



Workers' Health and Safety Legal Clinic Newsletter

Spring 2017

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In this issue:	Page
Case Report All Parties are Equal before the Human Rights Tribunal	2
Law Reform Workers' Rights in Focus: <i>The Changing Workplaces Review</i>	3
Clinic Update: New Website Launch	4
Clinic Partnership with the Centre for Spanish Speaking Peoples: Assisting Undocumented and Non-Status Workers with Health and Safety Issues	5
Teleconference Town Hall: <i>The Changing Workplaces Review</i>	6
Upcoming Events: Day of Mourning on April 28, 2017	7
In Memoriam: Patricia O'Reilly, Clinic Board Member	7
AGM Report: Regulatory Officials, the <i>Charter</i> , and Workplace Inspections or Investigations	8
Injured Workers' Demonstration	9
Clinic Personnel	
• New Intake Lawyer	10
• New Administrative Assistant	
• Two Articling Students	11
• New Social Justice Lawyer	
For Future Issues	12
Publication Information	12

Case Report

All Parties are Equal before the Human Rights Tribunal

By John Bartolomeo, Staff Lawyer

The Workplace Safety and Insurance Board (“the WSIB”) is sometimes referred to as a “creature of statute.” That means, as a legal entity its power comes out of legislation, namely the *Workplace Safety and Insurance Act* (“the Act”). By virtue of that Act, subject to rights of appeal and judicial review, the WSIB has the power to decide all workers compensation related decisions.

In making those decisions, which are subject to appeal, the WSIB must follow the *Human Rights Code* (“the Code”). The WSIB, just like any person, company, or branch of government, is subject to the Code. It is possible to complain to the Human Rights Tribunal of Ontario (“the Tribunal”) about the WSIB.

This does not mean the Tribunal will review WSIB decisions. However, if one can allege the WSIB discriminated against them, an application can be made to the Tribunal.

In one such case, the Clinic represented an injured worker with a discrimination complaint. Rather than go to a hearing the parties reached a mediated agreement.

It was our position, in our advocacy in this case, that the WSIB breached the agreement – and the Tribunal agreed.

The issue was whether the worker could have a hotel room every time he made a medical visit. He had just changed doctors and his new doctor wanted to see him every week. This was a change because his previous doctor only saw him monthly. The WSIB refused to pay for weekly visits rather only monthly visits.

The WSIB argued that as they are responsible for the compensation system, they can decide what visits are covered. However, the agreement was not worded that way; the agreement spoke only about visits to the doctor. The Tribunal acknowledged the WSIB’s role, “In its role as decision-maker under the [Act], the respondent as a party to the Application was entitled to call evidence and make submissions about whether the Tribunal had any jurisdiction to deal with the allegations at all. It also had the right to explain why its decisions were not discriminatory assuming the Tribunal had jurisdiction to the

deal with the allegation. However, once the respondent signed Minutes of Settlement, it had a different role. Its role then was a party to a legally binding contract. In that role, it agreed to a number of things, some of which overlapped with its other role as a decision-maker under the Act and some which it did not.”

The distinction is between the WSIB as a decision-maker and WSIB as a party to a binding contract. The WSIB could not rely on its role as a decision-maker to get out of what it agreed to in the contract. It made an agreement that was not covered by its role as a decision-maker and it was bound to fulfill its obligations. The application was allowed and the Tribunal ordered the WSIB to pay for the client’s hotel rooms, reimburse him for his out of pocket expenses, and pay him \$1,000 for general damages in compensation for the breach.■

Click the below link to access the Tribunal decision:

Fata v. Workplace Safety and Insurance Board, 2016 HRTO 592 (CanLII)

Law Reform

Workers' Rights in Focus: *The Changing Workplaces Review*

By Jeffrey J. Pariag, Staff Lawyer

In 2015, the Ontario government initiated a review of our province's labour and employment laws titled *The Changing Workplaces Review*. The Ministry of Labour appointed two Special Advisors to review the numerous proposed amendments submitted by business groups and worker advocates, including the Workers' Health and Safety Legal Clinic ("the Clinic"). Executive Director Linda Vannucci and Staff Lawyer Jeffrey Pariag made submissions at Queen's Park to highlight some changes relating to labour and employment law that would be beneficial for Ontario's workers.

The Clinic put forward numerous suggestions as noted in our submissions. Below are four of the Clinic's recommendations that could have a profound impact on the health and well-being of workers in Ontario.

Notice of Termination

In its present state, the *Employment Standards Act* ("the ESA") sets out how much notice employers must legally provide to employees based on an employee's length of employment. Employees who

are continuously employed for at least three months are entitled to 1 week of pay for each year of service to a maximum of 8 weeks. This means that an employee with 10, 15 or even 20 years of service only has entitlement to 8 weeks of notice or termination pay. The Clinic has taken the position that this is grossly inadequate and that the upper limit of notice should be removed. This would give Ontario's workers an entitlement to one week of notice of termination, or one week pay in lieu of notice, for each year of service with the employer. We also suggested, alternatively, that the ESA should be amended to increase the upper limit for notice of termination to 26 weeks.

Protection from Unjust Dismissals

The ESA needs to be amended to protect Ontario's employees from unjust dismissals. Employees in the Federal jurisdiction (banks, truck drivers, telecommunications, etc.) already have protection from unjust dismissal after 12 months of employment; employees in Nova Scotia have

similar protections after 10 years of service. Protection from unjust dismissals will allow for employees to request an investigation into the circumstances of their termination, which may result in a number of remedies including reinstatement. The Clinic has taken the position that the ESA should provide workers the same level of protection, and has put forth recommendations that will meet this objective.

Paid Sick Leave

Employees should be entitled to paid sick time under the ESA. Currently, employees are able to take up to 10 days of Personal Emergency Leave, contingent on the workplace regularly employing a minimum of 50 workers. Personal Emergency Leave is also unpaid leave. This is evidently problematic for several reasons including that employees bear the loss of a day's wage when taking Personal Emergency Leave, as well as workers who are employed in smaller workplaces (less than 50 regular employees) do not have rights to Personal Emergency Leave. The Clinic submitted that all employees

Workers' Rights in Focus: *The Changing Workplaces Review*

(Continued from page 3)

need to have access to paid sick time, regardless of the size of the employer's workforce.

Vacation Time

Our submission also included a recommendation to increase the amount of vacation that employees are entitled to in Ontario. Currently, employees are only entitled 2 weeks of vacation, regardless of how long they have worked for the employer. The Clinic proposed that workers should be

immediately entitled to 3 weeks of vacation. The Clinic also submitted that workers should be entitled to additional vacation following five years of service with the employer.

We are looking forward to the release of the Special Advisors' recommendations in the coming weeks. Many different groups spoke out in favour of changes that are aimed to benefit employees. As such, we hope that some of the suggestions become law.■

Click the below links to access the submissions made by the Clinic to the *Changing Workplaces Review*:

[October 14, 2016 - Submission in Response to *The Changing Workplaces Review: Special Advisors' Interim Report*](#)

[August 31, 2016 - Submission to *The Changing Workplaces Review* regarding Personal Emergency Leave](#)

Clinic Update

New Website Launch: www.workers-safety.ca

By **Genevieve D'Iorio**, Community Legal Worker

In December 2016, the Workers' Health and Safety Legal Clinic launched a newly designed website. The Clinic sought to create a more simplified, user-friendly and client-focused space to help the public learn more about our legal services.

Some of the website modernizations include an online membership application form located in the [Membership](#) section that can

be submitted electronically to the clinic, as well as a fillable form for general inquiries located in the [Contact Us](#) section.

Furthermore, the Clinic has added a [Communications](#) section that features clinic posts, newsletter articles, outreach activities and law reform initiatives.

A stand-alone [Public Legal Education](#) section highlights

our popular workers' rights workshops that are presented to newcomers, youth and jobseekers across the Greater Toronto Area.

As always, the Clinic's [Facebook](#) and [Twitter](#) pages are additional ways to keep up-to-date on news, events and articles about health and safety and employment law issues that are of public interest.■

Assisting Undocumented and Non-Status Workers with Health and Safety Issues

By Julio Díaz

Everyone needs protection at work regardless of their status. Undocumented workers are disproportionately exposed to health and safety hazards in the workplace. For example: a construction worker will be fired for asking for a harness before climbing a scaffold; a supermarket employee will be injured operating a meat slicer without proper training; a baker will think of quitting their job after being sexually harassed by their boss, and a painter will open a can without knowing its label means “serious health hazard.”

The Centre for Spanish Speaking Peoples and the Workers’ Health and Safety Legal Clinic are undertaking a joint two-year initiative that aims to prevent injuries among undocumented and non-status Spanish speaking workers in Ontario. Currently, the project’s focus is on workers in the Greater Toronto Area, with the potential to expand its scope provincially. The project began in October 2016 by Emelie Kozak, and is now being led by Julio Díaz, a lawyer working at both legal clinics.

One of the main objectives of this project is to provide public legal education about workers’

health and safety rights through community outreach. Another goal is to provide representation to workers in appropriate cases involving health and safety issues. Outreach materials with information on health and safety, workers’ compensation and human rights will be distributed in community health clinics and health centres, as well as other community organizations that provide services to the Spanish speaking community.

Undocumented and non-status Spanish speaking workers need better working conditions, and they need to know how to get a safer working environment. That is why we will also be doing outreach through radio programs, Spanish language publications, workshops and presentations.

If you would like more information about the project or for referrals, please contact **Julio Díaz** by phone at **(647) 462-3164** or email at **diazj@lao.on.ca**.

Workers can also contact the Centre for Spanish Speaking Peoples at (416) 533-8545 to book an appointment. All calls will be kept confidential.■



Click the below links to access the projects outreach print materials:

[YOUR HEALTH AND SAFETY AT WORK: Information for Workers \(Factsheet–English\)](#)

[TU SALUD Y SEGURIDAD EN EL TRABAJO: Información para Trabajadores \(Factsheet–Spanish\)](#)

New Radio Show!

Starting in late May, Julio Díaz will be hosting a bi-weekly radio show on *Voces Latinas* 1610 AM.

Tune in on Saturdays from 3:00pm-4:00pm.

www.chha1610am.ca

Teleconference Town Hall: *The Changing Workplaces Review*

By Linda Vannucci, Lawyer/Director

I recently participated in the Ontario Federation of Labour (“OFL”) sponsored provincial town hall teleconference on the *Changing Workplaces Review*. The OFL’s press release announcing the teleconference, urged the public to get involved because Ontario’s “labour and employment laws are outdated and do not reflect the reality of work in today’s economy.”

Because the event was scheduled during the evening, it was well-attended by working people facing precarious employment. They expressed their views about the insecurity of their jobs. Many work in low paying part-time or temporary work without any drug or dental benefit coverage.

The situation with sick day coverage is dire. Workers have told me that if they get the flu they are forced to continue working because they need money to pay the bills and buy basic groceries. At most small workplaces there are no paid sick days. In some cases, taking an unpaid sick day causes the employer to punish the worker by cutting their hours of work.

Another concern highlighted during the teleconference was that some workers who do the same jobs alongside unionized permanent staff, are earning half the rate of pay. These workers are on short-term contracts that never turn into permanent jobs.

Chris Buckley, President of the OFL, urged us to take part in the OFL’s *Make It Fair* campaign.

After the meeting, I followed up by checking out the campaign website www.MakeItFair.ca. It’s quick and easy to get involved; There are postcards that can be ordered online. Then, once the postcards are signed, you can send them to the OFL, which will arrange to meet with your MPP and deliver the postcards. Or, just drop it in the mailbox to your local MPP - no postage required. If you do not know who your MPP is, just go to our Clinic website www.workers-safety.ca for a complete list of Ontario’s provincial members of parliament.

The campaign works to support broad changes to the *Employment Standards Act* and the *Labour Relations Act*

that would improve minimum standards for workers and make it easier for them to join unions.

At the time of the writing of this article, the *Changing Workplaces Review* report is in the hands of the Minister of Labour, Kevin Flynn. The report has not yet been released to the public. We are hopeful that there will be a Bill that will make positive changes in the law for workers rights.

Will the changes go far enough to make a difference to precarious workers? If not, we should be ready to respond. ■

[Click here](#) to access the OFL’s original press release online.

Upcoming Events: Day of Mourning on April 28, 2017

The National **Day of Mourning** is held annually in Canada and is a day of remembrance for those who have lost their lives, or suffered injury or illness as a result of their work.

More than 25 years ago, the Canadian Labour Congress declared April 28th a “Day of Mourning,” and today about 80 countries around the world commemorate this day for fallen and injured workers.

Toronto GTA Events

Woodbridge 11:00 am
Woodbridge Memorial Arena,
5020 Highway #7 (at Islington)

Toronto Central 12:00 noon
Larry Sefton Park, North-east
corner of Bay St. and
Hagerman St.

Toronto North 3:00 pm
Italian Fallen Workers Monument,
behind the Columbus Centre,
901 Lawrence Ave. West,
(accessible via Playfair Ave.)

Contact the Labour Council for further information at (416) 441-3663.■

[Click here](#) to learn more about **Day of Mourning events happening across Ontario.**

Clinic Update

In Memoriam: Patricia O'Reilly

Patricia O'Reilly, J.D., was a compassionate advocate for workers and a dedicated clinic board member, who passed away this past February.

Patricia was a barrister and solicitor who practiced in the area of poverty law for eight years, working on behalf of injured workers. She was Assistant Professor in the Departments of Criminology and Law and Society Program at Wilfrid Laurier University, Brantford.

She was actively involved in social justice issues throughout her life, and expressly wished to be remembered for the work she cared deeply about.

As such, her husband and children, along with the support of colleagues at Wilfrid Laurier University, have set up a scholarship fund. The Patricia O'Reilly Scholarship will annually support a student interested in pursuing issues of social justice, especially those intending to apply to law school or graduate studies.

The Workers' Health and Safety Legal Clinic's Board of Directors and staff extend their deepest sympathies to the O'Reilly family, and have made a donation in her honour for her service to the injured workers' community.■

[Click here](#) to make a donation to the scholarship fund on **GoFundMe.com**

AGM Report

Regulatory Officials, the *Charter*, and Workplace Inspections or Investigations

The Workers' Health and Safety Legal Clinic held its Annual General Meeting on September 28, 2016. Members attending were fortunate to hear guest speaker, **Karolina Iron**, President of Osgoode Women's Network. Prior to studying law, she completed her undergraduate degree at York University with Honours in Criminology.

The Clinic asked Ms. Iron to research whether the *Charter of Rights and Freedoms*, particularly the Right to Counsel and the Right to Silence, is applicable during inspections and investigations into workplace accidents, and if so, at which point may these rights be invoked.

In order to understand whether the Right to Silence or Right to Counsel apply, it is important to first determine the purpose of a line of questioning. It can either be part of a workplace *inspection* or an *investigation*. Generally, these rights will not apply to a workplace inspection, and refusing to co-operate with an inspection can be seen as "obstruction" under the *Occupational Health and Safety Act* and can result in charges.

An inspection is routine and general in nature. The purpose of an inspection is to determine if the workplace has complied with legislation. An investigation is more targeted in nature, and the purpose is to determine fault.

Fact Situation 1:

Mr. Smith, an Inspector with the Ministry of Labour, arrives at a worksite in response to a fatal accident. He questions witnesses and requests documents in order to understand the cause of the accident. After questioning Ms. Doe, the worksite supervisor, he determines that reasonable and probable grounds exist to believe she failed, as a supervisor, to take every reasonable precaution to protect the worker who died. He asks her follow-up questions to determine her role in the accident.

Q. Is this an inspection or an investigation?

A. This is an investigation that began as an inspection. Once Mr. Smith believes an offence has likely occurred, he shifts his focus to determining fault, and the relationship between him and Ms. Doe becomes adversarial.

The Right to Silence and the Right to Counsel

Without an adversarial relationship, detention, or possibility of self-incrimination, the Right to Counsel may not apply. Also, since Occupational Health and Safety officials have the power to set their own procedures, and the statute does not provide a right to counsel, they may exclude counsel from an inspection interview.

Detention

An interview may constitute detention if the interviewee is forced to provide a statement or where a regulatory official abuses the powers granted to them during inspections to compel a statement in an investigation.

Fact Situation 2:

Mr. Smith is interviewing Ms. Doe. She is legally compelled to answer his questions.

Q. Is she being detained?

A. Not necessarily. An interview does not automatically constitute detention, even if there is a legal requirement to cooperate.

Self-Incrimination

A possibility of self-incrimination occurs when incriminating information is supplied after the relationship between the regulatory official and the individual becomes adversarial.

Fact Situation 3:

Ms. Doe is statutorily required to produce work logs. An accident occurs, and these logs are used as evidence against her.

Q. Does this constitute self-incrimination?

A. No, because the work logs were furnished at a time when the relationship between Ms. Doe and the regulatory official was not adversarial. Providing information before or during an inspection, even if that information is used as evidence later, does not automatically make it self-incriminating.■



Injured Workers' Demonstration



Injured workers, advocates, union members and allies rallied in Toronto, Ontario, on December 12, 2016 for the annual call to action against austerity measures that have been taken by the Workers Safety and Insurance Board (WSIB).

The rally began at the WSIB's office and then continued to the Ombudsman's office.

To wrap up the demonstration, the Workers' Health and Safety Legal Clinic welcomed the participants to their office to socialize and warm up with hot food and drinks.

The Clinic extends its thanks to the organizers of this event, the Ontario Network of Injured Workers' Groups and Toronto Injured Workers' Advocacy Group.■



Top Photo: Demo at the WSIB.

Bottom Photo: Clinic staff at the Demo.

Clinic Personnel

New Intake Lawyer: Jennifer Chan

The Workers' Health and Safety Legal Clinic (WHSLC) introduces **Jennifer Chan** as the Clinic's new Intake Lawyer. In this role, Jennifer provides summary advice and appropriate referrals to all incoming client intakes. She also assumes carriage of select files at the Clinic that involve workers' compensation matters, as well as other corollary issues. Jennifer joined WHSLC in November 2016.

Prior to working with the Clinic, she articulated and was counsel in the Tribunal Counsel Office at the Workplace Safety and

Insurance Appeals Tribunal.

She received her Juris Doctor from the University of Windsor. While at law school, Jennifer worked as a Summer Student and as a full-time Clinic Practicum Student at Legal Assistance of Windsor, as well as a Summer Legal Intern at the Canadian Civil Liberties Association.

In addition, she served as Copy Editor of the *Windsor Review of Legal and Social Issues* and participated in Windsor Law's moot program.

Jennifer received her Bachelor of Arts from McGill University, with a major specialization in Canadian Politics. ■

The Clinic is open for intakes:

**Monday — Friday
8:30am to 4:30pm**

Call for free legal advice.

416-971-8832 (local)
1-877-832-6090 (toll free)

Clinic Personnel

New Administrative Assistant/Law Clerk: Eugenia Lui

The Workers' Health and Safety Legal Clinic (WHSLC) welcomes **Eugenia Lui** as the Clinic's new Administrative Assistant/Law Clerk. Eugenia joined the Clinic in January 2017.

Eugenia previously worked in a private employment and labour law firm, which provided her with a great learning experience. Prior to entering the legal field, she completed an Undergraduate Degree in

Archaeology from the University of Toronto, and had plans to continue on to graduate school to become the next female *Indiana Jones*. Upon graduation however, she realized that academia was not for her, and instead decided to change career paths and obtained a Law Clerk diploma from Seneca College.

In addition to working as a legal assistant, Eugenia spent two years teaching English to

adults in her hometown of Hong Kong. Although she found those years presented amazing social and travel opportunities, she missed working in the legal field and moved back to Toronto, Ontario, in November 2016. ■

Clinic Personnel

2016/2017 Articling Students: Erin Hunte and Rocio Steeves

In the fall of 2016, the Workers' Health and Safety Legal Clinic hired two articling students, Erin Hunte and Rocio Steeves.

Erin Hunte is a recent graduate from Osgoode Hall Law School. In her second year, Erin was selected to participate in the Anti-Discrimination Intensive Program, which included a clinical placement at the Human Rights Legal Support Centre. She was also selected to participate in the International Legal Partnership, utilizing her legal training in assisting the University of the West Indies and the United Nations Children's Fund with their project to assist in the protection of vulnerable children in the Caribbean.

Rocio Villalvazo Steeves is an internationally trained lawyer from Mexico. She is working towards obtaining her Ontario license through the Law Society of Upper Canada. Before coming to Canada, Rocio lived in the United States and worked as an immigration consultant. During her studies in Mexico, she focused on such legal areas as social assistance, human rights and labour relations. Currently, she is articling in a joint position at the Workers' Health and Safety Legal Clinic and the Centre for Spanish Speaking Peoples.■

Clinic Personnel

New Social Justice Lawyer: Julio Díaz

The Workers' Health and Safety Legal Clinic (WHSLC) welcomes Julio Diaz as the Clinic's new Social Justice Lawyer. Fluent in Spanish, Julio is reaching undocumented Spanish-speaking workers and workers without work permits to advise them about their health and safety rights. Besides meeting with workers and conducting workshops, Julio also provides summary advice and legal representation on workers' compensation matters.

Julio worked as an articling student in the joint articling program at WHSLC and Centre for Spanish-Speaking Peoples (CSSP) from 2015 to 2016.

He received his Juris Doctor degree from Osgoode Hall Law School. While in law school, Julio joined different initiatives that promote social justice. He worked as a Division Leader for Community and Legal Aid Services Programme (CLASP) and was a volunteer at Parkdale Community Legal Aid Services,

the Family Law Project and York Centre for Community Safety.

Interested in different cultures and their ways of solving social conflict, Julio travelled extensively and lived in the USA and Taiwan for several years, besides his native Argentina. Julio received a Ph.D. in Philosophy from State University of New York at Binghamton, USA, but he promised us all to keep things plain and simple in the office.■



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Who We Are

The Workers' Health and Safety Legal Clinic (WHSLC) is committed to the promotion of safe and healthy workplaces throughout Ontario with a focus on the non-unionized sector of the workforce. We seek to do this by informing workers of their basic legal rights at work in the areas of health and safety, workers' compensation, human rights and employment standards as well as legal advice and representation to non-unionized workers attempting to improve conditions in their individual workplaces. In particular, we provide representation to workers who have been unlawfully punished or terminated for exercising their rights.

On a broader scale, we work independently and with other like-minded groups, agencies and organizations to advocate for the enactment of improved standards affecting workplace health and safety and employment rights.

Publication Information

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happen, although we try to be careful and strive for accuracy. We will try to correct any errors as soon as possible. Please let us know if you see any needed corrections or explanations.

Publication Clause

The publication includes information considered correct and up-to-date according to its content. It also contains general information and opinions. Nothing here is meant to be taken as legal advice or to replace getting legal advice for a particular situation.

Legal advice should be obtained from professional counsel, which might include our Clinic's lawyers, when acting on a lawyer-client basis.

Publication Credits

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For Future Issues

- ⇒ Law Reform: Bill 70 Submission
- ⇒ Report: 2016-2017 UofT 4th year students Multidisciplinary Capstone Design Projects presentation
- ⇒ Outreach Activities Update

THINK GREEN — Go Paperless!



We are looking to reduce the Clinic's use of paper in the distribution of our newsletter.

To receive our newsletter via email, please contact us by telephone at

416-971-8832 or toll free **1-877-832-6090** or email us at whslc@lao.on.ca.