SCC File No. 38534

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

BETWEEN:

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

APPELLANTS
(Respondents)

- and -

DAVID HELLER

RESPONDENT
(Appellant)

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INTERVENERS

FACTUM OF THE INTERVENERS: INCOME SECURITY ADVOCACY CENTRE and PARKDALE COMMUNITY LEGAL SERVICES

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A. Overview

1. This appeal concerns the right of vulnerable workers to access the protections of the *Employment Standards Act, 2000* (the "*ESA*").[1] Workers depend on these protections to provide food for their families, maintain a roof over their heads, and ultimately to attain a decent quality of life. For them, access to effective *ESA* enforcement mechanisms is critical.

2. An interpretation of the *ESA* that permits mandatory arbitration of disputes would deny vulnerable workers the benefit of effective and accessible *ESA* enforcement mechanisms, and by extension, the protections of the *ESA*. Employers may thus be effectively insulated from claims of employment standards violations by the very people most likely to suffer them. A purposive interpretation of the *ESA* that prohibits mandatory arbitration and preserves access to the enforcement mechanisms under the Act is necessary to fulfill its goal of protecting workers.

B. Statement of Facts

3. The Income Security Advocacy Centre and Parkdale Community Legal Services ("the Coalition") are Legal Aid Ontario funded legal clinics that regularly represent non-unionized low-wage precarious workers. The Coalition takes no position on the facts.

PART II – COALITION'S POSITION ON THE ISSUES

4. The Coalition intervenes in this appeal only to address the issue of whether the *ESA* permits mandatory arbitration clauses that preclude access to the Act's own enforcement mechanisms. The Coalition takes the position that it does not.

PART III – STATEMENT OF ARGUMENT

5. Mandatory arbitration clauses undermine decades of legislative reform to implement minimum employment standards and protect workers' rights. Legislatures and this Court have long recognized that workers are a vulnerable class requiring protection from the inherent inequalities of bargaining power in the workplace.[2] The *ESA* and its predecessors were enacted to provide

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[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41 [*ESA*].
[2] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1003 [*Machtinger*].

workers in Ontario with a floor of guaranteed minimum protections in the workplace, including the minimum wage, overtime pay, and protected leaves such as vacation and parental leave. Critical new workplace protections were enacted in 2017, such as a significant increase in the minimum wage, guaranteed sick leave for workplaces of all sizes, and the introduction of domestic or sexual violence leave.[3] These protections followed years of public consultation and a comprehensive review of labour and employment legislation in Ontario with particular attention to the circumstances of low-wage precarious workers.[4]

6. But legislative rights and protections are meaningless if they cannot be effectively enforced. This is especially true for low-wage precarious workers who are more likely than other workers to be subject to illegal working conditions and to also face barriers to enforcing their rights. For them, recourse to the publicly funded, accessible enforcement mechanisms provided by ss. 96-98 of the *ESA*, including the Ontario Ministry of Labour complaints process and the courts, is crucial.

7. Therefore, these provisions of the *ESA* must be interpreted to preserve the right to access these mechanisms and to bar mandatory arbitration clauses purporting to restrict that right. Below, the Coalition identifies the enforcement barriers that vulnerable workers face and argues that mandatory arbitration clauses undermine the *ESA*'s purpose of protecting them in two ways: (i) by barring their access to public and accessible forums, and (ii) by foreclosing critical systemic enforcement mechanisms. These mechanisms include Ministry of Labour workplace-wide investigations that are triggered by an individual worker's complaint as well as class actions. These considerations must inform this Court's determination of whether the *ESA* permits mandatory arbitration of disputes under the Act.

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[3] See the *Fair Workplaces, Better Jobs Act, 2017*, S.O. 2017, c. 22, which amended the *ESA*. While certain provisions of the *Fair Workplaces, Better Jobs Act, 2017* were later repealed by the *Making Ontario Open for Business Act, 2018*, S.O. 2018, c. 14, these and other important provisions remain.

[4] See C. Michael Mitchell & John C. Murray, "The Changing Workplaces Review: An Agenda for Workplace Rights" (2017), online: Ministry of Labour ["Changing Workplaces Review"].

A. Low-wage precarious workers are more likely to experience illegal working conditions and barriers to enforcing their rights

8. The Coalition represents individuals engaged in low-wage precarious work, which is work that is typically characterized by a lack of job security, low pay, insufficient hours of work, few or no benefits, and minimal control over working conditions.[5] Recent decades have seen a significant rise in this category of work, which frequently includes work that is part-time, casual, temporary, or contractual. It is these very characteristics that make precarious work attractive to businesses looking to minimize costs, and that contribute to negative life outcomes for workers, including poverty and poor physical and mental health.[6]

9. The rise of precarious work has had unequal impacts on the working population. Members of historically disadvantaged communities, including women, racialized and Indigenous persons, single parents, migrants, and persons with disabilities are overrepresented in low-wage precarious work.[7] These workers experience heightened vulnerability as a result of the intersection of those characteristics with their engagement in low-wage precarious work.[8] In particular, vulnerable workers experience a substantial pay gap and are more likely to experience illegal working conditions such as payment below the minimum wage, unpaid wages, and unpaid overtime pay.[9]

10. Not only are low-wage precarious workers more likely to experience illegal working conditions, but they also face numerous barriers to enforcing their rights in the workplace. These barriers include financial, psychological and social barriers, unfamiliarity with substantive rights

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[5] Law Commission of Ontario, "Vulnerable Workers and Precarious Work" (Toronto: December 2012) at 1, 7 ["Vulnerable Workers"].
[6] "Changing Workplaces Review" at p. 48; "Vulnerable Workers" at pp. 28-29.
[7] Sheila Block, Grace-Edward Galabuzi, and Alexandra Weiss (2014), "The Colour Coded Labour Market By the Numbers: A National Household Survey Analysis" (Toronto: Wellesley Institute); Canadian Human Rights Commission (2013), "Report on the Equality Rights of Aboriginal People" (Ottawa: Canadian Human Rights Commission); Oxfam and the Canadian Centre for Policy Alternatives (2016), "Making Women Count: The Unequal Economics of Women's Work" (Toronto: Oxfam).
[8] "Vulnerable Workers" at p. 10.
[9] "Changing Workplaces Review" at p. 57; Kevin Banks, "Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness" (Toronto: Ontario Ministry of Labour, 2015) at p. 44.

and legal processes, limited language skills, and fear of reprisals.[10] In this context, accessible and effective enforcement mechanisms are essential to remedying and deterring *ESA* violations.

B. Mandatory arbitration of *ESA* violations thwarts legislative protections for vulnerable workers and defeats the Act's purpose

11. The *ESA* provides for two avenues for non-unionized workers to enforce their rights under the *ESA*: the worker may file a complaint with the Ministry of Labour pursuant to s. 96 of the Act, or commence a civil proceeding in Superior Court pursuant to ss. 97-98. In 1996, the Ontario legislature codified the right to proceed in a civil action in the *ESA*'s predecessor legislation, to ensure that workers had an alternative to administrative proceedings to enforce the Act.[11]

12. The *ESA* should be interpreted to preserve the right of workers to access both forums, and to prohibit mandatory arbitration. Such an interpretation best fulfils the purpose of the Act.

13. The *ESA* is remedial legislation whose purpose is to protect employees' interests by requiring employers to comply with certain minimum standards.[12] In light of this purpose, it ought to be interpreted in a broad and generous manner.[13] An interpretation of the *ESA* that requires employers to comply with its minimum requirements, and thereby extends its protections to as many employees as possible, is to be favoured over one that does not.[14] Courts should avoid interpretations that would defeat the purpose of the statute.[15]

14. An interpretation of the *ESA* that permits mandatory arbitration clauses would frustrate the purpose of the *ESA* in two ways: (i) it would preclude vulnerable workers from seeking redress in the public and accessible forums provided for under the *ESA*, and restrict them to a private and

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[10] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 27; "Changing Workplaces Review" at p. 58.
[11] See section 19 of the *Employment Standards Improvement Act*, 1996, S.O. 1996, c. 23, which added ss. 64.3 and 64.4 to the *Employment Standards Act*, R.S.O. 1990, c. E.14. See also: *Franklin v. University of Toronto*, [2001] O.J. No. 4321 (Ont. Sup. Ct.) at paras 25-26 [*Franklin*]; and *Poletek v. Thomas Cook Group (Canada) Ltd.*, [1997] O.J. No. 1289 (Gen. Div.) at paras. 17-18.
[12] *Machtinger* at p. 1003; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36 [*Rizzo*].
[13] *Rizzo* at para. 36; *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 64(1).
[14] *Machtinger* at p. 1003.
[15] *Rizzo* at para. 27.

potentially inaccessible arbitration process; and (ii) it would undermine systemic enforcement mechanisms for the *ESA* that are especially important to vulnerable workers, including class actions and Ministry of Labour expanded investigations.

(i) Mandatory arbitration of ESA *violations denies workers their statutory right to accessible forums*

15. Both the Ministry of Labour and Small Claims Court processes are designed to be accessible to self-represented litigants. Mandatory arbitration ousts the jurisdiction of these public institutions in favour of private dispute resolution that is procedurally inaccessible to low-wage precarious workers. This Court has described an inaccessible process as "illusory",[16] and so too are rights that cannot be effectively enforced in that process. To avoid rendering the *ESA*'s protections meaningless, the statute should be interpreted to prohibit circumvention of its own enforcement mechanisms through mandatory arbitration.

16. Consider the hypothetical case of Miriam, a low-wage personal support worker from the Philippines who experiences sexual harassment on the job. When her employer fails to address the harassment, Miriam is forced to quit, but does not receive termination pay. Miriam is able to choose between the following forums for redress, each with unique features promoting access to justice, and both prohibited by mandatory arbitration:

a. A complaint under s. 96 of the *ESA* can be filed to the Ministry of Labour for constructive dismissal.[17] An Employment Standards Officer ("ESO") would then investigate her complaint, gather evidence, and facilitate a settlement or make appropriate orders for payment – all at no cost to Miriam.[18] In this process, the officer can require the production of records, question any person, and call on a police officer for assistance in executing a search warrant.[19] The ESO can identify and remedy additional violations not claimed by Miriam, who may not be aware of all her rights.[20]

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[16] *Hryniak v. Mauldin*, 2014 SCC 7, at para. 28 [*Hryniak*].
[17] *ESA*, ss. 54, 56, 96.
[18] *ESA*, ss. 91, 101.1, 103.
[19] *ESA*, ss. 91, 92.
[20] Leah Vosko et al, "Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution Under the *Employment Standards*

The Ministry provides Miriam with plain language guides about the enforcement process. If she needs additional assistance, Miriam can call the Ministry's Employment Standards Information Centre toll free and receive help in one of several languages.[21]

b. A claim for constructive dismissal can also be filed with the Small Claims Court for a small filing fee that can be waived for low-wage workers like Miriam.[22] Costs in that court are capped at 15% of the amount in dispute, which in turn is capped at $25,000.[23] As a small claims plaintiff, Miriam can proceed informally, using fill-in-the-blank forms, and has access to a free settlement conference conducted by a judge or referee.[24] The Small Claims Court is also geographically accessible, with 80 locations across the province.[25] These equitable features have turned the court into a centrepiece of access to justice.[26] Importantly, Miriam can advance her court case based on laws, procedures, and precedents from Ontario, which are available to her and the public.

17. Private arbitration is inherently less accessible to low-wage precarious workers. To pursue arbitration, workers have to shoulder the entire burden of investigation and prosecution. Upfront fees are often unaffordable, prior decisions always confidential, and the procedure inconsistent and therefore unknowable.[27] Arbitration generally does not provide assistance for vulnerable workers to overcome barriers caused by language, illiteracy, and unfamiliarity. As acknowledged by this

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Act, 2000" (Queen's Printer for Ontario, 2016), at p. 32 [Vosko].

[21] *Other Languages* (2019), online: Ministry of Labour.

[22] *Small Claims Court - Fees and Allowances*, O. Reg. 332/16; *Administration of Justice Act*, RSO 1990, c A.6, ss. 4.3, 4.4; *Fee Waiver*, O Reg 2/05.

[23] *Courts of Justice Act*, RSO 1990, c C.43, s. 29; *Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, s. 1(1).

[24] *Rules of The Small Claims Court*, O. Reg. 258/98, r. 13, Table of Forms.

[25] *List of Ontario Court Addresses* (2019), online: Ministry of the Attorney General.

[26] Shelly McGill, "Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief" (2017) 26 J. L. & Soc. Pol'y. 90.

[27] See, e.g. *Arbitration Rules*, online: ADR Chambers ("11.1. Subject to these Rules, the Arbitral Tribunal may conduct the arbitration *in such manner as it considers appropriate*…") (emphasis added).

Court, arbitration can be biased in favour of "repeat players" such as employers.[28] It is no surprise that in the United States workers are far less successful in arbitration than in courts.[29] The barriers are so high and prospects of success so low that US workers *almost never* initiate arbitration proceedings against their employers.[30]

18. Even if certain inaccessible features of arbitration are capable of improvement, low-wage precarious workers cannot bargain for an arbitration regime that meets their access needs. They must take the employment contract or leave it. If the *ESA* is interpreted to permit mandatory arbitration, these workers will be left at the mercy of employers, who can impose onerous arbitral procedures and effectively bar them from accessible, public enforcement mechanisms. This outcome would frustrate the remedial purpose of the *ESA* as its provisions will go increasingly unenforced, leading to a *de facto* waiver of fundamental employment standards.[31]

(ii) Mandatory arbitration of ESA *violations undermines systemic enforcement of workplace protections*

19. The *ESA* also allows for systemic enforcement mechanisms that can benefit many workers at once, such as class actions and Ministry of Labour expanded investigations. These mechanisms mitigate the barriers faced by vulnerable workers in filing complaints, such as the possibility of reprisal, by allowing for many workers to benefit from a single complaint. An employer who imposes mandatory arbitration on an individual worker therefore makes it more difficult for *every*

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[28] *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531 at para. 1 (quoting *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 30) [*Seidel*].

[29] Alexander J. S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes" (2011), 8 J. Empirical Legal Stud. 1 at pp. 1, 5-7.

[30] Cynthia L. Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 N.C.L. Rev. 679, at pp. 682, 688 [Estlund] ("well under two percent of the employment claims that one would expect to find in some forum, but that are covered by MAAs, ever enter the arbitration process.")

[31] See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) at p. 17 (Ginsburg J., dissenting) ("The inevitable result of today's [5-4 split decision to enforce mandatory arbitration clauses] will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.")

worker in that workplace to benefit from *ESA* protections. As a result, an interpretation of the *ESA* prohibiting mandatory arbitration must be favoured, because it would extend the Act's protections to as many workers as possible.[32]

20. Consider the hypothetical case of Claudia, a migrant farm worker from Mexico who works in Leamington, Ontario on an employer-specific work permit. Claudia discovers that her employer underpays women as compared to men for doing the same job, in violation of s. 42 of the *ESA*. But, like many workers, Claudia is worried she could face unlawful reprisal for speaking up against her boss.[33] If she loses her job, Claudia could also lose her permit to stay in the country and face deportation.[34] This structural precarity faced by migrant workers allows her employer to continue underpaying her and her female co-workers.[35]

21. Courageously, Claudia eventually decides to take action despite her fear of losing her job. Absent mandatory arbitration, she can access systemic remedies for her entire workplace from the courts and the Ministry of Labour. This allows her coworkers, who face similar barriers to seeking individual redress, to also benefit from her initiative:

a. A single complaint to the Ministry of Labour under s. 96 of the *ESA*, for instance, could trigger an "expanded" investigation into potential *ESA* violations in Claudia's entire workplace.[36] If violations are found, an ESO can order the employer to pay the unpaid wages of *all* affected workers, issue broad compliance orders, and impose penalties with a notice of contravention.[37] For employers, expanded investigations can also lead to a self-audit order or a prosecution for an *ESA* offence with the possibility of a deterrent fine or imprisonment.[38] These investigations are powerful for vulnerable workers because the Ministry shoulders the full burden of the investigative process. Expanded investigations, because they proceed from a worker's tip, are the most

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[32] *Machtinger* at p. 1003.
[33] "Changing Workplaces Review" at p. 38.
[34] See *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 183-85.
[35] "Changing Workplaces Review" at pp. 96-97.
[36] Vosko at p. 3.
[37] *ESA*, ss. 42, 91, 103.
[38] *ESA*, ss. 91.1, 132.

effective method of detecting *ESA* violations.[39]

b. Similarly, workers can seek collective remedies from the Superior Court. In a single class proceeding, for example, Claudia can pursue unpaid wages on behalf of all workers who have been denied equal pay.[40] Class actions can facilitate access to justice for those "who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights."[41] Even outside class proceedings, successful lawsuits against unscrupulous employers can lead to publicity and effective deterrence.

22. Mandatory arbitration prevents the operation of these mechanisms in favour of a process that provides none of the same systemic remedies. As this Court has noted in the consumer protection context, "[p]rivate arbitral justice, because of its contractual origins, is necessarily limited."[42] Participants in a given arbitration are limited to the contractual parties. As a result, each worker in a workplace facing the same *ESA* violations would need to advance her own arbitral case: there is no possibility for workplace-wide or group proceedings. Vulnerable workers facing barriers to advancing their own claims are therefore left behind. The secrecy of arbitration, moreover, prevents the dissemination of necessary information for each worker to step forward individually. This is a significant barrier as many workers already do not understand their rights.

23. Mandatory arbitration would guarantee that widespread violations continue unchallenged for workers who are the most vulnerable.[43] Its very confidentiality undermines the *ESA*'s purpose, because it prevents public accountability and deterrence.[44] A fair, large, and liberal interpretation

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[39] Vosko at p. 42.
[40] See e.g. *Franklin*.
[41] *Bisaillon v. Concordia University*, 2006 SCC 19, at para. 16.
[42] *Seidel* at para. 7.
[43] "Changing Workplaces Review" at p. 57 ("[A]t least a significant minority of employers are not in compliance with some employment standards, and vulnerable workers are most likely to be affected by non-compliance").
[44] *Seidel* at paras. 6, 24, 38.

of the *ESA* would therefore prohibit mandatory arbitration.[45]

C. Conclusion

24. This Court has recognized that "private arbitration is not the solution" for access to justice, "since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened."[46] Mandatory arbitration allows employers to sidestep legislated rights and processes with impunity. Many low-wage precarious workers will not be able to enforce their rights in arbitration, may become trapped in illegal and poor working conditions, and be at greater risk of exploitation by employers who know that the risk of enforcement and penalty is slim.[47] Preserving access to *ESA* protections for vulnerable workers is imperative.

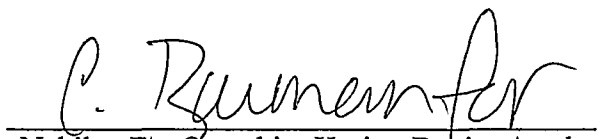
PART IV – COSTS

25. The Coalition does not seek costs and asks that no costs be awarded against its members.

PART V – ORDER SOUGHT

26. The Coalition has been granted permission by this Honourable Court to present oral argument and therefore does not seek an order from this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th day of October, 2019



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[45] *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 64(1).
[46] *Hryniak* at para. 26.
[47] Estlund at p. 707.

PART VI – TABLE OF AUTHORITIES

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22.	*Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, s. 1(1) *Compétence de la Cour des petites créances*, Règl de l'Ont 626/00, art. 1(1)	16

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