: 613-564-8269  
Email: atomkinds@plaideurs.ca

**James Plotkin**

Tel : 613-564-8271  
Email: jplotkin@plaideurs.ca

**Counsel for the Intervener,  
Canadian American Bar Association**

**BLAKE, CASSELS & GRAYDON LLP** 595  
Burrard Street, P.O. Box 49314  
Suite 2600, Three Bentall Centre  
Vancouver, BC V7X 1L3  
Fax: 604-631-3309

**Joseph C. McArthur**

**Rahat Godil**

**Laura Cundari**

**Justin Manoryk**

**Andrew Kavanagh**

Tel: 604-631-3300  
Email: joe.mcarthur@blakes.com

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

**DAVIES WARD PHILLIPS & VINEBERG  
LLP**

155 Wellington Street West  
37th Floor  
Toronto, ON M5V 3J7  
Fax: 416-863-0871

**Matthew Milne-Smith**

Tel: 416-863-0900  
Email: mmilne-smith@dwpv.com

**GOWLING WLG (CANADA) LLP**

2600 - 160 Elgin Street  
Ottawa, ON K1P 1C3  
Fax: 613-788-3509

**D. Lynne Watt**

Tel: 613-786-8695  
Email: lynne.watt@gowlingwlg.com

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

**GOWLING WLG (CANADA) LLP**

2600 - 160 Elgin Street  
Ottawa, ON K1P 1C3  
Fax: 613-788-3573

**Matthew Estabrooks**

Tel: 613-786-0211  
Email: matthew.estabrooks@gowlingwlg.com

**Agent for the Intervener, Canadian  
Chamber of Commerce**



**Chantelle Cseh**

Tel: 416-367-7552

Email: ccseh@dwpv.com

**Counsel for the Intervener,  
Canadian Chamber of Commerce**

**NORTON ROSE FULBRIGHT CANADA  
LLP**

1, Place Ville Marie  
Bureau 2500  
Montréal, QC H3B 1R1  
Fax: 514-286-5474

**Pierre Bienvenu**

Tel: 514-847-4747

Email:

pierre.bienvenu@nortonrosefulbright.com

**Andres C. Garin**

Tel: 514-847-4957

Email: andres.garin@nortonrosefulbright.com

**Alison FitzGerald**

Tel: 613-780-8667

Email:

Alison.fitzgerald@nortonrosefulbright.com

**Counsel for the Intervener,  
International Chamber of Commerce**

**SOTOS LLP**

1200- 180 Dundas Street West  
Toronto, ON M5G 1Z8  
Fax: 416-977-0717

**Mohsen Seddigh**

Tel: 416-572-7320

Email: mseddigh@sotosllp.com

**Daniel Hamson**

Tel: 416-572-7307

Email: dhamson@sotosllp.com

**Counsel for the Intervener, Consumers  
Council of Canada**

**NORTON ROSE FULBRIGHT CANADA  
LLP**

45 O'Connor Street  
Suite 1500  
Ottawa, ON K1P 1A4  
Fax: 613-230-5459

**Matthew J. Halpin**

Tel: 613-780-8654

Email:

matthew.halpin@nortonrosefulbright.com

**Agent for Counsel for the Intervener,  
International Chamber of Commerce**

**ALLEN/MCMILLAN LITIGATION  
COUNSEL**

1550-1185 West Georgia Street  
Vancouver, BC V6E 4E6  
Fax: 604-628-3832

**Greg J. Allen**

Tel: 604-282-3982  
Email: greg@amlc.ca

**Wes McMillan**

Tel: 604-282-3980  
Email: wes@amlc.ca

**Counsel for the Intervener,  
Community Legal Assistance Society**

**BENNETT JONES LLP**

3400 One First Canadian Place  
P.O. Box 130  
Toronto, ON M4X 1A4  
Fax: 416-863-1716

**Andrew D. Little**

Tel: 416-777-4808  
Email: littlea@bennettjones.com

**Ranjan K. Agarwal**

Tel: 416-777-6503  
Email: agarwalr@bennettjones.com

**Charlotte Harman**

Tel: 416-777-6235  
Email: hamanc@bennettjones.com

**Counsel for the Intervener,  
ADR Chambers Inc.**

**GIB VAN ERT LAW**

148 Third Avenue  
Ottawa, ON K1S 2K1  
Fax: 613-651-0304

**Gib van Ert**

Tel: 613-408-4297  
Email: gib@gibvanertlaw.com

**Agent for the Intervener,  
Community Legal Assistance Society**

**BENNETT JONES LLP**

World Exchange Plaza  
1900-45 O'Connor Street  
Ottawa, ON K1P 1A4  
Fax: 613-683-2323

**Mark Jewett**

Tel: 613-683-2328  
Email: jewettm@bennettjones.com

**Agent for the Intervener,  
ADR Chambers Inc.**

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
<b>PART I OVERVIEW .....</b>	<b>1</b>
<b>PART II INTERVENER’S POSITION ON THE QUESTION IN ISSUE.....</b>	<b>1</b>
<b>PART III STATEMENT OF ARGUMENT .....</b>	<b>2</b>
A. Protections Afforded to Workers Should Not be Undermined.....	2
1. <i>Occupational Health and Safety Act</i> .....	2
2. <i>Workplace Safety and Insurance Act, 1997</i> .....	3
3. <i>Human Rights Code</i> .....	4
B. Agreements that Displace Statutory Protections Undermine the Purpose of Statutes .....	5
C. Low-income, Non-unionized Workers Deserve Particular Consideration .....	7
<b>PART IV COSTS .....</b>	<b>9</b>
<b>PART V NATURE OF ORDER SOUGHT .....</b>	<b>9</b>
<b>PART VI TABLE OF AUTHORITIES .....</b>	<b>10</b>
<b>STATUTES.....</b>	<b>10</b>

## **PART I – OVERVIEW**

1. The Workers' Health and Safety Legal Clinic (the "WHSLC" or the "Clinic") represents low-income, non-unionized workers in the Province of Ontario who experience health and safety-related issues in the workplace. Clients access WHSLC's services if they experience a workplace accident, if they have concerns about health and safety standards in their workplace, or if they have suffered adverse consequences in their employment because they asserted their employment and/or health and safety rights at work. The WHSLC's clients come from both federally and provincially regulated workplaces.

2. In Ontario, in addition to the *Employment Standards Act, 2000*<sup>1</sup> (the "ESA"), statutes such as the *Occupational Health and Safety Act*<sup>2</sup> (the "OHSA"), the *Workplace Safety and Insurance Act*<sup>3</sup> (the "WSIA"), and the *Human Rights Code*<sup>4</sup> (the "Code") are essential for enforcing workers' basic entitlements such as health and safety protections at work or the right to benefits for work-related injuries. Reducing the statutory protections afforded to workers undermines the purpose of these statutes.

3. In non-unionized workplaces, low-income workers do not possess the benefit of union representation or the financial means to access legal representation when they encounter adverse health and safety-related consequences in the workplace. In Ontario, existing workplace legislation often serves as the sole resource that non-unionized workers can access in order to enforce their rights.

4. The Clinic makes no submissions on the facts in this appeal.

## **PART II – INTERVENER'S POSITION ON THE QUESTIONS AT ISSUE**

5. WHSLC submits that:

- a. The protections afforded to workers should not be undermined;
- b. Agreements that displace statutory protections undermine the purpose of statutes; and

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<sup>1</sup> *Employment Standards Act, 2000*, [SO 2000, c 41](#) [ESA].

<sup>2</sup> *Occupational Health and Safety Act*, [RSO 1990, c O.1](#) [OHSA].

<sup>3</sup> *Workplace Safety and Insurance Act, 1997*, [SO 1997, c 16, Sch A](#) [WSIA].

<sup>4</sup> *Human Rights Code*, [RSO 1990, c H.19](#) [Code].

- c. Low-income, non-unionized workers deserve particular consideration.

### **PART III – STATEMENT OF ARGUMENT**

#### **A. Protections Afforded to Workers Should Not Be Undermined**

6. The Legislature of Ontario drafted the statutes that govern workplace protections in order to prioritize the health and safety of workers. Those statutes should be enforced with that aim in mind. The *OHSA*, the *WSIA*, and the *Code*, similar to the *ESA*, are meant to promote the health and safety of workers, to provide workers with minimum workplace standards, and to provide workers with the enforcement tools to ensure those minimum standards are met.

7. The *OHSA*, the *WSIA*, and the *Code* constitute remedial statutes, which warrant a broad and liberal interpretation, consistent with this Honourable Court’s decision in *Rizzo & Rizzo Shoes Ltd. (Re)*.<sup>5</sup> Statutes that are “benefit conferring” should be interpreted in a generous manner.<sup>6</sup> These statutes should be interpreted in a similar manner.

##### **1. Occupational Health and Safety Act**

8. With respect to the *OHSA*, the Court of Appeal for Ontario found in *Ontario (Ministry of Labour) v Hamilton (City)* that the *OHSA* is “a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers.”<sup>7</sup> Given that it was designed to promote public health and safety, it should be “generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature’s public welfare objectives are to be avoided.”<sup>8</sup>

9. In addition to these overarching principles, the *OHSA* prescribes specific processes that provide workers with certainty as to how they are able to exercise their health and safety rights in the workplace. The *OHSA* also provides workers with enforcement mechanisms.

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<sup>5</sup> [1998] 1 SCR 27 at para 36, [1998 CanLII 837 \(SCC\)](#).

<sup>6</sup> *Ibid.*

<sup>7</sup> 58 OR (3d) 37 at para 16, [2002 CanLII 16893 \(ONCA\)](#).

<sup>8</sup> *Ibid.*

10. For example, s. 43 of the *OHSA* provides workers with the right to refuse unsafe work.<sup>9</sup> After a worker reports the circumstances of a refusal to their supervisor or employer, the employer is obligated to investigate the report in the presence of the worker. While the employer investigates the circumstances leading to the refusal, the worker has the right to remain in a safe area of the workplace. If the employer investigates and after the investigation the worker continues their refusal, either the worker or the employer must then contact the Ontario Ministry of Labour (the “MOL”) and request that they investigate the refusal.

11. Under s. 50 of the *OHSA*, if a worker complains that they were reprimed against for exercising their rights under the *OHSA*, they are entitled to file a complaint with the Ontario Labour Relations Board (the “OLRB”).<sup>10</sup> This section requires that the employer prove that the termination of the worker’s employment was for some reason other than the worker exercising their rights under the *OHSA*.

12. The *OHSA* provides all workers in Ontario with the specific mechanisms through which they are able to enforce their health and safety rights. There is no cost required to enforce these rights.

## **2. *Workplace Safety and Insurance Act***

13. The purpose of the *WSIA* is to promote the public good with respect to health and safety in workplaces through the return of injured workers to work and through the provision of compensation and benefits.<sup>11</sup>

14. The *WSIA* imposes specific obligations on employers with corresponding deadlines to ensure that the objectives of the statute are achieved. The *WSIA* also provides specific rights and enforcement mechanisms to workers to ensure that they can benefit from the statute’s remedial provisions. This is done through the statutory requirements imposed on employers and through the reporting and investigative tools that workers may access.

15. Employers must notify the Workplace Safety and Insurance Board (the “WSIB”) “within

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<sup>9</sup> *OHSA*, supra note 2 at [s 43](#).

<sup>10</sup> *OHSA*, supra note 2 at [s 50](#).

<sup>11</sup> *WSIA*, supra note 3 at [s 1](#).

three days of learning of an accident to a worker employed by him, her or it if the accident necessitates healthcare or results in the worker not being able to earn full wages.”<sup>12</sup>

16. Similarly, s. 75(1) requires all Schedule 1 and Schedule 2 employers (i.e. those employers obliged to register) under the *WSIA* to register with the WSIB within 10 days after becoming such an employer.<sup>13</sup>

17. Employers that do not comply with these and other specific requirements may be investigated by the WSIB. The *WSIA* authorizes the WSIB to investigate, impose payment obligations, and enforce penalties, as necessary.

18. In addition, the *WSIA* explicitly prevents employers from contracting out of their obligations under the legislation. Section 16 of the *WSIA* states that “[a]n agreement between a worker and his or her employer to waive or to forego any benefit to which the worker or his or her survivors are or may become entitled under the insurance plan is void.”<sup>14</sup>

19. The prohibition on enforcing agreements that waive or forego any benefit pursuant to the *WSIA* reflects the primacy of protecting minimum standards for injured workers. No injured worker can be cajoled, pressured, or in any way influenced to accept less than their statutory rights. Further, there is no cost to apply or appeal decisions.

### 3. *Human Rights Code*

20. Section 5 of the *Code* provides that “[e]very person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.”<sup>15</sup> Accordingly, the *Code* provides all workers in Ontario with basic protections against discrimination in the workplace on any protected ground, including with respect to disability. Section 10 of the *Code* provides a definition of disability that explicitly carves out a recognition that a disability will always include

<sup>12</sup> *WSIA*, supra note 3 at [s 21\(1\)](#).

<sup>13</sup> *WSIA*, supra note 3 at [s 75\(1\)](#).

<sup>14</sup> *WSIA*, supra note 3 at [s 16](#).

<sup>15</sup> *Code*, supra note 4 at [s 5](#).

an injury for which benefits “were *claimed or received*”<sup>16</sup> [emphasis added] under the *WSIA*.

21. Unlike the *OHSA* and the *WSIA*, s. 47(2) of the *Code* provides that, in the absence of language that explicitly states otherwise, where there is a conflict between the *Code* and other Ontario laws, the *Code* prevails.<sup>17</sup> This provision reflects the intention of the Ontario legislature to ascribe primacy to the *Code* and to provide expansive protections.

22. This Honourable Court has recognized the primacy of the *Code* and that it must be afforded quasi-constitutional status.<sup>18</sup> Accordingly, the *Code* should be “interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies.”<sup>19</sup> As per the Preamble to the *Code*, this broad interpretation ensures that the inherent dignity and inalienable rights of all people are respected.<sup>20</sup>

23. Similar to the *OHSA*, and *WSIA*, the *Code* outlines basic protections and mechanisms that provide workers with the opportunity to ensure their basic human rights are recognized and respected.

24. In addition to the enumerated protected grounds of discrimination, s. 9 of the *Code* prohibits employers from reprisal against any person that claims or enforces their rights under the *Code*.<sup>21</sup>

25. Specifically, s. 34(1) provides that any person in Ontario who believes that their rights have been infringed may apply to the Human Rights Tribunal of Ontario (the “Tribunal”) for an order.<sup>22</sup> There is no cost to make an application to the Tribunal.

## **B. Agreements that Displace Statutory Protections Undermine the Purpose of Statutes**

26. Section 5(1) of the *ESA* prohibits employers from contracting out of or waiving any

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<sup>16</sup> *Code*, supra note 4 at [s 10\(1\)](#).

<sup>17</sup> *Code*, supra note 4 at [s 47\(2\)](#).

<sup>18</sup> *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513 at para 33, [2006 SCC 14](#).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Code*, supra note 4 at [Preamble](#).

<sup>21</sup> *Code*, supra note 4 at [s 9](#).

<sup>22</sup> *Code*, supra note 4 at [s 34\(1\)](#).



minimum employment standard under that statute.<sup>23</sup> In the matter at hand, the Court of Appeal held that the arbitration agreement (“the Agreement”) contained in the Licensing Agreement, contravenes section 96 of the *ESA*.<sup>24</sup> Section 96 permits workers to make complaints to the Ministry of Labour regarding contraventions of their minimum employment standards.

27. The *OHSA*, the *WSIA*, and the *Code* establish the rights and protections to which workers in Ontario are entitled. They impose obligations on employers, the *OHSA* and *WSIA* provide for investigations into alleged contraventions, and the *Code* allows the Tribunal to make public remedy orders. These statutes provide a means of recourse for workers whose rights are contravened.

28. Through the *OHSA*, the *WSIA*, and the *Code*, the Legislature of Ontario has provided that workers as well as state actors are responsible for enforcing through the statutes themselves. Workers enforce those statutes by making complaints, requesting investigations, and filing applications with the OLRB, the WSIB, and the Tribunal respectively.

29. The *OHSA*, the *WSIA*, and the *Code*, similar to the *ESA*, are remedial in nature, and provide specific mechanisms by which workers may enforce their rights. These enforcement mechanisms are essential to the health and safety purposes of the statutes. If agreements that contract out of *ESA*’s enforcement mechanisms are deemed permissible, then employers might also seek to use those same agreements to abrogate the enforcement mechanisms and workplace protections found in the other statutes set out above.

30. Allowing employers to contract out of enforcement mechanisms would undermine one of the central tenets of the *OHSA* and the *WSIA*, which is to promote and guarantee minimum health and safety standards for all workers, as well as the primary purpose of the *Code*, which is, to ensure that the basic human rights of all people are respected.

31. Circumventing the definition of “worker” provides the opportunity to circumvent s. 50 of the *OHSA*. If an individual is not a worker, then that person would be prohibited from filing complaints with the OLRB if they believe that they have been reprimanded; they would then

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<sup>23</sup> *ESA*, supra note 1 at [s 5\(1\)](#).

<sup>24</sup> *ESA*, supra note 1 at [s 96](#).

need to resort to private arbitration. Similarly, employers may attempt to contract out of s. 34(1) of the *Code*, denying workers the ability to apply to the Tribunal if they have been discriminated against.

32. Even if employers do not explicitly attempt to contract out of certain minimum standards, granting employers leeway to do so creates needless uncertainty with respect to how workers ought to exercise their health and safety rights, and uncertainty about whether employers have met statutory obligations.

33. For example, s. 5(1) of the *ESA* is directly analogous to s. 16 of the *WSIA*, which renders void any agreement by a worker to waive or forego their entitlements under the *WSIA*. However, if the Agreement is found to be enforceable, employers may attempt to avoid their obligations under the *WSIA*. Such avoidance could entail that workers would have to submit to private arbitration instead of resorting to the investigative and decision-making powers of the WSIB.

34. The Legislature of Ontario granted workers free access to administrative Boards and Tribunals with which they may file their claims or applications to address complaints contemplated by statutes. Workers have the benefit to appear either with or without representation, and with minimal cost consequences, regardless of the outcome. The legislation outlines the powers and abilities of the relevant decision-makers, which means that these decision-makers are known entities. Their decisions are public, allowing some predictability in outcomes of certain applications and complaints.

35. Statutes protect injured workers to ensure they receive guaranteed benefits for work-related injuries and illnesses. Statutes protect workers' health and safety standards and their right to speak out without fear of reprisal. Statutes protect workers from discrimination. The standards set by these statutes should be broadly and liberally interpreted for the protection of workers' rights.

### **C. Low-income, Non-unionized Workers Deserve Particular Consideration**

36. Employers and workers occupy unequal bargaining positions - especially low-income,

non-unionized workers.<sup>25</sup> Non-unionized workers do not have the same level of resources as union members. There is no collective agreement to codify the employment relationship, there is no collective bargaining to assist with wage negotiation, and there is no grievance procedure to address conflicts. Low-income status further exacerbates this inequality because such workers do not have the financial means to access legal representation with respect to the various workplace issues that could arise.

37. There are qualitative differences between individual employees and employees with collective rights.<sup>26</sup> Unions play a role in the betterment of working conditions.<sup>27</sup> Unionized workers are also engaged in the running of the union - for example, by electing the steward.

38. Unionized workers can rely on their union steward to act as their representative and to advocate for them within the workplace. Having a representative to raise issues in the interests of all workers ensures that individual workers are not required to act alone.

39. Unionized workers have choices that are not available to non-unionized workers. For example, unionized workers can exercise a refusal to work under the relevant grievance procedure. Union-negotiated settlements are binding for the purposes of the *ESA*.

40. Given the power imbalance that exists, vulnerable groups such as low-income, non-unionized workers require enforceable statutory protections.

41. Weakening public welfare statutes will disproportionately impact such workers. Therefore, the existing legislation must be interpreted in a manner that extends protections to as many workers as possible, in order to provide non-unionized workers with the necessary protections.

42. If this Honourable Court determines that the Agreement is enforceable, employers may seek to rely on arbitration clauses to address all manner of employment disputes. Given their low-income and non-unionized status, many workers may enter into these kinds of arbitration agreements without having previously sought legal advice on the implications of such

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<sup>25</sup> *Machtiger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1003, [1992 CanLII 102 \(SCC\)](#).

<sup>26</sup> *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016 at para 17, [2001 SCC 94](#).

<sup>27</sup> *Ibid* at para 37 citing *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989.

agreements. Enforcing such arbitration clauses would undermine the existing remedial legislation that aims to protect vulnerable workers.

43. This appeal is an opportunity to ensure that all workers are able to exercise and enforce their health and safety rights. Employers should not be permitted to contract out of the minimum standards, including the enforcement mechanisms, which are afforded to workers. Allowing employers to do so would be particularly detrimental to the interests of vulnerable workers, including, but not limited to, low-income, non-unionized workers.

**PART IV - COSTS**

44. The Clinic seeks no order for costs and asks that none be made against it.

**PART V - NATURE OF ORDER SOUGHT**

45. The Clinic takes no position on the outcome of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17<sup>th</sup> DAY OF OCTOBER, 2019.**



**Kevin Simms**

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

**John Bartolomeo**



**Chetan Muram**

**PART VI - TABLE OF AUTHORITIES**

Authority		Paragraph(s)
<b>CASES</b>		
1.	<i>Rizzo &amp; Rizzo Shoes Ltd. (Re)</i> , [1998] 1 SCR 27, <a href="#">1998 CanLII 837 (SCC)</a>	7
2.	<i>Ontario (Ministry of Labour) v Hamilton (City)</i> , 58 OR (3d) 37, <a href="#">2002 CanLII 16893 (ONCA)</a>	8
3.	<i>Tranchemontagne v Ontario (Director, Disability Support Program)</i> , [2006] 1 SCR 513, <a href="#">2006 SCC 14</a>	22
4.	<i>Machtinger v HOJ Industries Ltd.</i> , [1992] 1 SCR 986, <a href="#">1992 CanLII 102 (SCC)</a>	36
5.	<i>Dunmore v Ontario (Attorney General)</i> , [2001] 3 SCR 1016, <a href="#">2001 SCC 94</a>	37
<b>LEGISLATION</b>		
6.	<i>Employment Standards Act, 2000</i> , <a href="#">SO 2000, c 41</a> , ss 5(1), 96	2, 26,
7.	<i>Occupational Health and Safety Act</i> , <a href="#">RSO 1990, c O.1</a> , ss 43, 50	2, 10, 11
8.	<i>Workplace Safety and Insurance Act, 1997</i> , <a href="#">SO 1997, c 16, Sch A</a> , ss 1, 16, 21(1), 75(1)	2, 13, 15, 18
9.	<i>Human Rights Code</i> , <a href="#">RSO 1990, c H.19</a> , Preamble, ss 5, 9, 10(1), 34(1), 47(2)	2, 20, 21, 24, 25

**STATUTES**

*Employment Standards Act, 2000*, SO 2000, c. 41  
ss. [5\(1\)](#), [96](#)

*Occupational Health and Safety Act*, RSO 1990, c. O.1  
ss. [43](#), [50](#)

*Workplace Safety and Insurance Act, 1997*, SO 1997, c. 16, Sch A  
ss. [1](#), [16](#), [21\(1\)](#), [75\(1\)](#)

*Human Rights Code*, RSO 1990, c. H.19  
[Preamble](#), ss [5](#), [9](#), [10\(1\)](#), [34\(1\)](#), [47\(2\)](#)

*Loi de 2000 sur les normes d'emploi*, LO 2000, ch. 41  
ss. [5\(1\)](#), [96](#)

*Loi sur la santé et la sécurité au travail*, LRO 1990, ch. O.1  
ss. [43](#), [50](#)

*Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*, LO 1997, ch. 16, annexe A  
ss. [1](#), [16](#), [21\(1\)](#), [75\(1\)](#)

*Code des droits de la personne*, LRO 1990, ch. H.19  
[Préambule](#), ss [5](#), [9](#), [10\(1\)](#), [34\(1\)](#), [47\(2\)](#)